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Alimahomed Osman v Ngoni-Matengo Co-Operative Marketing Union Ltd

[1962] 1 EA 1 (PC)

Division:	Privy Council
Date of judgment:	8 February 1962
Case Number:	29/1960
Before:	Lord Radcliffe, Lord Hodson and Lord Guest
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 6 of 1959 on appeal from H.M. High Court of Tanganyika – Crawshaw, J.

[1] Contract – Implied term – Agreement to provide transport for carriage of produce – Agreement made with agricultural co-operative society – Undertaking to have transport always available – Produce sold by co-operative society "ex godown" – Whether marketing terms must give transporter opportunity to earn remuneration for carriage of produce.

Editor's Summary

By a contract made in 1955 the appellant agreed to maintain for a term of three years a transport service for the carriage of the respondents' agricultural produce. The contract also provided that the appellant should always have transport and staff available to carry for the respondents up to five hundred tons of goods and produce per month and up to 25 tons of the same in any one day and that if after three days' notice the appellant should be unable to supply such transport as the respondents might require, he was to indemnify the respondents against any expense incurred by them. In 1957 the respondents entered into contracts for the sale of produce "ex seller's go-down". The appellant then sued the respondents for damages on the ground that when the respondents disposed of produce upon terms that, while the produce required transport to its destination, transport other than that of the appellant was used for that purpose, the respondents committed a breach of their obligations to the appellant. The respondents' contention was that under cl. 1 of the contract they were entitled to sell produce on terms which absolved them from transporting it. The trial judge found for and awarded damages to the appellant but, this decision having been reversed on appeal, the appellant brought this further appeal.

Held –

(i) the rights and duties created or implied by the contract were not to be determined solely by a strict and literal construction of cl. 1 of the contract.

(ii) the principle applicable is that if a party enters into any arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do

nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative. Dictum of Lord Cockburn, C.J., in *Stirling v. Maitland*, 5 B. & S. 840 at p. 852, applied.

(iii) the important words in the principle stated are "of his own motion" and the determining consideration in the instant case was that the terms of disposal were at the respondents' choice.

Appeal allowed. Order of the Court of Appeal reversed. Judgment of the High Court of Tanganyika restored.

Cases referred to in judgment:

(1) *Stirling v. Maitland*, 5 B. & S. 840; 122 E.R. 1043.

(2) *Southern Foundries* (1926) *Ltd. v. Shirlaw*, [1940] A.C. 701; [1940] 2 All E.R. 445.

Judgment

Lord Radcliffe: This appeal from the Court of Appeal for Eastern Africa arises out of a written contract between the appellant and the respondent entered into upon April 14, 1955. The question at issue is as to the nature and extent of the obligations thereby undertaken by the respondent and the problem is to determine in the light of them whether certain actions taken in the year 1957 amounted to breaches of contract. The evidence at the trial, which took place before Crawshaw, J., in the High Court of Tanganyika, is not in all respects easy to follow, but it does not appear that there was a conflict on any facts that are material to the decision of the case.

They can therefore be stated as follows. The respondent is a registered co-operative society in Tanganyika. Its members are affiliated societies which are engaged in the production of primary agricultural crops and the first of the objects stated in its by-laws is to undertake the marketing of all tobacco, coffee and other agricultural produce handed over to it by the affiliated societies or their members. It is therefore a central marketing organisation and is known as "the Union". Its constituent members, known as "primary societies", cover the whole of the District of Songea, a district on the western side of Tanganyika which abuts on Lake Nyassa and is separated from the eastern or sea coast of Tanganyika by other districts. The capital of the district is the town of Songea itself.

The crops concerned are mainly export crops. The method of collecting them is to bring them by head load to one of the various "buying centres" which are scattered over the district and are situated on minor roads connecting with the single main road which runs across the district from Mbamba Bay on the lake, through Songea and then over the eastern border in the direction of Mtwara, a port on the Tanganyika sea coast. Transport from the buying centres is by lorry. There are go-downs at these buying centres in which produce is assembled and there are also five go-downs on the main road itself, one at Songea owned by the respondent and four others belonging to primary societies but regularly used by it. The normal procedure, according to Mr. Hall, the local co-operative officer who gave evidence for the respondent, is for the produce to be moved from a buying centre to a main road go-down, where it is checked, weighed, if necessary rebagged, and consigned to the coast or any other destination.

The respondent handled the marketing for the primary societies. Whether they were entitled to dispose of some of their crops independently is a question of the construction and effect of the by-laws,

which are not altogether clear,

but there is no evidence to suggest that they did. The respondent is therefore to be looked upon as possessing both effective power to dispose of these crops produced in the Songea District and also power to choose the terms on which it is sold. In fact it was its regular practice to sell them on commission.

It is against this background that the contract of April 14, 1955, must be interpreted. The appellant, the other party to it, was a haulage contractor in business at Songea. Before setting out the clauses that are necessary to understand its full effect, it should be said that it was a contract to remain in force from April 1, 1955, to March 31, 1958, subject to a certain power in the respondent to call for reasonable modifications and revisions of its terms. Prima facie therefore it covered three successive crop seasons of agricultural produce.

Clause 1 was as follows:

> "1. The Union agrees to use, and the contractor agrees to supply, the contractor's lorries or other sufficient and suitable motor vehicles exclusively for the period of this agreement for the following purposes, namely –
>
> (*a*) for the transport of leaf tobacco, bagged paddy, and bagged wheat from all markets maintained by or for the affiliated societies of the Union, or agricultural produce of any kind being handled by the Union from these or any markets established by or for a native authority in the District of Songea to the factory of the Union situated at Songea, or to any other place in the Songea District desired by the Union together with such members of the managing committee of the Union, or Union staff, and members of the committee of primary societies and primary societies staff as may be duly authorised from time to time;
>
> (*b*) for the transport of baled tobacco, or any other primary produce, processed or unprocessed, in suitable packing, from its factory or go-down at Songea to the ports of Lindi and or Mbamba Bay or to any point on the Southern Province Railway or port served by that railway or to Njombe in the Southern Highlands Province;
>
> (*c*) for the transport, either inwards or outwards, of all such other goods or building materials as the Union may, from time to time, require to be transported from place to place in the Southern Province or between Songea/Njombe in the Southern Highlands Province;
>
> (*d*) for general transport in and around Songea Provided only that:
>
> (i) the Union shall at all times have the right to employ one three-ton lorry, and one motor car or vanette of one-ton capacity or under, both being the property of the Union, for any of the purposes above mentioned, if it so elects, and
>
> (ii) if, after due notice of three days to the contractor, the contractor be unable to supply sufficient and suitable lorries or other motor vehicles as required by the Union, the Union shall forthwith have the right, notwithstanding this agreement, to obtain the lorries or motor vehicles so required from any other person, firm or company."

The material portions of cl. 2, cl. 3, cl. 4 and cl. 5 were as follows:

> "2. The contractor agrees with the Union –
>
> (*b*) to carry and deliver to or from any point mentioned in 1(*a*), (*b*) and (*c*), above, as called upon, goods to the extent of any tonnage not

exceeding five hundred in all in any calendar month from April 1 until such time as the road to such points shall be officially declared closed;

(*d*) to operate and maintain and keep available for the Union at all time such minimum number of the lorries and other motor vehicles as will be sufficient and suitable to lift and carry not less than twenty-five tons of goods or produce in any one day of twenty-four hours on behalf of the Union, the onus of proof of availability thereby to lie upon the contractor;

(*e*) to indemnify the Union against any expenses incurred by the Union under the conditions of cl. 1(*d*)(ii) of this agreement, save only when such failure to provide transport shall be proved to the satisfaction of the district commissioner, Songea, to have been due to circumstances entirely beyond his control; and against any and all damage however caused to goods of the Union in transit in his lorries or motor vehicles; and for any other breach, default or delay on the part of the contractor, his servants or agents, occasioning actual financial loss to the Union;

"3. The contractor agrees to refrain from undertaking any contract to supply transport to another party during the period of this agreement, and to discharge such contract if in force during such period, unless he shall first satisfy the Union that he is in fact maintaining, and able to maintain, the said minimum number of lorries and motor vehicles.

"4. The contractor shall maintain within the township of Songea an office and a responsible office staff, capable, at all times within normal office hours of conducting the contractor's business in accordance with the terms of this agreement, and the closure of such office, or the absence of such staff at any time within normal business hours shall be deemed a breach and repudiation of this agreement.

"5. The Union agrees to pay, and the contractor agrees to accept remuneration for all services rendered under this agreement at the following rates and subject to the following conditions; and both parties to this agreement undertake to accept the arbitration and final rulings of the district commissioner, Songea, in all disputes arising out of any ambiguity contained in such rates and conditions:

(1) Specifically for the carriage of tobacco leaf and other primary produce from any market mentioned in cl. 1(*a*) to the Union's factory at Songea or any other place within the district at the rate of one shilling and fifty cents (Shs. 1/50) per running mile for a vehicle capable of loading five tons, the above rate being payable for a vehicle laden or unladen.

(2) Specifically at the following rates for the transport of baled tobacco and any other goods or produce inwards or outwards between the following places:

(*a*) Songea/Lindi.....cents eighteen per kilo (-/18)

(*b*) Songea/Mtama.....cents eighteen per kilo (-/18)

(*c*) Songea/Nachingwea.....cents eighteen per kilo (-/18)

(*d*) Songea/Mtwara.....cents twenty-two per kilo (-/22)

(*e*) Songea/Njombe.....cents twenty per kilo (-/20)

(*f*) Songea/Mbamba Bay.....cents four per kilo (-/04)

(*g*) Songea/Mbinga.....cents four per kilo (-/04)

(*h*) Mbinga/Mbamba Bay.....cents four per kilo (-/04)

(*i*) Mbinga/Peramiho.....cents four per kilo (-/04)

Provided only that in the case of loads of whatever nature the Union wishes to be carried from Lindi, Mtama, Nachingwea and Mtwara to Songea shall be at HALF the rates quoted in (*a*), (*b*), (*c*) and (*d*) above, respectively

(3) Specifically for the transport of other goods from place to place within the district of Songea at the rate of one shilling and fifty cents (Shs. 1/50) per running mile for a vehicle laden or unladen."

No trouble appears to have arisen over the 1955 season. According to the appellant, there were breaches of the respondent's obligation during 1956, but he has not founded upon them in the action, so it is not necessary to refer to them. It was the respondent's terms of disposal of certain of the 1957 crops that brought about the present proceedings.

The disposals complained of are five in number. Four were sales made on various dates in July and August, 1957, to the United Africa Co. (T) Ltd., of tonnages of sunflower seed and sesame seed. They all contained the same provisions upon the point to which the appellant objects: that is, the price was stated to be "ex seller's go-down at buying centres" and a stipulation was made "transport from buying centre to Mtwara to be arranged by buyers".

The fifth sale was of paddy. It was effected by letters passing between the respondent and the Tanganyika Transport Company, Ltd., dated May 31 and June 1, 1957, and disposed of what was apparently the entire seasonal crop handled by the respondent at the price of

"-/60 (sixty cents) per kilogram without bag at Mbamba Bay and Lituhi, and -/65 (sixty-five cents) per kilogram without bag at Songea (go-downs at Songea, Litola and Mamtumbo)".

The five places named corresponded with the five main road go-downs, or at any rate with four of them, used by the respondent.

Whatever the rights or wrongs of the matter, there are certain consequences of these transactions that are beyond dispute. First, the disposals did not involve the respondent in "using" any vehicular transport not belonging to the appellant in moving the produce. It did not therefore do anything in contradiction of the literal terms of its undertaking to him to use his motor vehicles "exclusively". It is to be observed, however, that this result was brought about by the respondent's selection of a method of disposal that absolved it from the need to use vehicular transport at all for the oil seeds, because by selling ex the buying centres and putting it on the purchaser to arrange for the outward transport to the coast at Mtwara it exempted itself from having to provide any transport for the purpose of effecting disposal. The paddy sale was a little different in that it left uncovered the collection from the local centres to the main road go-downs. It will appear later how this was dealt with. No doubt these terms were reflected in the price it obtained for the produce and in that sense the money that it would have had to pay the appellant for the use of his transport, if it had fallen within the terms of the contract, was conceded to the purchasers who had to bear the expenses of transport themselves.

Secondly, the journeys complained of were not on lines of movement that explicitly fell within the provisions of cl. 1 of the contract. Thus sub-cl. (*a*), which was evidently intended to deal with transport both originating and termininating in the Songea District, was expressed as covering only journeys which terminated at

> "the factory of the Union situated at Songea or in any other place in the Songea District desired by the Union".

This does not describe movements of export produce outwards to Mtwara, even if there was rebagging on the way at a main road go-down in the district. On the other hand sub-cl. (*b*), intended to deal with such export produce, whether consigned to the lake or the coast, describes the originating point as the respondent's "factory or go-down at Songea" and nowhere else. It may be that the "go-down at Songea" has an extended meaning in this context, as it has in the terms of the paddy sale, and covers other main road go-downs regarded as mere enlargements of the central go-down accommodation at Songea. But, prima facie at all events, sales effected ex buying centres on side roads or from main road go-downs not at Songea and destined for a point outside the district are not within the terms of the respondent's obligation under any of the headings of cl. 1.

Again, however, this consideration, which is one of the respondent's main arguments and seems to have been the foundation of the East African Court of Appeal's decision in its favour, must not be weighed without taking account of the fact that the journeys complained of took the precise from that they did because the respondent, having full choice of the method of disposal, chose to dispose of the produce ex delivery points which were different from those contemplated by the contract. There was nothing in the evidence to suggest that the produce could not have been sold ex Songea if the respondent had so stipulated. The fact therefore that the journeys actually arranged by it did not correspond with the wording of the contract cannot determine the question whether the respondent, having bound itself in the terms of the contract for three years, was in a position to make disposals of produce in this way without breaking its contractual obligations. If it was not, it becomes unnecessary to consider the finer points of construction raised by the respondent's argument; but it is fair to say that it would be a very literal interpretation of words to hold that the respondent, having undertaken to use the appellant's transport exclusively from, say, the Songea go-down to the port of Lindi, could get out of this and use some other transport that might suit it better by requiring the journey to start not from Songea but from another go-down a few miles up or down the same main road to the east or west of Songea itself. It would be more reasonable to treat the various road journeys described in cl. 1 of the contract as general indications of the nature of transport service required than as exhaustive definitions of what the appellant was to supply or the respondent to call for.

Whichever of the respondent's arguments is taken up there seems to be no doubt that its position amounts to saying that, notwithstanding its contractual undertaking to use the appellant's transport exclusively for the movement of agricultural produce handled by it, it could so arrange its sales of all or any part of that produce as either to absolve itself from requiring any transport or to despatch the produce on journeys which, though passing over the same roads, did not originate or terminate exactly at the points mentioned in the contract. Admittedly there is nothing impossible in such a position: the appellant may have been ready to secure nothing more for himself than the chance or likelihood of the respondent following a method of disposal which would correspond with the literal terms of the contract, and so create a need for his transport services. But whether that is the real import of the mutual obligations prescribed by this contract depends, in their lordships' opinion, upon a consideration of other clauses than cl. 1 taken by itself.

When cl. 2, cl. 3 and cl. 4, for instance, are looked at, it is clear that the respondent was requiring the appellant to set up and maintain the substance of a fixed establishment to carry out its transport work. His capital has to

be invested in their needs. He is to be ready to carry goods to the volume of anything up to five hundred tons a month; he is to operate, maintain and keep available for it at all times such minimum number of vehicles as will be sufficient and suitable to lift and carry as much as twenty-five tons of goods or produce in any one day, and he is not to undertake transport business for anyone else to the prejudice of this minimum available fleet; he is to indemnify the respondent for its expenses if at any time after three days' notice he cannot supply it with such transport as it requires and it obtains such transport else-where; he is to maintain within the township of Songea an office and responsible office staff capable at all times within normal office hours of conducting his business under the contract and indeed any failure to keep this office and staff going is to be deemed a repudiation of the agreement. It appears to their lordships that, having regard to these obligations imposed on the appellant, it would be a very one-sided and an unjust interpretation of the contract to suppose that the respondent remained at liberty, while still in control of the marketing of the district's produce, either for export or for internal use or processing, to give the appellant no work at all or opportunity of earning remuneration simply by adopting marketing methods which departed from those contemplated and, apparently, practised at the time when the contract was entered into.

They are of opinion therefore that, having entered into cl. 1, the respondent committed a breach of its obligations whenever, during the three years relevant, it disposed of produce covered by the contract upon such terms that, while the produce required vehicular transport to reach its destination, vehicular transport other than the appellant's was used for the purpose. The five disposals which were the subject of the present action all fall within this category of description and the appellant was right in claiming that they involved breaches of his contractual rights.

The view which commends itself to their lordships is the same as that of the trial judge, Crawshaw, J., whose judgment dated November 4, 1958, should be restored. His approach was not shared by the learned judges of the Court of Appeal because they thought that, while the contract gave the appellant the exclusive right to transport produce from the buying centres to any destination in the Songea District and a similar right to transport produce out of the district from the factory and go-down in Songea, his contractual rights of transport had been deliberately restricted to the undertaking of these precise journeys and the journeys complained of did not fall within the required descriptions. For this reason their judgment of December 3, 1959, reversed the judgment of the High Court and declared that the appellant's suit ought to have been dismissed.

Their lordships have already explained why they do not think that the rights and duties created or implied by this contract can be determined solely by a strict and a literal construction of the wording of the various sub-headings of cl. 1. The principle that they think ought to be applied is that which is referred to by Cockburn, C.J., in *Stirling v. Maitland* (1), 5 B. & S. 840 at p. 852, and adopted and applied in many subsequent cases.

> "If a party", he says, "enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative".

The important words in that statement are "of his own motion"; and the determining consideration in this case is that the terms of disposal of the produce to be marketed were at the respondent's choice. The sales that are complained of can be looked upon as a direct breach of the undertaking to use

the appellant's transport for the movement of crops, or as a breach of an implied obligation not to make any disposal of such crops that avoided the need for the appellant's transport, or, again, as a breach of contract in bringing about a state of circumstances in which the crops would be moved to market without the aid of his transport. The one way of stating the duty often merges into the other and, as Lord Atkin indicated in *Southern Foundries* (1926) *Ltd. v. Shirlaw* (2), [1940] A.C. 701 at 717, the most direct way is sometimes the simplest.

There remain two subsidiary points which require notice. It was said on behalf of the respondent that the 1957 sale of paddy to the Tanganyika Transport Co. could not in any event constitute a breach of contract with the appellant because he himself had already refused to carry out the transport of that crop before the other company took it up and moved it. This, however, does not represent what really happened. The paddy was sold by the respondent to the Tanganyika Co. by June 1, 1957, and it was not until August 3 that it made a requisition to the appellant for a truck to collect the paddy from local buying centres centred on Mbamba Bay and to assemble it at Mbamba Bay. As the terms of sale of the paddy were that the purchaser was to take delivery of it there and to supply his own transport to Songea or beyond, the appellant refused to do the local collecting for a rival in business who, wrongly as he believed, was being allowed by the respondent to do the main road transport that was his own right under the contract. It is plain from this that it was the respondent's original wrongful sale of the paddy that was the cause of the appellant's refusal.

Lastly, it was said that the learned trial judge had no right to direct an account of damages arising from the respondent's breaches and that, if he did not find damages proved in the evidence given at the trial, it was his duty to dismiss the action or award nominal damages only. It is impossible to say exactly what the position was as to damages by the end of the trial, because the judge made no finding upon the issue, merely directing the account and reserving the costs and liberty to apply. There is no reason at all to suppose, however, that he did not regard the appellant as having established some damage qualifying him for an inquiry: indeed his words

> "Mr. Dodd asked that, if damage was found, an order be made for accounts to be taken"

assume as much. Certainly he had before him an abundance of evidence on the issue, though much of it is unintelligible when read in the record. The evidence included the appellant's statement that since June, 1957, he had an average of eight to ten lorries of his fleet idle every day and the statement of the director of the Tanganyika Transport Co. (which had carried out the transport for the United Africa Co. (T) as well as for itself) that it was "naturally eager to get defendant's contract – it is a valuable one".

It must be taken therefore that the trial judge held an unspecified quantum of damages to have been proved. The reason why he did not assess a sum himself and by so doing close the matter seems to have lain in the fact that discovery prior to the trial had been very imperfect and that a voluminous document, entitled D.1, which was produced by the respondent at the trial by way of an account, was found so difficult to interpret that neither side felt itself able to base any conclusion upon it. In those circumstances, the responsibility for which they have no means of determining, their lordships think that the judge took a proper course in making a declaration of the respondent's liability for breaches and directing accounts, with reservation of the costs of the whole proceedings.

Their lordships will humbly advise Her Majesty that the order of the Court of Appeal for Eastern Africa in this matter dated December 3, 1959, should

be reversed and that the judgment of Crawshaw, J., in the High Court of Tanganyika dated November 4, 1958, should be restored; and that the respondent should pay to the appellant his costs of the appeal in the Court of Appeal.

The respondent must pay to the appellant his costs of the appeal to the Board.

Appeal allowed. Order of the Court of Appeal reversed. Judgment of the High Court of Tanganyika restored.

For the appellant:
Solicitors: Graham Page & Co., London
Alan T. Davies, Q.C., T. O. Kellock (both of the English Bar) and *H. Dodd*

For the respondent:
Knapp-Fishers, London
Sir Frank Soskice, Q. C., and *J. G. Le Quesne* (both of the English Bar)

Arikanjelo Dau s/o Okoba v R
[1962] 1 EA 9 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	4 January 1962
Case Number:	170/1961
Before:	Sir Alastair Forbes VP, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Uganda – Bennett, J.

[1] Criminal law – Evidence – Admissibility – Extra-judicial statement to police while in custody – "You are going to say what you told me yesterday" – Whether words constitute an order or threat – Whether statement made voluntarily – Evidence Ordinance (*Cap.* 9), *s.* 25 *and s.* 26 (*U.*) *– Evidence* (*Statement to Police Officers*) (*No.* 2) *Rules*, 1955, *r.* 9 (*U.*).

Editor's Summary

A girl, aged about six years, had been left by her mother with the appellant. When her mother returned the child had disappeared. Next day the girl was found drowned in a river and the medical evidence was that before death she had been interfered with sexually. The appellant was arrested and three days later was taken by a police sergeant to the river. Without charging or cautioning him the policeman asked the appellant to point out where he had pushed the deceased into the river. The appellant said it was where people drew water. Next day the sergeant said to the appellant, "You are going to say what you told me

yesterday, but I am not going to force you to do so". The sergeant went on to charge and caution the appellant, who then made a statement amounting to a confession. At the trial objection was taken to the admissibility of the statement. The judge held that the statement had been freely and voluntarily made and was admissible. On appeal the issue was whether the words "You are going to say what you told me yesterday" constituted an order or threat in the mind of the appellant.

Held –

(i) the words "You are going to say what you told me yesterday" did not constitute an order or threat in the mind of the appellant as they were tempered by the words which followed; and any possible effect they might still have had on the appellant would have been dissipated by the words of the caution which followed.

(ii) since the appellant himself never alleged that either confession was obtained by any threat or inducement and at the trial within a trial did not

give evidence nor say anything in his defence, the court could not say that the judge ought to have exercised his discretion to exclude the statement.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Smith*, [1959] 2 All E.R. 193.

(2) *Nayinda s/o Batungwa v. R.*, [1959] E.A. 688 (C.A.).

Judgment

The following judgment prepared by **Crawshaw, JA,** was read by direction of the Court:

The appellant appeals against his conviction of murder by the High Court, Uganda. The deceased, a girl of about six years of age, and her mother, Veterina, were staying at the house of Veterina's grandmother, Awuziru, when on June 26, 1961, the deceased disappeared. Her mother and Awuziru had left the house, leaving the deceased with the appellant, who was a nephew of Awuziru and who lived in the same village; his wife had left him a year or two earlier. On Veterina and Awuziru returning later in the afternoon they were unable to find the deceased. Awuziru asked the appellant where he had left her, to which he made no reply. When Veterina asked him, he at first said he had left her with Awuziru and later said that Veterina herself had left her with Veterina's husband, whose house was said to be some five miles from that of Awuziru. A search-party that evening was unsuccessful in finding the deceased, but next day her body was found in a nearby river. Medical evidence was that death had been due to drowning and that prior thereto she had been sexually interfered with.

Sergeant Langalanga arrested the appellant on June 27 after the deceased's body had been found, and there is no evidence that the appellant made any statement on that occasion. On June 30 Sergeant Langalanga took the appellant to the place by the river where the body had been found and without charging or cautioning him asked him to point out the place where he had pushed the deceased into the river. The appellant said he had pushed her in at the place where people drew water. On July 1 Sergeant Langalanga said to the appellant

> "You are going to say what you told me yesterday but I am not going to force you to do so";

the sergeant then went on to charge and caution the appellant. The appellant thereupon made a statement amounting to a confession which the sergeant recorded in the appellant's own language, read it back to him and to which the appellant placed his thumbprint.

At the trial Mr. Somani, advocate for the appellant, objected to the admission of the statements, and a trial within a trial was held. The Crown did not seek to prove the statement of June 30 (hereinafter referred to as the first statement) but only the statement of July 1 (hereinafter referred to as the second statement). The learned judge found that the latter had been freely and voluntarily made and ruled it admissible. In coming to this conclusion he said:

> "It was, of course, very undesirable that the accused should have been charged and cautioned by the investigating police officer. However that may be, I have to decide whether or not the statement made by the accused after being charged and cautioned was freely and voluntarily made, that is to say, whether or not it was made as a result of any inducement, threat or promise having reference to the charge. In my opinion the

words of the sergeant to which I have alluded contain no inducement or promise of favour. The words ‘You are going to say what you told me yesterday’ standing

> alone might be said to contain a veiled threat that if the accused did not repeat his story unpleasant consequences would ensue. However, they do not stand alone and, in my view, the words 'I am not going to force you to do so' made it plain that the statement as a whole contained no threat. Even if the statement as a whole contains a veiled threat, it was immediately followed by a caution which, in my opinion, was sufficient to remove any undesirable impression which may have been conveyed to the mind of the accused by the words used by the sergeant before he charged and cautioned the accused."

In summing up to the assessors the learned judge pointed out to them the necessity of the confession having been made freely and voluntarily, and the assessors apparently accepted it as such and believed in its truth and gave it as their view that the appellant was guilty of murder. The assessors did not, of course, know of the first statement and were not therefore aware of the real significance of the words of the sergeant, "You are going to say what you told me yesterday" which preceded the second statement.

Section 25 and s. 26 of the Evidence Ordinance (Cap. 9) read:

> "25. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.
>
> "26. If such a confession as is referred to in s. 25 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is relevant."

The learned judge's note of Mr. Somani's argument on the inadmissibility of the appellant's statement was:

> "Statement was obtained by an inducement. Accused placed trust in sergeant. On next day sergeant referred to accused's statement on previous day and told him to repeat it."

By this I suppose that Mr. Somani meant that the first statement was made as the result of an inducement. It is not clear whether he submitted that the second statement was made merely because the appellant thought that he was being ordered to repeat what he had said the previous day, and so was not voluntary, or whether his submission was that it went further and constituted a veiled threat.

The caution, as it appears on the recorded second statement, was substantially in the form prescribed by r. 9 of the Evidence (Statement to Police Officers) (No. 2) Rules, 1955, and no objection has been taken to it. The appellant was unrepresented at his appeal, but in his memorandum of appeal, filed by Mr. Somani, he refers to his two statements and to the words of the sergeant which preceded the charge and caution, and to the fact that the sergeant said that he made up his mind to charge the appellant on June 30 (the evidence does not disclose whether he made up his mind after the appellant's statement on that day or before, but one would presume the former as apart from the statement there was no real evidence against him) and said,

> "In view of the above the charge and caution statement is retracted and inadmissible in evidence".

Although the first statement was not admitted, it is proper and necessary in the circumstances that we should consider it in determining whether in fact the second statement can safely be regarded as having been made voluntarily. In *R. v. Smith* (1), [1959] 2 All E.R. 193, Lord Parker, C.J., in delivering the judgment of the court said at p. 195 D,

> "In deciding whether an admission is voluntary, the court has been at pains to hold that even the most gentle, if I may put it in that way, threats or slight inducements will taint the confession".

In that case there had been a fight between members of two companies of troops as a result of which three members of one company were stabbed, one of whom later died. The same night the regimental sergeant-major put on parade the men of the company which had caused the casualties and having questioned each man personally without satisfaction said,

> "I am not leaving, I am staying here until you give me an answer about this fight".

Thereupon the accused said he had done the stabbing with a bayonet, and he was arrested. The next morning an investigating officer, Sergeant Ellis, referred the accused to the statement he had made the previous night and the accused again admitted to the stabbings. He was then asked if he wished to make a statement and replied that he did, whereupon the usual caution was administered and the accused made a written confession. All the statements were admitted at his trial and he was convicted on them. The Appellate Court held that the first statement was inadmissible, the sergeant-major's words having operated as a threat or inducement, and the confession was therefore not voluntary. It was argued for the defence that the original taint in the confession of the night before persisted in the later confessions. After reviewing a number of cases, Lord Parker said at p. 196:

> "The court thinks that the principle to be deduced from the cases is really this: if the threat or promise under which the first statement was made still persists when the second statement is made, then the second statement is inadmissible. Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement."

The court held that the confessions on the second occasion were admissible, saying at p. 197 B:

> "No doubt the opening reference to what the appellant was said to have said to the regimental sergeant-major put the appellant in a difficulty. No doubt it was introduced by Sergeant Ellis in the hope that thereby he might get a continued confession; but it is quite clear that the effect of any original inducement or threat under which the first confession was made had been dissipated."

In the instant case it is doubtful, we think, whether the questioning at the river could have amounted to an inducement (although contrary to the Judge's Rules), but as in the *Smith* case (1) the confession which resulted from it no doubt put the appellant in a difficulty when referred to it by Sergeant Langalanga the following day. The question for decision, however, is whether the words, "You are going to say what you told me yesterday" constituted an order or threat in the mind of the appellant. The learned judge and the assessors held that it did not, and we see no reason to disagree. They were tempered by the words which followed, "I am not going to force you to do so". Any possible

effect they might still have had on the appellant would have been dissipated by the words of the caution which followed. The learned judge might, notwith-standing this conclusion, have decided, in the exercise of his discretion, to exclude the statement as being in the circumstances unfair to allow it in evidence against the appellant – *Nayinda s/o Batungwa v. R.* (2), [1959] E.A. 688 (C.A.) at p. 694. However, the appellant himself never alleged that either confession was obtained by threat or inducement. At the trial within a trial he did not give evidence, nor did he later say anything in his defence. We cannot say in these circumstances that the learned judge ought to have exercised his discretion to exclude the statement.

The second ground of appeal is that the learned judge,

> "erred in not holding that the appellant's degree of abnormality sub-stantially impaired his mental responsibility for his actions".

Diminished responsibility was a part of the appellant's defence at his trial and the learned judge in his summing-up to the assessors directed them on that question; it seems clear that the assessors as well as the learned judge were of the opinion that the doctrine did not apply in this case. The chief (presumably of the area in which the appellant lived) said he thought the appellant to be of "subnormal intelligence", but there was medical evidence on which the court was entitled to rely for its finding and we see no reason to interfere.

The appeal is dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Uganda
S. Musoke (Crown Counsel, Uganda)

R v Sharmpal Singh s/o Pritam Singh Sharmpal Singh s/o Pritam Singh v R
[1962] 1 EA 13 (PC)

Division:	Privy Council
Date of judgment:	16 November 1961
Case Number:	31 and 32/1961
Before:	Lord Morris of Borth-y-Gest, Lord Hodson and Lord Devlin
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Criminal Appeal No. 112 of 1960 on appeal from H.M. Supreme Court of Kenya – Wicks, J.

[1] Criminal law – Murder – Intent – Strangulation – Circumstantial evidence – Defence that accused killed his wife during sexual embrace – No evidence of extreme violence – Whether evidence sufficient to justify conviction of murder – Reasonable doubt – Penal Code, s. 198, *s.* 199, *s.* 202 (*K.*) *– Eastern African Court of Appeal Rules*, 1954, *r.* 41.

Editor's Summary

The accused had been tried for and convicted on circumstantial evidence of the murder by strangulation of his wife. The evidence established, inter alia, that the accused and his wife had been happily married for less than a year, that the wife was about four months gone with child and that the death of the wife was due to asphyxia caused by pressure on the neck and throat. The medical evidence indicated that intercourse had occurred just before death, that there were no signs of bruising on either the neck or chest nor any other external marks of injury that might have caused death but there were manifold signs of internal injury in both the neck and chest of which the simplest explanation was that they were caused by a hand or hands on the throat and a knee or elbow on the chest. The accused did not give evidence but

made an unsworn statement that he had had intercourse with his wife on the night of her death and the case for the defence was that he had killed his wife during a sexual embrace. On a first appeal against conviction the court held that the evidence did not eliminate as a reasonable hypothesis that the accused had killed his wife by an unlawful assault but without the intent necessary to constitute legal malice and, therefore, the conviction of murder must be quashed and a conviction of manslaughter substituted. On a further appeal by the Crown seeking restoration of the conviction of murder and by the accused seeking an acquittal

Held –

(i) the trial judge had overlooked that the Crown not only had to dispose of the defence set up but had also to prove that the evidence was consistent only with murder.

(ii) the inability of the medical evidence to speak with precision about the degree of force used together with other circumstances, such as the complete absence of motive or extreme violence, opened up both manslaughter and accident as alternative possibilities requiring consideration.

(iii) the incompleteness of the tale must not deter the court from drawing the inferences that flow from the evidence available and on that evidence there was no reasonable doubt that the case was one of manslaughter.

Both appeals dismissed.

Cases referred to in judgment:

(1) *Mancini v. Director of Public Prosecutions*, [1942] A.C. 1; [1941] 3 All E.R. 272.

(2) *Smith v. Director of Public Prosecutions*, [1961] A.C. 290.

Judgment

Lord Devlin: These are two appeals from a judgment of the Court of Appeal for Eastern Africa. The accused, Sharmpal Singh, the respondent in the first appeal, was in June, 1960, tried before Wicks, J., with the aid of three assessors for the murder of his wife. The three assessors each stated it as his opinion that the accused was not guilty, but the judge decided that he was and convicted him accordingly. The Court of Appeal quashed that conviction and substituted for it a conviction of manslaughter. From this the Crown appeals asking that the judge's verdict of murder should be restored; and the accused also appeals, asking for a verdict of acquittal.

The facts of the case are stated in detail in both judgments of the courts below and on most of them there are concurrent findings which have not been challenged before the Board. For the purpose of considering the submissions placed before the Board, they can be stated very shortly.

The accused and his wife were a young Sikh couple who had been married for less than a year; the wife was about four months gone with child. They lived in a flat in Kisumu which they shared with the wife's brother and his family. The marriage was a happy one. Between 9.30 p.m. and 3.45 a.m. on the night of February 28-29, 1960, the accused killed his wife while she was in bed. The defence called no evidence at the trial but the accused made an unsworn statement which is now relevant in only one particular. He stated that on that night he had had intercourse with his wife; and the medical evidence

indicated that intercourse had taken place just before death. Death was due to asphyxia; and the asphyxia was caused by pressure on the left chest applied simultaneously with pressure on the neck and throat. There were no signs of bruising on either the neck or the chest; nor were there any other external marks of injury that might have caused death. But there were manifold

signs of internal injury in both the neck and chest, extending in the case of the neck to half its circumference. According to the medical evidence the simplest explanation of these injuries is that they were caused by a hand or hands on the throat and a knee or elbow on the chest. An assailant who was throttling the woman might pin her down with a knee on her chest. But the case for the defence was argued on the footing that the accused killed his wife with a hand pressing on her neck and throat and an elbow pressing on her chest during what was described as a "sexual embrace"; their lordships understand this expression to mean no more than that the handling of the throat and the pressure on the chest were part of the love-making or bodily movements that went with the sexual act. The medical witnesses were unable to say how severe or how prolonged such pressure would have had to have been in either place in order to cause death by asphyxia; they did say, however, that the absence of external marks afforded no indication of lack of force.

After the death of his wife the accused prepared an elaborate plan of deception in order to make it appear that she had been attacked and robbed while on her way to the toilet which was outside the flat. He took the dead body out to the courtyard, stabbed it in two places with a knife and faked other signs of robbery. The prosecution naturally rely upon this as evidence of a crime which the prisoner was desperately anxious to conceal; the defence submit that it is equally consistent with panic seizing the prisoner when he found his wife had died accidentally.

The main defence in both courts below was that which the accused had prepared in this manner and it was persisted in until the case reached the Board. Nearly all the evidence at the trial was devoted to this issue and the trial judge delivered a very full and careful judgment upon it. In his cross-examination of the medical witnesses counsel for the defence gave some indication of an alternative line by seeking to obtain from them some material to show that death could have been caused accidentally during a sexual embrace. But he did not pursue the point in his submission at the end of the case and the trial judge glanced at it only to dismiss it. He said:

> "Whether it was during intercourse or whilst Ajeet was just lying in her bed, to strangle one's wife is murder, be it to stifle her complaints because she objects to intercourse, or refuses to submit to it, or even, she having consented to intercourse, the accused strangled her to gratify his lust".

Their lordships agree with the Court of Appeal that the trial judge fell into error (a very natural one considering the nature of the defence that was pressed upon him) in that he overlooked that the Crown not only had to dispose of the defence set up but had also to prove that the evidence adduced by the prosecution was consistent only with murder. In their lordships' opinion the inability of the medical evidence to speak with precision about the degree of force used, together with other circumstances in the case to which they will later refer, opened up both manslaughter and accident as alternative possibilities requiring consideration. It is now well established by a series of authorities, in which *Mancini v. D.P.P.* (1), [1942] A.C. 1, is the first and still the best known, that it is the duty of the judge to deal with such alternatives if they emerge from the evidence as fit for consideration, notwithstanding that they are not put forward by the defence. This may impose a heavy burden on the judge when, as in the present case, attention is concentrated by the defence on quite different issues. The use of the word "strangle" in the passage which their lordships have quoted is criticised by Mr. Dean, and it does seem to suggest that the judge was taking it as proved that the accused's object, once the act was admitted, was to cause death.

Before the Court of Appeal counsel for the appellant did not raise either manslaughter or accident as matters to be considered. He did not raise accident

even when the court itself raised manslaughter. The court does not in its judgment refer to the possibility of accident. The accused's complaint now is that the Court of Appeal should have gone further than it did and should have concluded that accident was a possibility which raised at least a reasonable doubt about the verdict of guilty; while the Crown complains that the court erred in law in substituting manslaughter for murder, contending that on the facts proved murder was the only verdict correct in law.

Before considering these rival submissions, their lordships will make some observations about the powers and duty of an appellate court on an appeal from the result of a trial by judge with the aid of assessors, as to which there was no disagreement at the Bar. If it had been a trial by jury, the failure of the trial judge to direct the jury to consider manslaughter as an alternative verdict of guilt and accident as an alternative ground for acquittal would have been fatal; an appellate court would have to quash the conviction and either discharge the prisoner or order a new trial. Mr. Dean has not contended that a similar result should follow from a similar failure to direct the assessors. The reasons they gave for their opinions showed that all three of them, notwithstanding a very clear direction by the learned judge on the nature and effect of circumstantial evidence, based their conclusion on the fact that there was no direct evidence of murder; it may well be that their opinion on any other points left would have shown an equal disregard of the law. The powers of the Court of Appeal are contained in the Eastern Africa Court of Appeal Rules, 1954, and provide by r. 41 that the court "may confirm, reverse or vary the decision of the trial court". It is agreed that the Court of Appeal in a case such as the present one is entitled and bound to consider whether the inferences that ought to be drawn from the facts proved demonstrate beyond reasonable doubt that the accused was guilty.

Their lordships will consider first the submission for the Crown. The law of murder and manslaughter is set out in s. 198, s. 199 and s. 202 of the Penal Code of Kenya. A person who by an unlawful act or omission causes death is guilty at least of manslaughter; and if the act is done with malice aforethought, he is guilty of murder. Malice aforethought is established where, inter alia, there is

> "knowledge that the act or omission causing death will probably cause the death of or grievous harm to"

another person; and in s. 5 of the Code grievous harm is defined as including anything likely seriously or permanently to injure health or any organ. The Crown submits that the definition of "grievous harm" is untouched by the observations on this point of Viscount Kilmuir, L.C., in *D.P.P. v. Smith* (2), [1961] A.C. 290. But it submits also that "knowledge", in the passage which their lordships have quoted from the Code, does not mean actual knowledge, but means, in accordance with the decision in *D.P.P. v. Smith* (2), the knowledge that a reasonable man would have of the probable consequences of his acts and omissions. The Crown contends that in reaching its conclusion the Court of Appeal ignored in this respect the law as laid down in *D.P.P. v. Smith* (2).

Their lordships do not consider that anything in this case turns upon the application of the principle enunciated in *D.P.P. v. Smith* (2). In that case the acts of the accused were proved by direct evidence. In the present case they are not; and the problem is to determine as a matter of inference what the accused actually did and what degree of force he used. Once these are determined, the Board is bound to presume, because there is nothing to suggest the contrary, that the accused intended the consequences that would naturally follow from the exercise of the degree of force proved. The accused did not himself give evidence and so there is no conflict between his intention as

deposed to in evidence and that which would have been formed by a reasonable man in his position: the latter is the only guide. Likewise, their lordships do not think it important in this case to decide whether the harm necessary to constitute the offence has to be serious or really serious or grievous. There is nothing to suggest that the accused intended merely to maim or cripple his wife; if he was deliberately inflicting any serious injury on her, he must have meant her to die. For the purpose of the Crown's submission, the Board will assume in its favour that the definition of grievous harm in the Code is unaffected by *D.P.P. v. Smith* (2).

Their lordships have therefore to ask themselves whether they are satisfied that the degree of force used was so extreme as to be consistent only with an intent to do serious harm. They are not so satisfied. Mr. Brabin rightly submits that the Crown is not obliged to prove a motive; but just as the presence of motive can greatly strengthen the case for the prosecution, so its absence can weaken it. There is here a complete absence of motive. The marriage was a new and happy one. Only an abnormal man could intend to strangle his wife while making love to her and there is no suggestion of known abnormality. The medical witnesses accepted that an inexpert strangler generally uses much more violence than is necessary to cause death; and the fact that there were no external signs of violence or of any struggle create, like the absence of motive, a weakness in the prosecution's case. These considerations are of themselves enough to induce in their lordships' minds, as they did in the minds of the judges in the Court of Appeal, a real doubt about the accused's guilt of murder.

Their lordships have next to ask themselves whether they are satisfied that the degree of force used was unlawful. The question is whether what was done was within the limits permitted by the wife's submission to intercourse and its normal accompaniments or whether it went beyond those limits so as to constitute an assault upon her amounting at least to a matrimonial offence. Mr. Dean has argued that a verdict of manslaughter should not be returned unless it is proved that the accused knowingly acted with reckless disregard for his wife's safety. That may be the proper test under the Code when the accused is guilty of omission or where the unlawful act is not aimed at the victim, as in the case of careless driving; see per Kilmuir, L.C., in *D.P.P. v. Smith* (2) at 325. But where there is an act done by the accused, such as the squeezing of the neck, the only question under the Code is whether that act is unlawful.

If death had been caused solely by the pressure on the chest, it would have been quite consistent with accident and the contact would obviously have been within the permitted limits. The difficulty in the way of the defence is to find a plausible explanation for the handling of the neck; the internal injuries suggest at least extensive pressure. Since an expert can cause death with very little force, it is conceivable that a husband might accidentally hit upon the same means. But deaths caused accidentally in sexual intercourse when the wife has ordinary health must be very rare indeed. The natural inference from the medical evidence is that the accused pressed much too hard. It is possible that as the Court of Appeal thought, the accused was

> "applying pressure in an excess of sadism to frighten or torment her, or overcome resistance".

But it is unnecessary to say more than that the evidence of the prosecution, unless explained away, proved that the accused had gone well beyond the limits.

This is the sort of case in which a not incredible explanation given by the accused in the witness-box might have created a reasonable doubt. But there is no explanation; and the prisoner's silence is emphasised by his consequent conduct. How did he come to squeeze his wife's throat? When the prisoner,

who is given the right to answer this question, chooses not to do so, the court must not be deterred by the incompleteness of the tale from drawing the inferences that properly flow from the evidence it has got nor dissuaded from reaching a firm conclusion by speculation upon what the accused might have said if he had testified. On the evidence they have their lordships are left with no reasonable doubt that this was a case of manslaughter.

For these reasons their lordships have humbly advised Her Majesty to dismiss both appeals.

Both appeals dismissed.

For the Crown:
Charles Russell & Co., London
D. Brabin, Q.C., and *D. A. Grant* (both of the English Bar) and *G. A. Twelftree* (Crown Counsel, Kenya)

For the accused:
T. L. Wilson & Co., London
J. Dean and *J. Baker* (both of the English Bar)

Ata Ul Haq v the City Council of Nairobi
[1962] 1 EA 18 (PC)

Division:	Privy Council
Date of judgment:	13 February 1962
Case Number:	48/1959
Before:	Lord Keith of Avonholm, Lord Morris of Borth-y-Gest and Lord Hodson
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 83 of 1957 on appeal from H.M. Supreme Court of Kenya – Forbes, J.

[1] Building contract – Seventeen blocks of municipal housing – Eleven accepted as complete – Six not accepted – Contractor's claim that contract performed – Claim for extras – Latent defects alleged in construction – No final certificate issued – Buildings said to be incomplete occupied and let – Rights of contractor and owners – Validity of engineer's certificates – Damages claimed by owners for extra cost of work done by contract – Whether claim established.

Editor's Summary

In 1954 the appellant entered into a contract with the respondents to build for them seventeen blocks of housing. The appellant duly completed eleven blocks which were accepted and taken over by the

respondents for which on certificates issued by their own engineer they had paid 95 per cent. of the certified value of the work. Of the remaining six blocks four were complete and the other two complete except for minor details when the parties fell out. For these six blocks the respondents had paid, when the dispute occurred, 90 per cent. of the certified value of the work done but, although when the appellant withdrew from the site the respondents occupied the premises, they never formally accepted them. In February, 1956, the appellant sued the respondents claiming that he had not only completed his work under the contract but had done additional work. His main claims were for the balance of the contract price including retention moneys, for Shs. 50,000/- deposited by him as security and for the value of the extra work. By their defence the respondents denied liability and alleged that the works had not been completed as required, that the appellant's suit was premature and that if any money was due to the appellant they were entitled to make deductions in respect of defects. Later in 1956, the respondents sued the appellant, alleging failure by him to execute the works required by the contract and complaining of latent defects discovered after payments had been made and claiming damages of Shs. 882,950/-. The appellant's defence was that he had completed the contract, that the respondents had accepted all the buildings, had gone into

possession and collected rents from letting them. There were also pleas of waiver and estoppel. Both suits were consolidated and tried together and the judge gave judgment for the appellant for the balance of the contract price, for the deposit and Shs. 70,850/- for extras and he awarded the respondents Shs. 22,502/- damages for defective work. On appeal by the respondents the appellate court held, inter alia, that whilst the finding of the judge that the work had been substantially completed, with some defects, was correct, substantial completion was not enough to justify payment of retention moneys which were only payable when the work was entirely performed; that the cost of making good the defects in all seventeen blocks was much more than the judge had awarded the respondents and that the respondents were entitled to damages of Shs. 312,955/-. On further appeal

Held –

(i) whilst the opinions of courts on other words in other contracts in other cases are of assistance the decision in the present case must depend upon the construction of its own contractual documents.

(ii) there was no reason for the application of any principles of waiver or estoppel; by the contract the parties had agreed that the respondents' engineer was to decide and be the final arbiter whether the works had been completed and executed in accordance with the contract and to his satisfaction.

(iii) it was not the case that the engineer's certificate had only to be given for administrative reasons or that it merely recorded a personal or provisional opinion; according to the contract the certificate was final, subject only to the provisions regarding the maintenance period and the rights given to the respondents in respect of defects appearing during that period.

(iv) the appellant was entitled to payment in full for the eleven blocks and the respondents were only entitled to damages for defects in the six blocks; accordingly the appeal would be allowed and the matter remitted to the Court of Appeal to work out a new decree.

Appeal allowed.

Cases referred to in judgment:

(1) *Lord Bateman v. Thompson* (1875), 2 Hudson's Building Contracts (4th Edn.), 36.

(2) *Newton Abbot Development Co., Ltd. v. Stockman Bros*., [1931] 47 T.L.R. 616.

(3) *Petrofina S.A. of Brussels v. Compagnia Italiana Transporto Olii Minerali of Genoa*, [1937] 53 T.L.R. 650.

(4) *Harvey v. Lawrence* (1867), 15 L.T. 571.

Judgment

Lord Morris of Borth-Y-Gest: In 1954 the City Council of Nairobi undertook the development of an African housing estate at Ofafa. For purposes of construction the housing estate was divided into sections. On one of these sections seventeen blocks of buildings were to be erected. They were to comprise dwellings and ablution units and other ancillary works. Tenders were invited. The appellant (the contractor) submitted a tender which was accepted. A deed of contract between him and the respondents, the City Council of Nairobi (the Council) was made on June 29, 1954. By such deed of contract there was agreement for the execution of the proposed work. The work was to be done in

accordance with certain general conditions, with the contractor’s tender, with a specification prepared by the Council’s engineer, with a schedule of rates, and also in accordance with certain drawings.

The contractor entered upon the site and commenced work in June, 1954. In due course eleven of the seventeen blocks were completed. They were accepted in writing and were taken over by the Council. Payments were made to the contractor on certificates issued by the city engineer to a total which was 95 per cent. of the certified value of the work in respect of those blocks. As to the remaining six blocks the position was that four were completed and the other two were complete except for minor details when differences arose between the contractor and the Council. Interim payments had been made to the contractor in respect of these six blocks of amounts which were 90 per cent. of the certified value of the work done. The six blocks were never formally accepted but in fact they were occupied by the Council after the contractor had withdrawn from the site.

On February 18, 1956, the contractor as plaintiff issued a plaint (in Suit No. 170) against the Council and claimed that he had duly completed his work in accordance with the contract and further that he had done additional work. His main claims were (1) for a sum of Shs. 140,018/- in respect of the balance of the contract price including retention moneys, (2) for a sum of Shs. 50,000/- in respect of a deposit which he had made by way of security and (3) for payment of such amount as should be held to be the value of extra work carried on by him. Included in the defences raised by the Council (who denied liability) were that the works had not been completed in accordance with the contract and that the Council were justified in not taking over the six blocks. The Council also pleaded that there had been no certificates for any payment beyond what had already been made and that the contractor's suit was premature. If, however, any money was due from them they claimed to be entitled to make deductions in respect of defects.

Later in the same year (on November 14, 1956) the Council issued a plaint (in Suit No. 1314) against the contractor. They asserted that the contractor had failed to execute the works in accordance with the contract and that defects of which they complained were latent and had not been known to them when certificates, upon which payment had been made, had been issued. The Council claimed Shs. 882,950/- damages from the contractor. This total included (i) Shs. 826,849/-, the alleged cost of bringing the buildings up to specification or where that was impracticable the alleged reduction in the value of the buildings, (ii) Shs. 9,881/-, the cost of a detailed survey and report on the work and (iii) Shs. 46,220/- for unusual maintenance costs which it was alleged would be caused by the poor quality of the buildings. In his defence the contractor pleaded that he had duly completed the contract and that the Council had accepted all the works (including the six blocks) and had gone into possession and let them and collected rents from them. He further pleaded that after inspections of the works on behalf of the Council he had carried out all the repairs or alterations that he had been required to do. There were also pleas of waiver and of estoppel.

As was obviously convenient and desirable the two actions were consolidated and were tried together. The trial took place on days in April, May and June, 1957. In all the hearing occupied some seventeen days. A number of issues were formulated and agreed. On September 6, 1957, the learned judge (MR. Justice Forbes) gave judgment for the contractor in his action for Shs. 260,868/- and costs. That sum included the three following items: (i) Shs. 140,018/- in respect of the balance of the contract price, (ii) Shs. 50,000/- in respect of the deposit for security, (iii) Shs. 70,850/- in respect of extras. In the Council's action the learned judge gave judgment for the Council for Shs. 22,502/- for damages in respect of defective work with costs on that amount. For the purpose of assessment of the costs of the hearing which should be respectively attributable to the two actions he held that one-eighth of the costs of the hearing were attributable to the Council's action.

The Council appealed to Her Majesty's Court of Appeal for Eastern Africa. After a hearing in September, 1958, judgment was given on December 10, 1958. Before further referring to the issues which were most prominent at the hearing and on the appeal it is convenient to set out that the decision of the Court of Appeal resulted in an order summarised in the respondent's case as follows:

"(1) That the appeal be allowed and the decree of September 6, 1957, be set aside;

"(2) That the respondents (the City Council) do pay the appellant (Ata UI Haq), in respect of his claim in Suit No. 170, Shs. 70,850/- for extras;

"(3) That the respondents (the City Council) were entitled in Suit No. 1314 to the damages following:

		Shs.
(i)	For foundations and foundation walling	48,708.00
	Plus for pumping and baling if remedial work carried out Shs. 10,000	
(ii)	For floors and hardcore fill underneath	193,524.45
(iii)	For superstructure walling	46,433.00
	Door frames and windows	10,537.50
	Damp course	500.00
(iv)	For joinery – hinges	7,252.50
(v)	Loss of rent – the actual loss incurred by excavation of buildings for carrying out remedial work, if put in hand and completed with reasonable despatch	–
(vi)	For cost of survey and report	6,000.00
		312,955.45

"(4) That against the said sum of Shs. 312,955.45 the appellant might set off the sum of Shs. 70,850/- for extra work under (2) above, retention moneys of Shs. 140,018/- being the balance of the contract price, and his deposit by way of security of Shs. 50,000/-;

"(5) That the appellant pay the respondents two-thirds of their cost of both suits; and

"(6) That there be liberty to apply for the purpose of working out the Court of Appeal's decree."

It will be seen that in one form or another the order of the Court of Appeal provided that the contractor should have credit for the sums of Shs. 70,850/-, Shs. 140,018/- and Shs. 50,000/- which were awarded by the learned judge. As regards the first of these (the sum for extras) the Court of Appeal gave judgment in favour of the contractor. As regards the other two sums the Court of Appeal allowed credit for them as against the damages to which they held the Council to be entitled. The view of the Court of Appeal was that though the works had been substantially completed in accordance with the contract, but with some defects, the works had not been satisfactorily completed and that the retention money was only payable on satisfactory completion on entire performance. They said:

"As to the retention money the contractor is not entitled to any of it until he has satisfactorily completed the work which he has certainly not done to date. Only if and when the contractor has discharged his liabilities

> to the Council enumerated above, so that it can be said that the defects for which the contractor is liable have been remedied or damages paid in lieu will he be entitled to receive payment of the retention moneys and of the sum of Shs. 50,000/- deposited by way of security."

It may here be stated that the Council did not on the hearing before their lordships' Board seek to support the items of damage which the Court of Appeal awarded contingently upon the actual execution of remedial work or the actual incidence of loss. The item for pumping and baling under (3)(i) above is therefore eliminated as also is item (3)(v).

The first part of cl. 1 of the deed of contract provided as follows:

> "In consideration of the works hereafter mentioned the Council shall pay to the contractor the sum of pounds eighty-five thousand four hundred and seventy-six (£85,476) (hereinafter referred to as "the contract price") subject to the provisions of cl. 2 hereof at the times and by the instalments and subject to the provisions for retention moneys mentioned in the attached documents or if no time is therein mentioned then on the completion of the work."

By cl. 2 it was provided that the engineer could give a notice in writing to the contractor requiring him to make some alteration in addition to or omission from the works or some alteration in kind or quality of the materials to be used but that without the previous consent in writing of the engineer the contractor was not to do any work extra to or to make any alterations or addition to or omission from the works or any deviation from any of the provisions of the contract.

For a consideration of the questions of construction of the contract which arise it is necessary to have regard to all its various provisions and their lordships here refer only to some of them. Condition 2(i) of the general conditions was as follows:

> "The contractor shall at his own risk and cost execute and perform the works described in the contract agreement and detailed in the specification and drawings provided and supplied to the contractor for the purpose of the works and completely finish the said works in a good and workmanlike manner with the best materials and workmanship and with the utmost expedition, in accordance with the said contract agreement, specification and drawings, which shall have been signed by the contractor and the engineer, and in accordance with such further drawings, details, instructions, directions and explanations as may from time to time be given by the engineer."

The first sentence of condition 3 was as follows:

> "The said works shall be executed under the direction and to the entire satisfaction in all respects of the engineer, who shall at all times have access to the works, to the yards and workshops of the contractor or other places where work is being prepared for the building."

Condition 7 (iv) was:

> "When the works have been completely executed according to the provisions of the contract and to the satisfaction of the engineer, the date of such completion shall be certified by him, and such date shall be the date of commencement of such period of maintenance as may be provided by the contract."

Condition 9 was as follows:

> "(i) All materials and workmanship shall be the best of their respective

kinds and shall be provided by the contractor, except as may be otherwise particularly provided by the specification or directed by the engineer, and the contractor shall, upon the request of the engineer, furnish him with proof that the materials are such as are specified. The engineer shall at all times have power to order the removal of any materials brought on the site which, in his opinion, are not in accordance with the specification or with his instructions, the substitution of proper materials and the removal and the proper re-execution of any work executed with materials or workmanship not in accordance with the specifications and drawings or instructions, and the contractor shall forthwith carry out such order at his own cost.

"(ii) Any defect which may appear, either of material or of workmanship during the period of maintenance provided by the contract, shall be made good by the contractor at his own expense, as and when directed.

"(iii) If the contractor shall fail to carry out any such order, as by the preceding sub-clauses provided within such reasonable time as may be specified in the order, the materials or work so affected may, at the option of the engineer, be made good by him in such manner as he may think fit, in which case the cost thereby incurred shall, upon the written certificate of the engineer, be recoverable by the City Council as a liquidated demand in money.

"(iv) If any defect be such that, in the opinion of the engineer, it shall be impracticable or inconvenient to remedy the same, he shall ascertain the diminution in the value of the works due to the existence of such defect and deduct the amount of such diminution from the sum remaining to be paid to the contractor, or failing such remainder, it shall be recoverable as a liquidated demand in money."

Condition 10 provided for the opening up of work at the request of the engineer.

Condition 16 was as follows:

"Payment shall be made to the contractor by instalments in accordance with the provisions of the specification, under the certificates therein stipulated to be issued by the engineer to the contractor.

"No certificate so issued by the engineer shall of itself be considered conclusive evidence as to the sufficiency of any work or materials to which it relates so as to relieve the contractor from his liability to execute the works in all respects in accordance with the terms and upon and subject to the conditions of this agreement or from his liability to make good all defects as provided thereby."

Conditions 17, 18 and 19 dealt with variations and payment for them and with claims for extras.

Condition 23(i) was as follows:

"In case at any time during the progress of the works –

(*a*) any unnecessary delay shall occur in the carrying out of the same through some default of the contractor, or

(*b*) the contractor shall not carry out the said works to the satisfaction of the engineer, or

(*c*) the contractor shall fail to comply with the directions given by the engineer, or

(*d*) the contractor shall at any time neglect or omit to pull down or

remove any work or material which the engineer shall have certified in writing to be defective or not according to the contract then, and in any such case, the engineer shall give written notice to the contractor to proceed with the said works or to remedy such default or defect to the satisfaction of the engineer."

Condition 23(ii)(*a*) was as follows:

"If the contractor shall

fail to comply with the instructions given in such written notice to the satisfaction of the engineer, within six days after such notice shall have been given, then, and in any such case, the engineer shall be at liberty, without avoiding the contract, to take the said works wholly or partially out of the hands of the contractor and to enter upon and take possession of all materials, plant, tools, implements and things on or about the said works (or on any grounds continguous thereto) intended for use for the purpose of the contract, and the engineer shall retain and hold a lien upon such plant until the works shall have been completed under the powers hereinafter conferred upon him."

Condition 26(i) and (ii) were as follows:

"(i) If any dispute shall arise between the engineer and the contractor as to anything contained in or incidental to the contract, otherwise than such matters or things hereinbefore left to the decision or determination of the engineer, every such dispute shall at the instance of either party, be referred to arbitration and unless the engineer and the contractor concur in the appointment of a single arbitrator, the reference shall be to two arbitrators and every such reference shall be deemed a submission within the meaning of the Arbitration Ordinance, 1913, and any Ordinance in amendment thereof or in substitution therefor, and shall be subject to the provision of such Ordinances.

"(ii) Provided always that either party to the contract shall give notice in writing to the other party of his intention to submit any such dispute to arbitration not later than thirty days after the date of receipt by the contractor of the final certificate."

There was a specification which contained some seventy paragraphs.

Paragraph 1 was as follows:

"Scope of Contract.

"The contract is for the erection, completion and maintenance including the supply of all necessary labour and materials, of 'Doonholm Neighbourhood, Stage 1, Part C, African Housing Scheme', as shown on and in accordance with the contract, drawings, this specification and the general conditions of contract and to the entire satisfaction of the city engineer."

Paragraph 14 was as follows:

"Period of Maintenance.

"The period of maintenance of any dwelling and/or ablution block shall be six months after the date of completion of the block as certified by the city engineer under cl. 7 of the general conditions."

Paragraph 15 was as follows:

"Terms of Payment.

"Payments will be made on certificates issued by the city engineer at his discretion.

> "Interim payments shall not exceed 90 per cent. of the value of the work properly executed. When the work has been satisfactorily completed and taken over by the Council, the contractor shall be entitled to a certificate for 95 per cent. of the value of the work so executed. The remaining 5 per cent. shall be paid to the contractor at the termination of the period of maintenance as laid down in cl. 13 hereof. [It is clear that the figure 13 should read 14.]
>
> "The value of any materials which it is intended to use in the work and which are unfixed will not be included in any interim payment certificate."

Paragraph 17 was as follows:

> "Cash Deposit.
>
> "The contractor is required to deposit with the Council the sum of Shs. 50,000/- as surety for the due performance of the contract. This sum must be deposited when the contract is signed and will be refunded when the final certificate is issued by the city engineer."

The work of constructing the buildings began in June, 1954. It was held by the learned judge at the trial that the day to day supervision of the execution of the work was carried out by an African housing architect and a clerk of the works. They were both employed by the Council. The architect was a Mr. Tanner and the clerk of works was a Mr. Stone. When certain blocks (of the 17) were completed they were accepted in writing. Letters of acceptance were from time to time sent by the city engineer. Some units were so accepted before the end of the year 1954. In May, 1955, Mr. Stone was succeeded as clerk of works by a Mr. Goodwin. In March, 1955 (at a time when the works were about 80 per cent. complete), Mr. Mould under Mr. Tanner became associated with the work and as architect took over from Mr. Tanner in June, 1955. Both Mr. Stone and Mr. Mould gave evidence. Apart from the contractor they were the only witnesses who gave evidence as to the progress of the work on site: Mr. Stone's evidence covered the first 80 per cent. or so of the work and Mr. Mould's evidence related to the latter part of the work. Mr. Tanner was not available as a witness. The learned judge regarded Mr. Stone as an "impressive witness" who appeared to be "genuinely impartial": the learned judge did not accept Mr. Mould's evidence as entirely impartial and he noted "a tendency to exaggeration". The learned judge stated in his judgment that there had been no suggestion of the existence of any fraudulent collusion between Mr. Tanner or Mr. Stone and the contractor.

The facts as found by the learned judge were not seriously questioned on the appeal to the Court of Appeal and in the judgment of the Court of Appeal the following passage from the judgment of the learned judge was quoted:

> "Taking the evidence of Mr. Stone and Mr. Mould together, a very clear general picture emerges. I do not think it is disputed that the Council were seeking to erect cheaply priced buildings in this housing estate, and that this contract did envisage a low, or shall I say, economical standard of work. This, of course, is no excuse for an even lower standard than is called for by the specification. There is, however, some latitude for interpretation of the specification, and it is perfectly clear that during his term of office as architect in charge of the contract, Mr. Tanner deliberately allowed a low standard of work within the specification, in a number of instances below specification, while Mr. Mould on arrival, no doubt performing the function of a new broom, did his best to insist on compliance with a far higher standard. The position is really summed up by Mr. Mould's admission in cross-examination when he agreed that a different standard is being applied now, when he whole-heartedly condemns

> all the blocks or buildings, from that applied when acceptance of certain of the blocks was recommended to the Council. I accept Mr. Mould's evidence that when he drafted letters of acceptance in respect of five of the blocks he was not fully aware of the general character of the buildings. He had, of course, not seen the major part of the work being carried out; and I have no doubt that he was sincerely shocked when he did discover the standard to which the building had been carried out and considered it was a scandalously low standard. I do not accept, however, that the Council, through its officers, had no knowledge of the standard to which the works were being built. It is clear from Mr. Stone's evidence that Mr. Tanner was in general fully aware of the standard of the work that was being done and accepted it, and there is some evidence that this knowledge and acceptance was shared by more senior officers of the Council. Mr. Mould stated that he did not recommend acceptance of the five blocks of buildings without protest but that he was overruled. He said that he indicated his objections to Mr. Roberts, then city engineer, and that later, when Mr. Saunders was acting city engineer, he explained his grounds of objection to Mr. Saunders in detail. Mr. Mould said that Mr. Saunders put it to him often that he (Saunders) would have to put it to the Council and Mr. Mould also said that there were many meetings between heads of departments. Mr. Mould was not present and was unable to say what was put to the Council or what was discussed at the meetings of heads of departments, and other evidence does indicate that Mr. Mould's superior officer, and possibly the Council itself, was at one time prepared to accept a lower standard of work than he was.
>
> "However this may be, I am satisfied that, with certain exceptions to which I will refer later, Mr. Tanner, and Mr. Stone on Mr. Tanner's authority, allowed a low standard of work; and that in many cases work was authorised or knowingly accepted which was not strictly in accordance with specification. I am also satisfied that on occasion Mr. Tanner directed work to be done which was additional to specification. It seems equally clear that notwithstanding the provisions of the contract documents, to which I will refer in detail presently, practically the whole of the dealings between Mr. Tanner (and later Mr. Mould) and the contractor were on a verbal basis and that the contractor accepted and gave effect to verbal directions given him by Mr. Tanner. Written variation orders for additional work in accordance with the contract appear to have been issued in only three cases, that is, exhibits 18, 19 and 20."

In reference to the certificates referred to in condition 7 (iv) of the general conditions it was common ground between the parties that different parts of the works were to be completed at different times and that more than one certificate of completion could be issued. It followed that there were different maintenance periods in respect of different parts of the works. It was also common ground that various letters which were signed by the city engineer in reference to the first eleven blocks did constitute certificates as contemplated by condition 7 (iv).

The learned judge at the trial held that the contractor had been guilty of certain failures in regard to the contract. He found, for example, that the contractor had failed to maintain the specified mix for mortar and concrete in a proportion of the mortar and concrete used or that the mix was not properly mixed or laid: defective mortar and concrete resulted. Without referring to all the detailed findings it may be mentioned that in regard to the filling materials used for the floors and the laying and ramming he held that there had been a breach in using larger boulders than would go into six-inch layers though he was not satisfied that the absence of small filling between the

larger boulders used was a non-compliance with the specification or the drawings. The conclusion of the learned judge was that as regards the eleven blocks in respect of which the city engineer had issued certificates under condition 7 (iv) no claim could be presented by the Council for the certificates were conclusive as to the sufficiency of the work at the date of their issue: the further issue of the certificates operated as a waiver of strict compliance with the specification and the engineer had been the agent of the Council for the purpose of passing the works: and acceptance of the works with knowledge of defects disentitled the Council from claiming for such defects. As to the eleven blocks the learned judge considered that the contractor's responsibility was limited to defects which appeared during the maintenance period (but not including any alleged defects known to but accepted by the engineer). He held that defects of concrete and of mortar in the foundations were not discovered within the maintenance period. As regards the mortar in the walls he held that the extent of the defects had not been established sufficiently to enable him to assess a figure for damages.

As to the six blocks the conclusion of the learned judge was that the contract work had been substantially completed and that the contractor was entitled to recover the contract price less any sums allowed for defects. In regard to the six blocks he held that the sums to be allowed against the contractor for defects should relate to the foundations and the superstructure walling: he quantified the damages by taking six-seventeenths of the sums assessed by Mr. Wevill, a practising architect and quantity surveyor, who had carried out a survey of the works in April, 1956, and had made a report for the Council. He did not quantify the damages in relation to defective concrete and mortar in the floors since the figure in Mr. Wevill's report did not relate solely to faulty concrete.

The Court of Appeal held that while the representative of the engineer could give directions within the limits of the contract documents there could be no alteration, variation or deviation from the contract without the written direction or consent of the engineer. As to the eleven blocks they held that the Council could show that the work was not satisfactorily completed and could sue for defects notwithstanding acceptance. They held that the contract imposed a dual obligation: it was (*a*) to complete the work according to the provisions of the contract and (*b*) to complete the work to the satisfaction of the engineer. They held that even if the engineer was satisfied the contractor was in breach if he failed to complete the contract in accordance with its provisions. They further held that acceptance of the eleven blocks by the engineer and the taking over of them by the Council did not prevent the Council from claiming damages for defects even though such defects might appear and a claim in respect of them be made after the expiration of the maintenance period. Rejecting the contentions of waiver or of estoppel they awarded damages as indicated above. As regards the floors they held that if the stones had been broken smaller so as to go into six-inch layers then there could have been consolidation. They considered that as Mr. Tanner had seen the progress of the work and the type of hardcore used there could have been timely correction of the defects and mitigation of the damage. Though evidence was lacking as to what would have been the cost at the time of remedying the defects and as to what was the proportion of the sum claimed which was attributable to faulty concrete the Court of Appeal considered that as both parties were at fault it was reasonable to allow the Council one-half of the sum that they claimed in respect of the floors and the hardcore fill underneath them.

It seems clear that different considerations apply in regard to the eleven blocks and the six blocks. As to the former it is common ground that the engineer issued certificates of completion under condition 7 (iv). One of the principal questions concerns the effect of such certificates. This must be determined

by considering the provisions of condition 7 (iv) in its setting in the contract as a whole. A certificate of completion is not in terms said to be “final” or “conclusive” but this circumstance taken by itself is not decisive. It is said on behalf of the Council that the certificates amounted to no more than acknowledgments of delivery up and completion which marked the beginning of the maintenance period and the end of the time during which the contractor was entitled to possession of the site and during which he was under obligation to insure (see condition 24) but which in no way precluded the Council from asserting and seeking to prove that the buildings had not been erected in accordance with the provisions of the contract.

Their lordships consider that this approach gives inadequate meaning to condition 7 (iv). It is to be remembered that the contract as a whole is a very elaborate document and it is reasonable to expect that within the diverse terms of it will be found the methods by which the arrangements between the parties were to be adjusted. Under the contract the engineer has a very important role. He is much more than an officer of or an agent of the Council charged with the duty of controlling the execution of the contract. He also has functions which he must discharge in an impartial judicial spirit. The specification provides that the work is to be done “under the supervision of and to the entire satisfaction of the city engineer”. Under cl. 3(i) of the general conditions it is provided that the works are to be executed “under the direction and to the entire satisfaction in all respects of the engineer”. Furthermore in many stipulated circumstances it is for the engineer to certify and the contract contemplates that his certification is to be conclusive. Thus cl. 2 of the deed of contract provides for his authority and certification in regard to “unforeseen work”. Under cl. 7 of the general conditions further time may be allowed “as the engineer shall in writing, certify to be reasonable”. See also condition 7 (iii), condition 9 (iii), condition 16, condition 22, condition 23(i)(*d*), condition 23(iv). The wording of the arbitration clause condition 26 suggests that the parties were agreeing to give finality to the decisions of the engineer. They agreed that the disputes that might go to arbitration were those which should arise

> “between the engineer and the contractor as to anything contained in or incidental to the contract otherwise than such matters or things hereinbefore left to the decision or determination of the engineer”.

The effect of condition 7 (iv) must be examined in the light of all these considerations.

> “When the works have been completely executed according to the provisions of the contract and to the satisfaction of the engineer the date of such completion shall be certified by him, and such date shall be the date of commencement of such period of maintenance as may be provided by the contract”.

Their lordships consider that when “the date of such completion” is certified by the engineer he is certifying (*a*) that the works have been completely executed according to the provisions of the contract and (*b*) that the works have been completely executed to his satisfaction. Condition 2 obliged the contractor to execute and perform the works and completely to finish them in accordance with the contract. It seems to their lordships that condition 7 provided that it was for the engineer to decide whether the contractor had carried out his obligations under condition 2. Condition 3 imposed a further obligation upon the contractor. He was to execute the works under the direction and to the entire satisfaction of the engineer. For this reason the engineer had at all times access to the works and to the yards and workshops of the contractor. The engineer had full powers of supervision and had rights to call for work

to be opened up for inspection. The engineer was naturally the person to certify whether works had been executed to his satisfaction.

When the engineer gave his certificate under cl. 7 (iv), which involved a dual certification, then the maintenance period began and furthermore (see specification 16) the contractor became entitled to a certificate for 95 per cent. of the value of the work so executed. The provisions regulating the period of maintenance then became operative. Its period was six months (see specification 14). Any defect which might appear during it (either of material or workmanship) had to be made good by the contractor at his own expense as and when directed. (See general condition 9 (ii).) Other provisions as to defects were contained in general condition 9 (iii) and (iv). The remaining 5 per cent. of the value of the work executed had to be paid to the contractor at the end of the period of maintenance (see specification 15) – subject always to the powers of the engineer under general condition 9.

In all these various and detailed provisions their lordships consider that the terms agreed upon by the parties for regulating their dealings are to be found. Their lordships find no reason to apply any principles of waiver or estoppel. The position was that by their contract the parties agreed that the engineer was to decide and was to be the final arbiter as to whether the works had or had not been completely executed in accordance with the provisions of the contract and also to his satisfaction. If he so decided, and of course decided impartially and not in collusion with the contractor, then as regards such of the works as he covered by his certificates the provisions governing the maintenance period then became applicable.

It is said, however, that the contractual provisions as to payment point to a different conclusion. By cl. 16 of the general conditions it is provided that payment shall be made to the contractor by instalments in accordance with the provisions of the specification: cl. 15 of the specification provides for interim payments up to 90 per cent. and provides that

> "when the work has been satisfactorily completed and taken over by the Council the contractor shall be entitled to a certificate for 95 per cent. of the value of the work so executed. The remaining 5 per cent. shall be paid to the contractor at the termination of the period of maintenance".

There is a proviso to cl. 16 of the general conditions that

> "no certificate so issued by the engineer shall of itself be considered conclusive evidence as to the sufficiency of any work or materials to which it relates so as to relieve the contractor from his liability to execute the works in all respects in accordance with the terms and upon and subject to the conditions of this agreement or from his liability to make good all defects as provided thereby".

Their lordships cannot think that these words ought to be taken as in any way modifying the provisions contained in 7 (iv) of the general conditions. A certificate under 7 (iv) will only be given by the engineer when he decides that the works have in fact been completely executed according to the provisions of the contract and to his satisfaction. Then the provisions relating to the maintenance period become operative. The Council and the engineer could then avail themselves of any of the provisions of cl. 9 (ii) and (iv) of the general conditions. Within those provisions there were ample means for the protection of their interests.

Their lordships conclude that as to the eleven blocks the contractor was entitled to full payment and it was not shown that any directions were given to him or that he was guilty of failure to obey any directions in respect of any defects appearing during the various maintenance periods.

The various contractual documents taken as a whole contain very full and detailed and comprehensive provisions and their lordships consider that though 7 (iv) does not specifically use such words as “final” or “conclusive” the certificate of the engineer if given was intended to record a decision which was binding upon the parties. Their lordships cannot accept the submission that the certificate of the engineer was only a document which had to be given for administrative reasons or was one which merely recorded a personal opinion or a provisional opinion. It seems to their lordships that the whole scheme of the contract involved that a certificate under 7 (iv) was final subject only to the provisions in regard to the maintenance period and the rights given to the Council in respect of defects either of material or of workmanship which might appear during the maintenance period.

In regard to the six blocks the position is different. No certificates under 7 (iv) were issued. It is said on behalf of the contractor that certificates should have been issued and that the Council cannot avoid payment if there was a wrongful failure to certify. In view of the findings of fact of the learned judge it cannot however be said that there was any such wrongful failure. If certificates are issued by the engineer then they are issued by the person who was charged under the contract with the duty of decision and whose decision it was for the parties to accept. As to the six blocks there was no such decision. It was said that when Mr. Mould came on the scene he disregarded and overruled decisions, approvals and directions previously given to the contractor and that this was in contravention of cl. 1 of the general conditions. Their lordships cannot accept this submission. The approach of Mr. Mould may well have been a new one and his interpretations may have been more exacting than those of his predecessor but their lordships cannot think that he was circumscribed by any prior events or that he was not entitled to insist upon his own appreciation of the standards required by the contract or that it can properly be said that Mr. Mould acted in contravention of cl. 1 of the general conditions.

Their lordships consider that the decision in the present case must depend upon the construction of its own particular contractual documents and though a consideration of the opinions of courts on other words in other contracts in other cases is of assistance the adjudication in this case involves thereafter a return to a study of the contract under review. The wording of the contract in the well-known case of *Lord Bateman v. Thompson* (1) (1875), 2 Hudson’s Building Contracts (4th Edn.), 36, differed much from that in the present case, but in that case even apart from the proviso in the contract the court was of opinion that if work has to be done so as to satisfy an owner and his architect and if satisfaction with work done is expressed in the way provided then there is performance by the contractor in such a way that no action is maintainable against him. By contrast in *Newton Abbot Development Co. Ltd. v. Stockman Bros*. (2), [1931] 47 T.L.R. 616, a provision in a building contract that the work was to be carried out to the satisfaction of the surveyor and the sanitary inspector of the local Urban District Council was held to be only a superadded protection for the building owner who was not prevented from suing for damages in respect of work improperly done even though the surveyor and the sanitary inspector had approved the work. In *Petrofina S.A. of Brussels v. Compagnia Italiana Transporto Olii Minerali of Genoa* (3), [1937] 53 T.L.R. 650, it was held that cl. 27 gave an added right to the charterers and that the fact that the tanks had been inspected on their behalf did not prevent them from claiming in reliance upon the express warranties contained in cl. 1 and cl. 16. These cases and also *Harvey v. Lawrence* (4) (1867), 15 L.T. 571, are amongst the cases which are reviewed in the careful and full judgment in the Court of Appeal and which were considered in the submissions of counsel. Helpful though a survey of them has been their lordships have found themselves

in the end driven to a return to the particular wording of the elaborate contract now in issue.

There remains the question of the damages payable to the Council in respect of the six blocks. It will be convenient to deal with the damages by reference to the items awarded by the Court of Appeal. As stated above any items for pumping and baling and for loss of rent are to be excluded. Certain of the figures assessed by the Court of Appeal were on the basis of including sums by way of extra cost for work done by contract. Their lordships are not satisfied that the necessity for doing work by contract was established. It was argued that the basis upon which the item for floors and hardcore fill underneath was arrived at (i.e. the basis of awarding a half of the sum assessed on the footing that there should have been mitigation by taking earlier action) was not on principle supportable. Their lordships do not find it necessary to examine this matter further because they consider that (if the extra cost for work done by contract is eliminated) the sum assessed by the Court of Appeal is in any event not more than the sum that could properly be awarded. Other items were debated before their lordships but subject to the matters here mentioned their lordships do not dissent from the assessment of the Court of Appeal. As the Council fail, in their lordships' view, to establish any right to damages in respect of the eleven blocks and as the contractor's defence fails in respect of the six blocks the Council are entitled to damages to the extent of six-seventeenths of the sums resulting if from items 1 to 6 declared in the order of the Court of Appeal there are first deducted the sums which as stated above are to be excluded.

The result of their lordships' opinions is that in his action the contractor was entitled to recover the actual balance on the eleven blocks (Shs. 53,216/-) and Shs. 70,850/- in respect of extras. In their action the Council were entitled to recover the sums of damages which will be ascertained on the basis set out above. Provided the Council are credited with (and in that way recover) the damages to which they are entitled then, on the principle stated by the Court of Appeal, the contractor will thereafter be entitled to receive payment of the balance of the retention moneys referable to the six blocks (Shs. 86,802/-) and of the sum of Shs. 50,000/- deposited by way of security. The order of the Court of Appeal included an order that there be liberty to apply for the purpose of working out the Court of Appeal's decree. Their lordships will therefore humbly advise Her Majesty that the appeal of the appellant should be allowed and the order of the Court of Appeal set aside and the matter remitted to the Court of Appeal for the purpose of working out a new decree on the basis of their lordships' conclusions. The Council must pay the contractor three-quarters of his costs of the consolidated suits. The contractor must pay the Council one-half of their costs of the appeal in the Court of Appeal. The Council must pay the contractor one-half of his costs of his appeal to their lordships' Board.

Appeal dismissed.

For the appellant:
T. L. Wilson & Co., London
S. P. Khambatta, Q.C., and *D. Taverne* (both of the English Bar)

For the respondent:
Gordon, Dadds & Co., London
E. D. Stewart-Brown, Q.C., and *J. S. Daniel, Q.C.* (both of the English Bar)

S L Patel and another v Dhana Singh s/o Hakam Singh

[1962] 1 EA 32 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	20 November 1961
Case Number:	5/1961
Before:	Sir Kenneth O'Connor P, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Farrell, J.

[1] Specific performance – Sale of land – Description of parcels – Estimate of area – Sketch plan annexed to agreement – Whether parcels sufficiently identified – Indian Code of Civil Procedure, 1908, *Appendix A – Indian Evidence Act*, 1872, *s.* 73.

Editor's Summary

By a contract dated January 7, 1954, the respondent agreed to sell to the appellants a portion of his land "estimated to comprise one hundred acres or thereabouts" as shown within red lines on a sketch plan annexed thereto. This sketch plan was of the whole area owned by the respondent and a clerk of the advocate acting for the parties had delineated a portion thereof with red lines. The contract provided that the respondent should have the survey and survey plan done and approved within two years, that the survey should include an area whereon the appellants had dug a well, that the price should be at the rate of Shs. 300/- per acre and that if the respondent failed to get the survey done within two years the appellants should have the right to employ a surveyor for this purpose. On November 18, 1955, the appellants reminded the respondent of his obligation to have the survey done to which the respondent's advocate replied suggesting rescission of the contract on the grounds that there would be practical difficulty in surveying and conveying the land to the appellants. The respondent having failed to get the survey done, the appellants engaged a surveyor who prepared a plan which the appellants duly submitted to the respondent. This plan comprised about 101 acres. He rejected this plan because it did not conform to the area proposed for sale during negotiations. The appellants then asked the respondent to indicate the boundaries to another surveyor but the respondent refused to allow this surveyor to enter upon the land. The appellants accordingly sued for an order for specific performance or alternatively damages for breach of contract. The trial judge held that whereas the contract referred to one hundred acres or thereabouts, the sketch plan annexed showed a considerably larger area, that the intention was that the description should prevail over the plan, that the precise land to be sold had never been and still had to be determined and accordingly there was no concluded agreement on which an order for specific performance could be made. On appeal

Held –

(i) since the boundaries were not described and the acreage was a mere estimate the plan annexed to the agreement was the governing description of the land agreed to be sold.

(ii) it was significant that payment was to be Shs. 300/- per acre and not a fixed sum which suggested that the acreage would not be ascertained until the area had been surveyed.

(iii) it could not be said that the parcels in the agreement were insufficiently described so as to create a latent ambiguity and accordingly it was a case in which an order for specific performance should be made.

Appeal allowed. Order for specific performance of the agreement granted.

Cases referred to in judgment:

(1) *Samuel v. Jarrah Timber and Wood Paving Corporation Ltd*., [1904] A.C. 323.

(2) *Eastwood v. Ashton*, [1915] A.C. 900.

(3) *Llewellyn v. Earl of Jersey and Another*, 152 E.R. 767.

(4) *Jenkins v. Green*, 54 E.R. 172.

(5) *Rumble v. Heygate* (1870), 18 W.R. 749.

The following judgments were read:

Judgment

Crawshaw JA: This appeal arises out of a suit in the Supreme Court in which the appellants were the plaintiffs and asked for an order against the respondent/defendant for specific performance of an agreement relating to a piece of land which they alleged the respondent had agreed to sell to them, or in the alternative, damages for breach of contract. The court dismissed the suit with costs, and it is against that decision that the appellants have appealed. I would say now that there was no evidence of damages having been suffered and the case was fought exclusively on the question of specific performance.

The appellants and the respondent were farmers, and by a written agreement (hereinafter referred to as "exhibit 1") dated January 7, 1954, the respondent agreed to sell a part of his land to the appellants. The recitals and the body of the agreement were in the following terms:

> "Whereas:
>
> "(1) The vendor is seised for an estate in fee simple of all that piece of land situate on the Kiboko River in the Ukamba Province of the Colony of Kenya containing four hundred and twenty acres or thereabouts title to which said piece or parcel of land is registered in the Crown Lands Registry at Nairobi aforesaid in volume No. N 6 folio 353/28.
>
> "(2) The purchasers have lent to the vendor on the security of the said hereditaments and premises a sum of shillings sixty thousand bearing interest at the rate and upon the terms and conditions as set out in an indenture of mortgage of even date herewith and made between the same parties as the parties hereto.
>
> "(3) The vendor has agreed to sell to the purchasers a portion of the said hereditaments and premises hereinafter more particularly described comprising an area of one hundred acres or thereabouts at the price of shillings three hundred per acre upon the terms and conditions hereinafter appearing.
>
> "Now it is Hereby Mutually Agreed by and between the parties hereto as follows:
>
> "1. The vendor sells and the purchasers purchase all that piece or parcel of land estimated to comprise one hundred acres or thereabouts being a portion of the said hereditaments and premises as shown on the rough sketch plan annexed hereto and thereon bordered red for an estate in fee simple free from encumbrances.
>
> "2. The purchase price of the said portion shall be at the rate of shillings three hundred per acre and the same shall be paid and satisfied out of the said sum of shillings sixty thousand so lent as aforesaid by the purchasers to the vendor by the purchasers giving him credit in respect of the said area on account of the said principal sum.

"3. The purchasers are in possession of the said area or a portion thereof hereby agreed to be sold and accordingly until the said area has been surveyed and deed plan thereof prepared and the same has been conveyed to the purchasers, the purchasers shall be tenants thereof at a rental of shillings one hundred and fifty per month but such rental shall be deemed to be in payment on account of part of the interest under the said mortgage.

"4. The vendor shall at his own expense get the said area hereby agreed to be sold surveyed and deed plan thereof prepared and approved by the Survey Department not later than two years from the date hereof. Such survey shall include the area on which the purchasers have dug a well.

"5. On the survey being done and the plans thereof prepared and approved by the Survey Department the sale shall be completed at the offices of Messrs. Shapley, Barret, Allin and Company, advocates of Nairobi aforesaid, within twenty-eight days of the receipt by such advocates of the deed plan.

"6. On the purchasers giving the vendor credit for the purchase money of the said area calculated at the rate of shillings three hundred per acre on account of the said principal sum and interest then remaining due and owing to the purchasers on the said recited indenture of mortgage the vendor will execute a proper assurance of the said area hereby agreed to be sold. Such assurance shall be prepared and perfected by and at the expense of the purchasers by the said Messrs. Shapley, Barret, Allin and Company.

"7. Should the vendor fail or neglect to get the said area hereby agreed to be sold surveyed within the said period of two years from the date hereof, the purchasers shall be entitled to get the said area surveyed by employing their own surveyor at the expense of the vendor.

"8. If for any reason the survey cannot be done and consequently the conveyance cannot be prepared in favour of the purchasers then the purchasers shall be entitled to remain in possession of the area for a period of one year from the date of the repayment of the said mortgage as provided in the said Indenture of Mortgage but the purchasers shall be liable to pay the said monthly sum of shillings one hundred and fifty per month and credit the same on account of interest payable under the said recited Indenture of Mortgage but after there payment of the said mortgage and during the one year following repayment rent payable to the vendor shall be at the rate of shillings one per annum and after the expiration of one year the purchasers shall vacate and hand over the said area to the vendor together with any permanent erections thereof in good and tenantable condition."

The agreement was drawn by Mr. Bhatt, who was a conveyancing clerk with Messrs. Shapley, Barret, Allin & Co., who, it appears, were acting for both parties. The plan referred to in exhibit 1 (which I will refer to as "the first plan") was a survey plan drawn to a scale showing the total area of 420 acres owned by the respondent, of which a portion had been delineated in red. The agreement was signed in the presence of Mr. Bhatt who, at the same time, drew the red lines on the plan, and the plan was then signed by the first appellant and by the respondent. The portion delineated red was regular in shape to the extent that it was quadrilateral, and purported to be (either accurately or approximately – this is a question to which I will refer later) the area agreed to be sold.

By a letter dated November 18, 1955, the appellants, through their lawyers, reminded the respondent of his obligation to have the area surveyed. The

respondent's lawyers replied on November 24, 1955, the second paragraph of their letter reading:

> "It is not possible to carry out the agreement of sale as the same purports to sell to your clients so to speak an island leaving other land all round. This would be very difficult for purposes of survey and conveyance and we are instructed to write and ask whether your clients will agree to treat the agreement as rescinded on our clients agreeing to refund the moneys paid thereunder."

It will be observed that this letter complains not of the uncertainty of the parcels but of their inconvenience.

The respondent failed to have a survey or deed plan prepared as provided for in cl. 4 of exhibit 1, with the result that in 1956, following the expiration of the two years, the appellants themselves engaged Messrs. C. P. Kirby & Co., surveyors, for the purpose. The surveyors prepared a plan (hereinafter referred to as "the second plan") of a piece of land measuring 101.58 acres, all but a very small part of which was within the area delineated red on the first plan. The second plan was submitted to the respondent who, through his advocate, Mr. Mandavia, who appeared for him also in the court below and before us, replied by letter of November 14, 1956, saying that the plan

> "cannot be accepted since it is not in conformity with the area which was proposed for sale during the course of negotiations between the parties".

The "area" here referred to was presumably the area delineated red on the first plan. In the same letter Mr. Mandavia said it was not admitted that the agreement was "anything but virtually null and void", but he gave no reason for so saying. It seems probable that the agreement he was referring to was exhibit 1. On March 17, 1958, the appellants' advocates wrote to the respondent saying that the appellants had engaged another surveyor, Mr. Tucker, to whom the respondent should express his own "version" of the boundaries if he was not prepared to accept that of the appellants. The respondent, however, refused to permit Mr. Tucker to enter the land. The appellants thereafter filed their suit.

Paragraph 9 of the plaint reads:

> "Notwithstanding repeated requests by the plaintiffs, the defendant has neglected and refused, and continues to neglect and refuse (*a*) to accept the deed plan submitted by the plaintiffs; (*b*) to have the said plot surveyed; (*c*) to pay the expenses of the surveyor engaged by the plaintiffs, and (*d*) to perform any of his obligations under the said agreement."

The written statement of defence was in the vaguest terms. Paragraph 2 reads as follows:

> "2. He will maintain that the agreement of sale, referred to in para. 3 of the plaint is vague and uncertain in its terms and conditions, and it is null and void and further that it is unenforceable at law."

Nowhere is it said in what respect exhibit 1 was "vague and uncertain". This is a thoroughly unsatisfactory method of pleading and fails to comply with the provisions of O. VI, r. 1. The appellants could of course have asked for further and better particulars, and it is perhaps surprising that they did not do so, but that does not excuse the respondent. I agree with the statement in Mulla, Code Of Civil Procedure (12 Edn.), Vol. 1, p. 580, that

> "the courts have uniformly said that the plaintiff, or the defendant, is entitled to be told any and every particular which will enable him to properly prepare his case for the trial, so that he may not be taken by surprise".

In the Form of Defence (No. 13) to a suit for specific performance in Appendix A to the Indian Code of Civil Procedure there is a paragraph reading:

> "6. The agreement is uncertain in the following respects – (state them)".

In his defence, the respondent has neither denied the accuracy of the parcels as shown on the first plan nor the boundaries which the appellants say were subsequently agreed. Paragraph 4 of the written statement of defence does not admit "the correctness of the averments set out in paras. 4, 5 and 6 of the plaint", and yet those paragraphs merely set out certain terms of exhibit 1. The complaints in paras. 3, 5 and 6 of the written statement of defence are mainly that the appellants failed to have a proper survey carried out or approved plans prepared; these were obligations which under exhibit 1 fell on the respondent. Paragraph 7 of the written statement of defence reads as follows:

> "7. The defendant will maintain that the survey purported to have been made by the plaintiffs' surveyor is incomplete and lacks the approval of the Lands Survey Department of Kenya, and the same is therefore useless for the purpose for which it was required, and therefore the plaintiffs are not entitled in law to claim payment of the sum of Shs. 2,595/- or of any part thereof, liability for which is hereby denied by the defendant."

No issues were framed, but being an action for specific performance it was of course necessary for the court to consider whether there was in fact any agreed parcel of land in respect of which an order for specific performance could be made. Evidence was led by the appellants, but none by the respondent. The learned judge directed his mind to whether there had been a finally concluded agreement between the parties and in doing so said

> "only in case of ambiguity in those terms [the terms of exhibit 1] may resort be had to extrinsic evidence".

As a general principle of law this would not, with respect, appear to be correct, as s. 93 of the Indian Evidence Act, 1872, reads:

> "93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects."

The proposition is, of course, correct if the ambiguity is latent. The ambiguity or "discrepancy" which the learned judge found was that whereas in exhibit 1 the parcels were described as "one hundred acres or thereabouts", the first plan showed a considerably larger area which he estimated, by reference to the second plan and in the absence of evidence thereon, at 120 acres, an estimate with which I would agree. He said that

> "while the description by the use of the words 'estimated' and 'or thereabouts' admits of a certain degree of latitude, I am satisfied that the latitude does not extend to a variance of 20 per cent. or even 15 per cent.".

He held that the intention of the parties was that the description should prevail over the plan and

> "that an area not yet defined amounting to one hundred acres was to be carved out of the area shown on the plan",

and that the precise one hundred acres to be conveyed was left to be determined by further agreement, and (by implication) that no such further agreement had been entered into, and that there was therefore no concluded agreement on which an order for specific performance could be made.

At the commencement of the hearing of this appeal application was made by Mr. Mandavia to add a cross-appeal to the effect that the judgment of the lower court could be affirmed on the additional ground that exhibit 1 was unenforceable as being a clog on the equity of redemption. We disallowed this application for reasons which we gave at the time, intimating, however, that as the appellant was seeking an equitable remedy an equitable doctrine which would preclude such a remedy was a matter which this court could consider even though the point had not been pleaded or taken by Mr. Mandavia in the court below. It will perhaps be convenient to deal with it at this stage as, if exhibit 1 were a clog on the equity, it would of course vitiate the agreement ab initio.

The second recital in exhibit 1 was that the appellants had lent to the respondent on security of his 420 acres Shs. 60,000/- by an "indenture of mortgage of even date herewith"; this, if correct, would mean that the mortgage was dated January 7, 1954, the same date as exhibit 1. Mr. Mandavia, however, saw fit to question the first appellant as to this in cross-examination, and the first appellant replied

> "The loan of Shs. 60,000/- was made on the previous day, January 6, as shown by the mortgage deed";

there followed a note by the court "(refreshes his memory)" which presumably means that the witness refreshed his memory from the mortgage deed. Mr. Mandavia does not appear to have challenged this evidence and the mortgage deed was not exhibited although apparently available; it must therefore be supposed that, at that time at least, he accepted the evidence (which meant that the recital was inaccurate) and I see no reason why this court should not do so likewise. Mr. Mandavia submits that even if the mortgage deed was dated January 6, the mortgage and the agreement for sale were in fact a single transaction. If this was so, the law is clear. *In Samuel v. Jarrah Timber and Wood Paving Corporation Ltd*. (1), [1904] A.C. 323, Lord Lindley said at p. 328:

> "In *Lisle v. Reeve* Buckley, J., suggested some instances in which he considered a mortgage might validly stipulate for an option to buy the equity of redemption; but although his decision was affirmed first by the Court of Appeal and afterwards by this House, the affirmance proceeded entirely on the fact that the agreement to buy the equity of redemption was no part of the original mortgage transaction, but was entered into subsequently, and was an entirely separate transaction to which no objection could be taken. It is plain that the decision would not have been affirmed if the agreement to buy the equity of redemption had been one of the terms of the original mortgage."

and later he said:

> "The doctrine 'Once a mortgage always a mortgage' means that no contract between a mortgagor and a mortgagee at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security."

In the instant case it was not pleaded that the agreement for sale was part of the bargain entered into at the time of the mortgage, and in the absence of any evidence to that effect I do not see why we should be asked to hold that this was so. In the circumstances I am not prepared to say that the agreement did constitute a clog on the equity.

I return now to the question of identification of the parcels. Taking exhibit 1 alone, the learned judge contrasted the "vagueness of the words of description with the precision of the plan" and said

> "I cannot hold that the boundaries shown in red on the sketch plan are incapable of being exactly determined on a survey".

In examining in detail the wording of the parcels in cl. 1 of exhibit 1 I would say first of all that "the said hereditaments and premises" must, I think, refer to the whole of the 420 acres described in the first recital and not to the land "as shown on the rough sketch plan . . . bordered red". That they refer to the latter has not, I think, been submitted; that they refer to the 420 acres would appear to be consistent with the third recital that it was agreed to sell a portion of "the said hereditaments and premises", which clearly relates to a portion of the 420 acres. It is further to be observed that the parcels agreed to be sold under the third recital are said to be "hereinafter more particularly described". That can only refer to the description by reference to the plan, for otherwise the description in cl. 1 is the same as in the recital. It seems to me that, put another way, what cl. 1 is saying is

> "All that piece or parcel of land, being a portion of the said hereditaments and premises described in the first recital hereto, shown on the rough sketch plan annexed hereto and thereon bordered red and estimated to comprise one hundred acres or thereabouts, for an estate in fee simple free from encumbrances".

This is consistent also with the order of the description contained in the third recital. In *Eastwood v. Ashton* (2), [1915] A.C. 900 at p. 910, Earl Loreburn said

> "Where there is an ambiguity in the operative part of an indenture recourse may be had to the recitals to see whether they throw any light on the matter".

If read in this way, the plan is clearly the governing description. The boundaries are not described; the part in occupation by the appellants is left uncertain; the acreage is a mere estimate. The only description from which the boundaries can by survey be ascertained is that shown on the plan. On this view, if the estimate of one hundred acres is, as the larned judge regarded it, too great a discrepancy to be covered by the words "or thereabouts" then I would say that it would be covered by the maxim "falsa demonstratio non nocet". In *Llewellyn v. Earl of Jersey and Another* (3), 152 E.R. 767, the difference between the measurement described and the area shown on the plan was probably a greater percentage than in the instant case, and there the measurement was shown as definite and not as "thereabouts". In the circumstances of that case it was held that the boundaries shown on the plan could be precisely ascertained and that the declared measurement was a falsa demonstratio. The disputed boundary had incidentally been "drawn roughly with a pen" on the plan.

It is not perhaps without significance that payment was to be Shs. 300/- per acre and not a fixed sum, which suggests that the acreage was not expected to be exactly one hundred acres, but that it would remain uncertain until the area had been surveyed as provided for in the agreement. The survey to be carried out under cl. 4 was of "the said area", and the appellants were declared in cl. 3 to be "in possession of the said area or a portion thereof"; the "said area" one would think would be the area delineated, for it would be inaccurate to refer to the "said area" if the area had not yet been geographically ascertained. Clause 8 commences

> "If for any reason the survey cannot be done and consequently the conveyance cannot be prepared in favour of the purchasers",

then certain provisions were made for the purchasers to remain temporarily

on the premises before vacating them. It is not clear what reason was contemplated why the survey might not be carried out, but perhaps the parties had in mind possible failure to obtain permission from the authorities to the sub-division, a requirement recognised by cl. 4 of the agreement; mention was also made of the difficulty in obtaining the services of a surveyor at that time, and in this connection it is to be observed that the long period of two years for the survey was allowed in cl. 4. The words quoted from cl. 8 would be a strangely indirect way of saying, "if the parties are unable to agree the area to be surveyed".

The learned judge said –

> "The last and clearest indication that the plan was not intended to prevail over the description in determining the area to be conveyed is to be found in the stipulation in cl. 4:
>
> > 'such survey shall include the area on which the purchasers have dug a well'."

This, the learned judge observes with some cogency, would be an unnecessary provision if the area was otherwise certain. Mr. Khanna submits that it would have been falsa demonstratio if the well had in fact been outside the plan, but it seems it was not. Standing on its own as it does, I do not think it could have overridden the clear description of the parcels by reference to the plan; it would appear to be merely demonstrative of an existing fact.

No reference was made in the plaint to a necessity for any further agreement relating to the parcels, nor was such necessity mentioned in the written statement of defence. Clause 3 of the plaint says the price under the agreement was to be Shs. 30,000/- which at Shs. 300/- per acre would represent exactly one hundred acres, but in so doing it also inconsistently relates the price, in unequivocal words, to the delineated area which would cost considerably more. The learned judge expressed the opinion that although not conclusive, it was improbable that the appellants would have been prepared to commit themselves to an unknown sum much in excess of Shs. 30,000/-; with respect, I do not think much weight can be attached to this, especially in view of the terms of the agreement under which the price was to be set off against the mortgage debt and so would involve no cash payment.

There can be no doubt from the evidence of the first appellant in cross-examination, which Mr. Gautama who was representing the appellants in the lower court did not apparently object to, that the appellants at some stage at least, understood that there was to be a further plan excising from the area delineated in the first plan a part thereof of one hundred acres. The first appellant said for instance –

> "I and my partner were in occupation of the land which was the subject of the agreement. We were in possession of about one hundred acres";

the red lines shown on the plan "were approximate"; "I asked him" (the surveyor) "for one hundred acres";

> "I agree that without a further agreement with the defendant, a plan could not be prepared".

Mr. Gautama in his final address to the court submitted that the case turned entirely on the construction of exhibit 1, and then said –

> "What vendors contracted to sell and purchaser to purchase is an area of one hundred acres included between red lines. Red lines represent substantially the area to be sold. Demarcation of exact area can more appropriately be dealt with after order for specific performance."

He appeared therefore to have adopted the view that the parcels were governed by the description of "one hundred acres or thereabouts", although later he said –

> "Either the defendant has sold area bounded within red lines irrespective of acreage, or he sold one hundred acres to be surveyed and the land to be within the red lines".

Mr. Khanna has not supported this argument and submits that it was the whole area delineated on the first plan which was to be sold subject, of course, to any subsequent agreement that it should be a lesser area.

There was one very important piece of evidence which was not commented on by Mr. Gautama nor mentioned by the learned judge. The first appellant in cross-examination had said –

> "The boundary which Mr. Kirby had surveyed was the one agreed between me and the defendant".

This could mean that the first appellant considered the boundaries to have been agreed under the terms of exhibit 1, or it could mean that it was a separate and distinct agreement of the boundaries as proposed by his surveyor, though the respondent subsequently refused to accept the second plan. This alleged agreement of the boundaries on the second plan was not rebutted, for as I have said, the respondent did not give evidence.

The evidence of the first appellant is certainly not on the whole very satisfactory, due, I should say, to the manner in which it has been adduced. If, however, exhibit 1 can be said to have contemplated a second agreement then, according to the first appellant, the final agreement was arrived at; on the other hand, if no second agreement was contemplated, there was no consideration for it and the respondent could insist on a conveyance of the area delineated in the first plan, although he is offered the election between that and the area on the second plan. On this footing it seems that the respondent must either convey the whole area in the first plan or the reduced area in the second plan, the appellants being prepared to accept either. He cannot complain if he is given the choice. If he refuses to exercise it, my view is, for the reasons I have already given on a proper construction of exhibit 1, that in law he is bound by the first plan.

I have expressed my view on the position as I see it if the extrinsic evidence is taken into consideration, but it is my opinion that so much of it as related to a construction of exhibit 1 was inadmissible under the provisions contained in Chapter VI of the Indian Evidence Act. I have already referred to s. 93; in the commentary thereon in Monir, Principles and Digest of the Law of Evidence (4th Edn.), 583, it is said –

> "the true view seems to be that insufficient description of property is merely a latent ambiguity which can be removed by extrinsic evidence",

and is to be differentiated from certain kinds of patent ambiguity. Section 94 reads:

> "94. When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts."

Monir (supra) in commenting thereon at p. 586 says:

> "Extrinsic evidence is not, therefore, admissible to construe a document which is plain and unambiguous, and the intention of the parties to such a document must be gathered from the language of the document itself."

and at the same page –

> "While the true construction of an obscurely framed document may be determined by reference to the conduct of the parties, no such procedure is admissible when the terms of the instrument are unambiguous, for no amount of acting by the parties can alter or qualify words which are plain and unambiguous. If there is no ambiguity in a document, the mere fact that parties have acted on an erroneous construction of an instrument furnishes in itself no reason why the courts should not follow the general rule that an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed."

I agree that these are correct statements of the law. In my opinion it cannot be said that the parcels in exhibit 1 were insufficiently described so as to create a latent ambiguity. At most there was a misdescription of the measurement, but for the reasons I have given I think the first plan was clearly the operative part and from it the measurements could accurately be obtained.

Even if this is a wrong view, and the right view of the agreement is, as the learned judge found, that a parcel of one hundred acres was to be carved out of the area delineated red on the first plan, I am inclined to think that on the principles applied in *Jenkins v. Green* (4), 54 E.R. 172, and *Rumble v. Heygate* (5) (1870), 18 W.R. 749, it would be proper to make an order for specific performance, and to do so whether or not the precise situation of the one hundred acres had been agreed between the parties. Halsbury's Laws of England (2nd Edn.), Vol. 31, p. 350, and Fry on Specific Performance (6th Edn.), p. 160, both refer to these cases. At p. 350 Halsbury says:

> "The incompleteness of the contract may be in regard to the identification of the subject-matter, and may in such case arise . . . where the subject-matter was not finally determined at the date of the contract but was left to be ascertained thereafter, . . . the defect may be cured if the subject-matter is ascertained by the proper party prior to the action being brought."

In the *Jenkins*' case (4) the headnote commences –

> "An incumbent agreed to grant, at a future period, a lease of his glebe, containing about 437 acres, 'except thirty-seven acres thereof' which were not specified. Held, that the contract was not void for uncertainty, that the right of selecting belonged to the lessor, he having the first act to do."

No arrangement was ever made between the parties as to which of the 37 acres of the farm were to be excepted from the demise, and the lessee objected that the agreement was void for uncertainty and that it would be a variation of the contract for the lessor to retain such portion of the farm as he chose. Counsel for the lessor argued –

> "that the agreement was valid, that it was capable of being reduced to a certainty by a selection of the thirty-seven acres reserved, Sheppard's Touch (p. 78), and that in such cases 'always he which is the first agent and which ought to do the first act shall have the election'; Co. Lit., p. 145(*a*); Termes de la Ley (p. 164, tit. 'Election').",

and that the lessor had the first act to do. Sir John Romilly, M.R., apparently accepted this argument and granted specific performance, leaving the selection to the lessor subject to certain conditions safeguarding the lessee's interest. In that case, the "first act" was, it would seem, the lessor's duty to prepare the lease.

The *Rumble case* (5) is not available to me, but it is summarised in Fry (supra) as follows:

> "Thus, where a contract was made by the defendant to sell to the plaintiff for the purpose of a churchyard so much land as was necessary on the north side of the church, and the plaintiff obtained the sanction of the proper authorities to the consecration of three-quarters of an acre of land adjoining the north side of the existing inclosure of the church and applied to the defendant to convey, it was held that the plaintiff being the person to do the first act under the contract had a right of election, and that if otherwise there was uncertainty of description he had sufficiently ascertained the land to be conveyed."

In the instant case the first act to be done was by the respondent, who under cl. 4 of the agreement was required to have the area surveyed and a deed plan thereof prepared and approved by the Survey Department within two years. Had the case been decided on this basis he should not, in my opinion, have been allowed to benefit by his failure to carry out this obligation, and the right of selection would pass to the appellants. The case has not been thus argued, however, and having formed the opinion that the agreement was not incomplete nor the parcels uncertain, I do not find it necessary to consider an order based on selection.

I would allow the appeal and order specific performance of the agreement, exhibit 1. Before deciding the exact terms of the order it was agreed that counsel should be given an opportunity of addressing us in terms of the minute of judgment filed by Mr. Khanna in anticipation of his appeal being successful.

Sir Kenneth O'connor P: I agree with the conclusions of the learned Justice of Appeal. There will be an order for specific performance of the agreement. We are prepared to hear argument upon the precise terms of the order to be made.

Newbold JA: I also agree with the conclusions of the learned Justice of Appeal, but I am not sure, having regard to the evidence as a whole, that the statement of Mr. S. L. Patel that the boundary which Mr. Kirby had surveyed was the one agreed between Mr. Patel and the respondent means that the respondent had subsequently agreed that the boundaries shown on Mr. Kirby's plan were the boundaries of the area to be sold.

Appeal allowed. Order for specific performance of the agreement granted.

For the appellants:
D. N. and R. N. Khanna, Nairobi
D. N. Khanna

For the respondent:
G. R. Mandavia, Nairobi

A J Karia and others v V K Shah and another
[1962] 1 EA 43 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	13 January 1962
Case Number:	39/1961

Before:	Sir Kenneth O'Connor P, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Edmonds, J.

[1] Sale of goods – Note or memorandum in writing – Material alteration – Condition inserted in sale note deleted by buyer's agent – Fraudulent alteration – Whether contract enforceable by buyer – Sale of Goods Ordinance (*Cap.* 290), *s.* 6 (1) (*K.*).

[2] Evidence – Sale of goods – Note or memorandum in writing – Material condition deleted by buyer's agent from sale note – Whether forged memorandum of sale admissible as a note or memorandum in writing as required by Sale of Goods Ordinance (*Cap.* 290), *s.* 6 (1) (*K.*).

Editor's Summary

The appellant sued the respondents for damages for alleged breach of a contract to sell 3,200 tins of kerosene in accordance with a sale note prepared by a broker acting for the appellants. The broker's evidence was that having negotiated the transaction, he prepared a sale note in quadruplicate, three copies of which he sent to the respondents for signature, of which they returned two copies duly signed but with the words added "Subject to the delivery from the Caltex Company"; that when he objected to this addition the respondents asked for the return of the two copies for deletion of the words, that he returned the notes and later received them back with the addition deleted. A partner of the respondents said the broker had agreed during negotiations to the condition, but had brought them the sale note for signature without the words inserted, that he had then gone with the broker to the Caltex office to ascertain the position regarding delivery, after which he had inserted the condition and in the broker's presence signed three copies of the sale note, two of which he handed to the broker who then left. The trial judge found that the words added by the respondents had been scored out by the broker on all copies except the buyers', which the respondents had retained, he rejected the broker's evidence and held that since the appellants would not have entered into the contract with the condition attached, and the broker knew the respondents insisted on the condition, the parties were never ad idem and the action must fail. On appeal

Held –

(i) the findings of the judge were that the broker was the agent of the appellants; that the broker forged the copy of the note upon which the appellants founded their case, that the forgery was of a material part of the note and related to a material term of the contract.

(ii) either there was, as found by the judge, no agreement on the condition making the contract subject to availability of supplies – in which case the parties were not ad idem and there was no contract – or, alternatively, the appellants' agent, acting in the course of business and within the scope of his authority, entered into a contract containing a material condition which he subsequently fraudulently deleted; the appellants, having sought to take advantage of that fraud, could not recover on the instrument as it was originally made.

(iii) the appellants could not be allowed to produce a forged sale note as a note or memorandum in writing of the contract to comply with s. 6 (1) of the Sales of Goods Ordinance.

Appeal dismissed.

Cases referred to in judgment:

(1) *Master v. Miller*, 100 E.R. 1042.

(2) *Suffell v. Bank of England* (1882), 9 Q.B.D. 555.

(3) *Kemp v. Mackrell*, 28 E.R. 370.

(4) *Ganga Ram v. Chandan Singh* (1881), 4 All. 62.

(5) *Kwei Tek Chao v. British Traders and Shippers Ltd*., [1954] 2 Q.B. 459.

The following judgments were read by direction of the court:

Judgment

Newbold JA: Before the Supreme Court the appellants (then the plaintiffs) claimed the sum of Shs. 8,672/- from the respondents (then the defendants) for breach of contract. The alleged contract was set out in para. 3 of the plaint which, together with para. 4(*a*) of the plaint and the material parts of the attachment thereto, are as follows:

> "3. On or about September 25, 1958, the defendants agreed to sell and the plaintiffs agreed, through their Mombasa broker Messrs. Shah Doshi & Company, to purchase a quantity of kerosene (Caltex), namely 3,200 tins of kerosene at an agreed price of Shs. 8/25 per tin f.o.r. Mombasa, the said kerosene being 'ready' goods, was agreed to be consigned through railway from Mombasa to the plaintiffs at Masaka via Station Kampala immediately.
>
> "4(*a*) A sale note dated September 25, 1958, consistuting (sic) and the aforesaid agreement was duly prepared by the said brokers, Messrs. Doshi & Company and was duly signed and executed by the defendants, as sellers and by the said brokers on behalf of the plaintiffs as buyers. The said brokers, through an error, forwarded to the plaintiffs a 'sellers copy' of the said note instead of the normal 'buyers copy'; however a copy of the said note is attached hereto and marked 'A' and the plaintiffs shall refer to the same at the hearing of this suit for its full terms, conditions and effect thereof as if the same was set out verbatam (sic) herein."

SELLER'S COPY

Shah Doshi & Company

Brokers and Commission Agents

25/9/1958.

Sale Conditions

Sellers	M/s Shah Virchand Karamshi, Msa.
Buyers	M/s A. J. Karia, Masaka.
Articles	Kerosene Caltex.
Quantity	3,200 tins only.
Price	8/25 Eight Shgs. & Cts. Twenty-five per tin.
Delivery time	Ready.
Delivery place	F.O.R. Mombasa.
Terms of payment	Cash against sight.

Special conditions

Despatching instructions Masaka St. Kampala.

Signature of buyers,

Confirmed by phone, Mr. Amritlal Signature of Sellers

(Sd.) Kenya Revenue 20 cts.

Remarks

Signatures of Brokers (Sd.) L. P. Doshi."

The respondents in paras. 2, 3 and 4 of the defence pleaded as follows:

"2. Paragraphs 3 and 4 of the plaint are denied. The plaintiffs are put to strict proof of all the allegations contained therein.

"3. Without prejudice to the foregoing the defendants admit agreeing to sell to the plaintiffs through Messrs. Shah, Doshi & Company 3,200 tins of kerosene at the price of Shs. 8/25 per tin f.o.r. Mombasa to be railed to Masaka Station, payment cash against sight, but aver and allege that it was a condition of the said agreement that the said kerosene was obtainable from Caltex (Africa) Ltd. at a price below the normal wholesale price. The said condition was agreed by Mr. L. V. Shah, one of the defendants, on behalf of the defendants and by Mr. L. P. Doshi of the said Shah, Doshi & Company, on behalf of and as agent for the plaintiffs. Thereafter a sale note was prepared by the said Shah, Doshi & Company, and signed by the said L. P. Doshi and presented to the defendants for signature. The said condition regarding delivery from Caltex (Africa) Limited had been omitted from the said sale note and before signing the same, on behalf of the defendants, the said L. V. Shah inserted thereon the following remarks 'subject to the delivery from the Caltex Company'. The said L. V. Shah thereafter signed the said note on behalf of the defendants.

"4. The said Caltex (Africa) Limited did not deliver to the defendants the said 3,200 tins of kerosene or any part thereof at a price below the normal wholesale price. The defendants accordingly, in view of the condition of the sale as aforesaid, were not bound to deliver the said kerosene or any part thereof to the plaintiffs and were not in breach of contract."

To this defence the appellants filed a reply, paras. 2, 3, 4 and 5 of which are as follows:

"2. They specifically deny that there was any condition attached to the transaction as alleged in para. No. 3 of the defence and categorically deny that Mr. L. P. Doshi (the person named in the said paragraph), or any other representative of M/s Shah Doshi & Company ever agreed to the condition alleged.

"3. The plaintiffs further state that the said M/s Shah Doshi & Company made out and sent to the defendants three copies of the contract embodying the sale conditions; the defendants returned the two copies, duly signed, but having inserted therein the additional words 'subject to the delivery from the Caltex Company'; the said M/s Shah Doshi & Company, protested to the defendants regarding insertion of the additional words (that being contrary to the terms agreed upon) and reforwarded the copies to the defendants for deletion of the insertion; the defendants so deleted and returned the copies.

"4. Without prejudice to above, the plaintiffs submit that tins of kerosene were available from the Caltex at the relevant time.

"5. The plaintiffs aver that the condition alleged is contrary to the terms of the written contract and would therefore be inadmissible in evidence."

When the case came on for hearing before the Supreme Court the agreed issues were as follows:

"1. Was there a contract between the parties as alleged by the plaintiffs?

"2. What were the terms of the contract?

"3. Is the defendant in breach of the contract?

"4. If so, what is the quantum of damages?"

Mr. L. P. Doshi (hereinafter referred to as "the broker"), the proprietor of the firm of brokers referred to in para. 3 of the plaint, gave evidence to the effect that on behalf of the appellants he entered into the contract (together with a number of other similar contracts) pleaded in that paragraph with the respondents at their office and that there was no such condition to the contract as was alleged in the defence; that he then returned to his office and subsequently that night made out the contract notes in quadruplicate; that the following day he sent to the respondents the sellers' copy, buyers' copy and brokers' copy of the contract notes and subsequently that day received the sellers' copy and the brokers' copy signed on behalf of the respondents; that he then noticed that against the column marked "Remarks" there had been written the words "Subject to the delivery from the Caltex Company"; that he thereupon telephoned the respondents and objected to the addition as no reference had been made to the condition when the contract had been made the previous day and that the condition made the contract meaningless; that he was subsequently asked by the respondents to return the two contract notes to them so that the conditions could be deleted; and that he did so and subsequently received them back from the respondent with the condition deleted. A partner of the appellants also gave evidence to the effect that before the contract was made the broker spoke to him by telephone; that there was no reference to the condition; and that he would not have authorised entry into the contract with such a condition. Mr. L. V. Shah, a partner of the respondents, gave evidence to the effect that the broker on September 25, 1958, came to his office and asked whether the respondents would supply kerosene at a reduced price; that the respondents were prepared to do so at an agreed price if the kerosene was delivered to the respondents by the Caltex Company; that the broker agreed to the condition, returned to his office and on the same day returned to the respondents' office with the contract notes but without the condition inserted; that he (Shah) referred to the omission of the condition; that he and the broker then went to the offices of the Caltex Company to ascertain the position in relation to delivery; that he was advised by the representative of the Caltex Company not to enter into the contract without the condition; that he and the broker then returned to the respondents' office when he inserted the condition in the presence of and without comment from the broker in each of the three copies of the respective contract note and signed them; and that the broker then left taking with him two of the three copies of the contract notes. After further evidence had been called for the respondents, both counsel addressed the court in course of which counsel for the appellants apparently conceded that the evidence of the broker was not to be believed but argued that on the facts pleaded in the defence and the evidence for the respondents a conditional contract had been entered into and the claim should be determined on that basis. Counsel for the respondent objected to this, and submitted that the appellants were seeking to found their claim on a contract which they had not pleaded and which they denied having entered into.

The learned judge, having referred to certain evidence showing that the broker was untruthful, continued as follows:

> "Suffice to say that on all the evidence I have no hesitation whatever in rejecting as untrue the evidence of the broker where it conflicts with that of the defendants, and in finding that the condition written into the contract note by L. V. Shah was scored through by the broker on all copies but the buyer's copy which had been retained by the defendants.

> "I now come to consider the first issue, namely, 'Was there a contract between the parties as alleged by the plaintiff', and it must follow from my finding of fact that there was not. But it is contended for the plaintiffs that, the parties having agreed on the subject matter to be sold and the price to be paid, the fact that they do not agree as to the implementation of the contract being subject to a condition should not release the defendants from fulfilling the terms of the contract if that condition was in fact met. In other words, the plaintiffs are saying, first, that there was no condition, but secondly, that if there was one, then as kerosene was made available to the defendants at the cut price, the defendants were bound to fulfil their part of the bargain as they understood it. But the real and basic question to be considered is whether any agreement had been reached between the parties. The condition which the defendants allege and which they have proved they insisted on went, in my opinion, to the very root of the contract and it was never accepted or acceded to by the plaintiff or the broker on their behalf. From the very outset the broker has contended that the contract was never made subject to the condition, and in his evidence he contends emphatically that had the condition been mentioned as a term of the contract, he would never have accepted it. He says that immediately he saw the words written in the ' Remarks' column of the bought and sold notes, he rang up the defendants and told them that, by adding the words of the condition, they had ' made the contract meaningless', and that the insertion of the condition would amount to a cancellation of the contract. The senior partner of the plaintiff firm who gave evidence, said he would not have agreed to purchase kerosene on the condition made by the defendants. Although I have no doubt that the broker was aware that the defendants insisted on the condition, it is manifest by reason of his having scored through the words of the condition on his copies of the notes, that he did not accept it. It is equally manifest that the plaintiffs were not told of the condition at the time that they placed their order and that, had they known of it, they would not have accepted the terms. It must follow, therefore, that there was never any concluded contract between the parties and therefore no binding contract on the defendants. It is unnecessary for me to refer to authority for the well settled principle that in the absence of consensus and where the parties are not ad idem there can be no agreement.
>
> "But there is a further ground on which the plaintiff's action must fail. By s. 6 (1) of the Sale of Goods Ordinance (Cap. 290 of the Laws of Kenya), a contract for the sale of goods of a value greater than Shs. 200/- is unenforceable unless the buyer accepts and received part of the goods sold or makes part payment therefor or unless a note or memorandum in writing of the contract is made. For their claim the plaintiffs rely on the bought and sold notes signed by the defendants and the broker as evidencing their contract. But I think it is well settled that where such notes materially vary, there can be no binding contract. In support of this proposition of law, learned counsel for the defendants cited the cases of *Ah Shain Shoke and Others v. Moothia Chetty and Others* (1899-1900), 27 I.A. 30, *Sievewright v. Archibald* (1851), L.J. Q.B. 529, and *Clarton v. Shaw and Another* (1872), 9 Bengal 245."

The learned judge, having held that the parties were not ad idem, with the result that there was no contract, and also that as the bought and sold notes differed in a material respect there was no binding contract, dismissed the suit with costs. From this decision the appellants appealed. Mr. O' Donovan, who appeared for the appellants, presented his case as follows: the learned judge accepted the evidence for the respondents; that evidence, together with the

defence, makes it clear that a contract with the condition was entered into between the respondents and the broker on behalf of the appellants; the necessary note of the contract as required by s. 6 (1) of the Sale of Goods Ordinance (Cap. 290 of the Laws of Kenya) is in evidence by reason of the production by the respondents of the unaltered copy which had been in their possession; that while the appellants, having regard to the fraud of their agent, could not rely on the forged copy of the contract note, they could rely on the respondents copy of the contract note to provide the necessary evidence required by the Sale of Goods Ordinance of the concluded contract; and that the respondents had not raised the issue of fraud in their pleadings.

It is true that the respondents did not specifically allege in their pleadings that there was fraud or that the contract note attached to the plaint was forged, but they pleaded with full particulars the fact that the contract notes as signed by the respondents contained the condition and that the contract entered into was a conditional contract. As the facts which found a case of fraud were fully pleaded and as the cross-examination of the broker and the evidence for the respondents was directed towards showing that there was an improper alteration in the contract notes, I do not consider that this court should shut its eyes to any fraud or forgery on which the appellant' s claim is based.

The findings of the learned judge result in the following facts being found:

First, that the broker was the agent of the appellants for the purpose of entering into the contract and signing the contract notes. Secondly, that the broker forged the copy of the contract note upon which the appellants founded their case and produced in evidence by deleting therefrom the condition. Thirdly, that the forgery was in respect of a material part of the contract note and related to a material term of the contract. None of these findings were challenged on appeal.

As I understand the law, if a party to a suit founds his case upon a document which is forged in a material respect, the forgery having been committed by a person for whose acts he is responsible, then, the forgery having been discovered, he will not be allowed to succeed by disregarding the forgery and relying on other evidence. It seems to me basically wrong that the courts of justice should be used as an instrument to serve the purposes of a party whose claim is based on fraud maintained up to the last moment but which, when discovered, he askes the court to disregard and to allow him to succeed on evidence produced by the party against whom the fraud was perpetrated. In *Master v. Miller* (1), 100 E.R. 1042, Lord Kenyon said at p. 1047:

> "Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected".

In the same case at p. 1055 Grose, J., said:

> "The policy of the law has been already stated; namely, that a man shall not take the chance of committing a fraud, and when that fraud is detected, recover on the instrument as it was originally made".

These dicta were quoted with approval by Jessel, M.R., in *Suffell v. Bank of England* (2) (1882), 9 Q.B.D. 555 at p. 560. At p. 561 the learned Master of the Rolls said

> "The policy of the law has been already stated, namely, that a man shall not take the chance of committing a fraud, and when that fraud is detected recover on the instrument as it was originally made".

And at p. 562 he said:

> "The doctrine in *Master v. Miller* (1), has been applied since to various

> kinds of instruments not under seal, such as bought and sold notes; and it has been fully recognised to be the law of England . . ."

This I take to be a general statement of the law, not confined to the facts of *Suffell' s* case (2). In *Kemp v. Mackrell* (3), 28 E.R. 370 the head note reads:

> "Parties resting their defence in an issue at law upon instruments ascertained at the trial to be forged will not be allowed to enter into any other evidence; or to say that the forged instruments were immaterial"

and the Lord Chancellor (Lord Hardwicke) said:

> "It is now said that whether these exhibits are true or false there is other evidence which makes them immaterial. If the court should now go into that other evidence, there would never be an end of things; therefore for the sake of precedent I will not do what is now desired by the plaintiffs. The parties must abide by the defence they set up; and if they set up a forged defence they must rest upon it and cannot afterwards say, that piece of evidence is nothing to the purpose."

In *Ganga Ram v. Chandan Singh* (4) (1881), 4 All. 62, the High Court of Allahabad said at p. 64:

> "When the contract upon which he based his suit is found never to have been made in the shape he set it up, it does not appear to us that, having been thus detected in a forgery, he should be allowed to revert to the contract that actually was made."

In *Kwei Tek Chao v. British Traders and Shippers Ltd*. (5), [1954] 2 Q.B. 459, buyers contracted to purchase goods which were to be shipped not later than October 31 and payment was to be made against "shipped" bills of lading. Payment was made against the bills of lading which were forged in that they purported to show that shipment was made on that date whereas in fact it was made subsequently. The sellers were not, however, responsible for the forgery and the buyers accepted the goods with knowledge that the goods had been shipped after the due date, though without knowledge of the forgery. On discovering the forgery the buyers sued for the return of the money, claiming that the forgery resulted in the bills of lading being a nullity. It was found that the sellers were not responsible for the forgery and for that and other reasons the claim was dismissed, but Devlin, J. (as he then was), at p. 471 said:

> "if the person who presents the bills of lading knows that they are untrue and he is an agent, that is an end of the matter; but that is not suggested here".

I understand this to mean that had the sellers based their defence to retain the money on a forged document and for the forgery of which they were responsible either directly or through their agent then the defence could not succeed. I think that in the present case the appellants were responsible for the fraud of their agent, though apparently they did not know of it, since Doshi was doing improperly the very act which (according to the appellants' evidence) he had been employed to do, namely to procure an unconditional contract of purchase (see *Kwei Tek Chao's* case (5), at p. 470). It was pressed upon us by counsel for the appellants that he also had authority to negotiate a conditional contract.

In this case the appellants could not succeed without producing the note or memorandum of the contract required by the Sale of Goods Ordinance. They produced a forged note, for the forgery of which they were, through their agent the broker, responsible, and they based their claim on that note which was forged in a material respect. They did, it is true, advance an alternative plea

in their reply. The forgery having been discovered, they now seek to recover by other evidence. On the authorities to which I have referred I do not consider that they should be allowed to do so.

It seems that the appellants are in this dilemma. Either there was, as found by the learned judge, no agreement on the condition making the contract subject to availability of supplies – in which case the parties were not ad idem and there was no contract; or, alternatively, the appellants' agent, acting in the course of business and within the scope of his authority, entered into a contract containing a material condition which he subsequently and frau dulently deleted. The appellants having sought to take advantage of that fraud, cannot recover on the instrument as it was originally made.

For these reasons I would dismiss the appeal with costs.

Sir Kenneth O'Connor P: I agree. The appeal will be dismissed with costs.

Crawshaw JA: I also agree.

Appeal dismissed.

For the appellants:
Doshi & Chohan, Mombasa
Bryan O'Donovan, *Q.C.* and *D. D. Doshi*

For the respondents:
J. E. L. Bryson and *Ram Hira*, Mombasa

Benjamin Sauzier v R
[1962] 1 EA 50 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	5 January 1962
Case Number:	133/1961
Before:	Sir Alastair Forbes Ag P, Crawshaw Ag VP and Newbold JA
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Seychelles – Rasool, Ag. C.J.

[1] Criminal law – practice – Trial – Summing up – No direction as to circumstantial evidence – Penal Code, s. 318 *and s.* 319 (*S.*).

[2] Criminal law – Charge – Arson – Amendment of charge – Amendment when prosecution case closed – Amendment to attempted arson – Whether amendment necessary – Penal Code, s. 318 *and s.* 319 (*S.*) *– Criminal Procedure Code, s.* 160, *s.* 187 *and s.* 304 (*S.*).

Editor's Summary

The appellant appealed against his conviction of attempted arson. The appeal was dismissed but the appellate court commented upon two aspects of the trial. The first was the failure of the trial judge to direct himself expressly that, in a case depending exclusively upon circumstantial evidence, he must find, before deciding upon conviction, that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The second was that at the close of the case for the prosecution, the evidence having disclosed an attempt at arson only, the trial judge upheld a submission of no case to answer, but, having regard to s. 160 of the Criminal Procedure Code, ordered that the charge be amended to attempted arson contrary to s. 319 of the Penal Code and took the appellant's plea on the amended charge.

Held –

(i) although the judge had failed to give himself an express direction on circumstantial evidence, on the evidence which he had accepted he would have reached the same conclusion on a proper direction.

(ii) in view of the terms of s. 160 of the Criminal Procedure Code it is not necessary to amend a charge of committing a full offence in order to convict an accused of an attempt.

(iii) the procedure adopted caused no failure of justice and was simply an irregularity curable under s. 304 of the Criminal Procedure Code.

Appeal dismissed.

Case referred to in judgment:

(1) *Ilanda s/o Kisongo v. R.*, [1960] E.A. 780 (C.A.).

Judgment

Sir Alastair Forbes Ag P, read the following judgment of the court: The appellant, who was convicted by the Supreme Court of the Seychelles of attempted arson contrary to s. 319 of the Penal Code and was sentenced to eighteen months' imprisonment, appealed to this court against his conviction. We were satisfied there was no substance in the appeal, which we accordingly dismissed, but we desire to comment on two aspects of the trial.

The first of these was the failure of the learned trial judge to direct himself expressly that, in a case depending exclusively upon circumstantial evidence, he must find, before deciding upon conviction, that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The necessity for a trial judge to give himself such a direction in a case depending upon circumstantial evidence has been stressed by this court more than once e.g. *Ilanda s/o Kisongo v. R.* (1), [1960] E.A. 780 (C.A.). In the instant case, though the learned judge failed to give himself such a direction, he did say that the various items of evidence

> "led me to one conclusion that accused did place the fire under the door of complainant's house and attempted to set fire to the house".

This indicates that the learned judge considered that the only conclusion to be drawn from the evidence was that the appellant was guilty; and we were satisfied that on the evidence which the learned judge accepted he must have reached the same conclusion on a proper direction as to the principles applicable to circumstantial evidence.

The second matter on which we desire to comment is a procedural one. The appellant was charged with the offence of arson contrary to s. 318 of the Penal Code. The prosecution evidence disclosed an attempt only, the fire being discovered and extinguished before any part of the house in question caught fire. At the close of the prosecution case counsel for the appellant submitted that there was no case to answer. The learned trial judge upheld the submission as regards the offence charged and acquitted the appellant of the offence of arson; but having regard to s. 160 of the Criminal Procedure Code he ordered that the charge be amended to attempted arson contrary to s. 319 of the Penal Code, caused the charge to be read to the appellant, and took the appellant's plea on the amended charge. With respect, it was quite unnecessary to amend the charge in this way; and to do so at that stage was, in fact, contrary to s. 187 of the Criminal Procedure Code which only authorises amendment before the close of the case for the prosecution. Section 160 of the Criminal Procedure Code reads:

> "160. When a person is charged with an offence, he may be convicted of having attempted to commit that

offence, although he was not charged with the attempt.”

Under that section no amendment of a charge charging commission of the full offence is necessary before the accused person can be convicted of the attempt. The effect of the section is similar to that of s. 9 of the Criminal Procedure Act, 1851, as to which, see Archbold's Pleading Evidence and Practice in Criminal CaSES (34th Edn.), p. 205, para. 585. On the submission made by counsel for the appellant in the instant case, the learned judge should have ruled that there was a case of attempted arson to answer, and that accordingly the trial must proceed. However, the procedure adopted caused no failure of justice and we were of opinion that it amounted to no more than an irregularity curable under s. 304 of the Criminal Procedure Code.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Seychelles
A. J. F. Simmance (Crown Counsel, Kenya)

Yafesi Kinsambwe Lutalo v R
[1962] 1 EA 52 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	12 January 1962
Case Number:	524/1961
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Drugs – Medical practitioner – Prescription book – Failing to record details of poisons supplied to patients – Vials of penicillin – Prosecution – No evidence that vials contained penicillin – Ordinance amended after prosecution begun – Amendment raising presumption that vials contained drugs as labeled – Pharmacy and Poisons Ordinance, 1957, *s.* 31, *s.* 52 (*U.*) – *The Poisons List Confirmation Order*, 1958 (*U.*) – *Liquor Ordinance*, 1960, *s.* 28(*d*) (*U.*).

Editor's Summary

The appellant, a medical practitioner was charged with failing to record in his prescription book particulars of Part I poisons supplied by him to patients, as required by s. 31 (3) and s. 52 of the Pharmacy and Poisons Ordinance, 1957. The charge concerned a substantial number of vials of procaine penicillin which the appellant had ordered from pharmacists. He was convicted and sentenced to three months' imprisonment. On appeal it was submitted that no evidence had been given at the trial that the vials contained penicillin, a Part I poison, and that s. 51 A of the Ordinance was an amendment

introduced after the prosecution of the appellant had begun and not applicable in his case. Section 51 A provides that in proceedings under the Ordinance where a person is charged with, inter alia, unlawful possession of any poison which is in a container, and such container appears to the court to be intact and in the original manufacturer's packing, the contents of such container shall be deemed, unless the contrary is proved, to be of the description specified on the label of such container.

Held –

(i) since the pharmacists received the vials in the ordinary course of business from their usual suppliers with the usual labels on them and they had supplied these to the appellant on his written order for what they purported to contain, and since it had not been suggested that they had been opened, the objection failed.

(ii) section 51 A ibid, had been added to the Ordinance ex abundanti cautela.

Appeal dismissed.

Case referred to in judgment:

(1) *Patel v. R.* (1955), 22 E.A.C.A. 392.

(2) *R. v. Emmanuel Mutakayana*, [1961] E.A. 276 (U.).

Judgment

Sheridan J: Having disposed of one ground of appeal continued: The other main ground of appeal is that there was no evidence of the contents of the vials. Mr. Pandit relies on *C. L. Patel v. R.* (1) (1955), 22 E.A.C.A. 392 and *R. v. Emmanuel Mutakayana* (2), [1961] E.A. 276 (U.). He also refers to the amendment to the Ordinance by the addition of s. 51 A since the institution of these proceedings as filling a lacuna in the law. The section reads:

> "Evidence.
>
> "51A. Where in any proceedings under the provisions of this Ordinance any person is charged with:
>
> (*a*) the unlawful possession, sale or supply of any poison and such poison is in a container; or
>
> (*b*) with any other offence where the contents of a container are in issue in such proceedings,
>
> and such container appears to the court to be intact and in the original state of packing by the manufacturer thereof, the contents of such container shall be deemed, unless the contrary is proved, to be of the description specified on the label of such container."

This section is analogous to s. 28(*d*) of the Liquor Ordinance, 1960, on which the magistrate relied in *Mutakayana's* case (2). There the police found *open* bottles of beer with proprietary labels on them so the section could not be invoked and in the absence of any satisfactory evidence of their contents the appeal was allowed. In that case there was no evidence of the source of the bottles – as in *Patel's* case (1), of the source of the M. & B. tablets. It would probably have been otherwise if it could have been shown that the bottles came from a brewery and were secured when first seen. Here the pharmacists received the vials in the ordinary course of business from their usual suppliers with the usual labels on them and they were supplied to the appellant, a medical practitioner, on his written order for what they purported to contain. No one has suggested that they had been opened. My view is that s. 51 A has been added ex abundanti cautela. This ground of appeal also fails.

Appeal dismissed.

For the appellant:
S. V. Pandit, Kampala

For the respondent:
The Attorney-General, Uganda
J. M. Long (Crown Counsel, Uganda)

Balwantrai D Bhatt v Ajeet Singh and another

[1962] 1 EA 54 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	4 January 1962
Case Number:	82/1961
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Newbold JA
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Kenya – Farrell, J.

[1] Mortgage – Enforcement of security – Default in payment of interest – Exercise of power of sale without intervention of court – Whether instrument an "English mortgage" – Indian Transfer of Property Act, 1882, *s*. 58(*e*) *and s*. 69 – *Indian Transfer of Property Act* (*Amendment*) *Ordinance*, 1959, *s.* 13 (*K*.).

Editor's Summary

In September 1959, the appellant executed a mortgage to secure a loan made to him by the respondents and interest thereon. The mortgage provided for repayment on August 1, 1962, and payment of interest quarterly in the meantime with a proviso that if there was default in payment of any instalment of interest then the principal sum should immediately become payable. The appellant defaulted in payment of the interest due on November 1, 1959, and the respondents, after giving the appellant three months' statutory notice, exercised their power of sale under s. 69(4)(*a*) of the Indian Transfer of Property Act, 1882, as amended by s. 13 of the Indian Transfer of Property Act (Amendment) Ordinance, 1959, by instructing a firm of court brokers and auctioneers to sell the property by public auction. Thereupon the appellant filed a plaint seeking a declaration that no power of sale had arisen since the instrument was not an English mortgage as defined in s. 58(*e*) of the Indian Transfer of Property Act, 1882. The plaintiffs then moved that the plaint be struck out and the suit was dismissed. On appeal it was submitted that the instrument was not an English mortgage since, by reason of the default clause, it could not be said with certainty on what date the money secured was repayable.

Held – the instrument was an English mortgage within the definition in para. (*e*) of s. 58 of the Indian Transfer of Property Act, 1882; the clause in the mortgage providing that upon default in payment of the principal sum or interest as required by the mortgage, or upon failure to fulfil any obligation of the mortgage, the entire loan then owing should become payable, did not remove it from the ambit of para. (*e*) of s. 58 ibid.

Appeal dismissed.

Judgment

Newbold JA, read the following judgment of the court: This was an appeal against a judgment and decree of the Supreme Court of Kenya given on July 19, 1960, whereby it was ordered, inter alia, that the plaint filed by the appellant (then the plaintiff) be struck out and that his suit be dismissed with costs. After hearing Mr. O'Donovan on behalf of the appellant we dismissed the appeal with costs, giving a certificate for two counsel, and stated that we would give our reasons in writing.

The facts relevant to this appeal are set out in the following extract from the judgment in the Supreme Court of the learned judge:

> "The plaintiff in this suit is an advocate of the Supreme Court, and the owner and occupier of a residential plot in Nairobi. On September 19,

1959, the plaintiff entered into an instrument of mortgage with the defendants to secure repayment of a loan of Shs. 65,000/- and interest thereon at 10 per cent. payable quarterly in advance. The date stipulated for repayment of the principal sum was August 1, 1962. The plaintiff defaulted on payment of the interest due on November 1, 1959. By a letter dated January 16, 1960, the defendants gave the plaintiff notice that unless the full amount of the loan was repaid within three months, they would exercise 'their statutory powers of sale'. Payment not having been made within the period of the notice, the defendants on April 26, 1960, instructed a firm of court brokers and auctioneers to sell the property by public auction, and the sale was advertised to take place on June 3, 1960. On May 28, 1960, the plaintiff filed a plaint praying for a declaration that no power of sale had arisen to the defendants under the instrument, on the principal ground that the instrument was not an English mortgage as defined in the Indian Transfer of Property Act: secondly, that it did not contain the certificate prescribed under s. 69(4)(*a*) of the Act as amended by the Indian Transfer of Property (Amendment) Ordinance, 1959, (No. 9 of 1959): and finally that it was not properly attested. Service of the plaint could not be effected until May 31, 1960, and on June 2, the day before the date of the sale, the plaintiff applied ex parte under O.39, r. 1 for an injunction to restrain the defendants from proceeding with the proposed sale. The summons contained a further prayer that notice of the application should be dispensed with under r. 3 of the Order, but that the parties should be at liberty to have the order set aside under r.4.

"The chamber summons came on for hearing on the afternoon of June 2. The instrument was referred to and certain Indian authorities were cited: but in the nature of the case there was little opportunity to consider the full terms of the instrument or the full implications of the cases cited. It appeared to the court, however, that there might at any rate be an arguable case for granting the relief sought in the suit and that if an injunction were not granted the suit property would be alienated and that an irreparable injury might be done to the plaintiff if he were right in his contentions. The application was accordingly granted, on an undertaking by the plaintiff to indemnify the defendants against all costs incurred by the grant of a temporary injunction if it should be shown in further proceedings that the defendants had in fact a statutory power of sale.

"The defendants now by this notice of motion ask that the plaint in the suit be struck out under O. 6, r. 29 and that the temporary injunction granted on June 2, be set aside. Alternatively, the defendants ask that if the temporary injunction is to be continued, the plaintiff be put on terms as to payment into court of the arrears due under the instrument."

Mr. O'Donovan stated that only two issues arose on the appeal. First, whether the mortgage was an English mortgage as defined in s. 58(*e*) of the Indian Transfer of Property Act, 1882 (hereinafter referred to as "the Act"); and secondly, if it was not an English mortgage, did it validly create a power of sale without the intervention of the court?

Mr. O'Donovan made his submissions with the clarity and conciseness this court has come to expect from him. As regards the first issue, he submitted that the mortgage in question was not an English mortgage because the date upon which the appellant undertook to repay the loan was not definitely ascertainable from the mortgage but depended on future events, the time of which was not fixed by the mortgage, and thus it could not be said that the mortgagor had bound himself to repay the mortgage money on a certain date.

The submissions, in effect, were that while the appellant by the first covenant had bound himself to repay the loan on August 1, 1962, which standing by

itself was a covenant to repay the mortgage money on a certain date, nevertheless, by reason of the default clause in the mortgage, which provided that in the event of the appellant failing to fulfil any of his obligations under the mortgage deed the whole amount of the mortgage money would immediately be payable, it could not be said with certainty on what date the mortgage money was repayable.

An English mortgage as defined in s. 58(*e*) of the Act is as follows:

> "(*e*) Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is called an English mortgage."

In the present case, the mortgagor bound himself to repay the mortgage money on a certain date – August 1, 1962. He also agreed to pay interest and he entered into certain other obligations. He transferred the property absolutely to the mortgage subject to a proviso for redemption. In our opinion, the instrument was an English mortgage within the definition in para. (*e*) of s. 58; and the fact that there was a clause in the mortgage deed providing that on default in payment of the principal sum or interest as required by the mortgage or on failure to fulfil any obligation under the mortgage the entire amount of the loan then owing should become payable did not remove it from the ambit of that paragraph. We thought that this construction was strongly supported by s. 69 of the Act (as substituted by s. 13 of the Indian Transfer of Property Act (Amendment) Ordinance, 1959). Section 69 (1) reads:

> "69(1) A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall by virtue of this Act and without the intervention of the court, have power when the mortgage money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage money, or part thereof, immediately due and payable."

This sub-section is dealing with an English mortgage and yet it uses the words:

> "either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage money, or part thereof, immediately due and payable".

This sub-section clearly envisages that in an English mortgage there may be a default clause making the mortgage money repayable on a date earlier than the fixed date.

For these reasons we did not agree with the submissions that this mortgage was not an English mortgage. As Mr. O'Donovan had conceded that if the mortgage was an English mortgage he could not succeed, it therefore became unnecessary for us to consider the second issue raised on the appeal. The fact

that we do not deal with it must not be taken as meaning that we necessarily agree with the decision of the learned judge.

Appeal dismissed.

For the appellant:
D. N. Nene, Nairobi
Bryan O'Donovan, Q.C., and *C. S. Joshi*

For the respondent
Mandla & Co, Nairobi
D. N. Khanna and *F. R. S. De Souza*

In Re Modern Retreading Co Ltd

[1962] 1 EA 57 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	14 March 1962
Case Number:	52/1961
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Company – Winding-up – Just and equitable – Petition by shareholder opposed by co-shareholders and principal creditors – Private company – Quarrels between shareholders – Grounds for winding-up – Companies Ordinance (*Cap*. 212), *s*. 167 (*f*) (*T*).

Editor's Summary

The petitioner, a shareholder in a private company, petitioned for the winding-up of the company mainly on the ground that this was just and equitable. The affidavits sworn by the petitioner on one hand and his two co-shareholders on the other hand, showed that there had been bitter and unresolved quarrelling between the parties going to the root of the company's business, but none of these stated specifically that the company's affairs had reached a deadlock. It was common ground that the petitioner had as a result of the quarrelling been prevented from participating in the management of the company.

Held –

(i) the principle applicable is that in the case of a small private company, which is more in the nature of a partnership, a winding-up under the "just and equitable" clause will be ordered in such circumstances as those in which an order for the dissolution of a partnership would be made.

In re Yenidji Tobacco Co. Ltd., [1916] 2 Ch. 426 applied.

(ii) the existence of the quarrel had made it impossible for the company to be run in the manner in which it was designed to be run, or for the parties' disputes to be resolved in any other way than by a winding-up; accordingly the petition must be granted.

Winding-up order made.

Cases referred to in judgment:

(1) *In re Yenidji Tobacco Co. Ltd*., [1916] 2 Ch. 426.

(2) *In re Davis and Collett Ltd*., [1935] 1 Ch. 693.

(3) *Rayfield v. Hands*, [1960] 1 Ch. 1; [1958] 2 All E.R. 194.

Judgment

Sir Ralph Windham CJ: This is a petition for the winding-up of a private company known as the Modern Retreading Co. Ltd., whose registered office is in Moshi. The main ground upon which the windingup

is sought is that it is just and equitable, in accordance with para. (*f*) of s. 167 of the Companies Ordinance. By consent, the petition is to be determined on the strength of its allegations attested to by the petitioner in his statutory affidavit, of affidavits by each of the two opposing contributories, of an affidavit by the petitioner in reply, and of affidavits by each of the four principal and opposing creditors of the company; and it has been agreed to dispense with the cross-examination of any of these deponents on their eight affidavits.

While this course has been sensibly agreed upon in the interests of expedition, it has left me confronted with a number of conflicting allegations in the affidavits of the petitioner on the one hand and those of the opposing contributories on the other, with little means of deciding with any certainty where the truth lies. But fortunately, after considering carefully the position as it emerges from those allegations in the affidavits which are either common ground or are at least unchallenged, I find myself able, aided by the relevant English authorities, to decide this petition upon them alone, without having to rely on any of the allegations that are disputed, or to make findings of fact upon these.

The undisputed position, as so established, is the following. The company was incorporated in May, 1956, with a nominal capital of Shs. 100,000/-, divided into 1,000 shares of Shs. 100/- each. From October 18, 1958, onwards there were three shareholders only; the petitioner, who held 250 shares; his sister, the opposing deponent Mrs. Kaur Rana, who held 250 shares; and his cousin, the opposing deponent Hajura Singh Dhillon, who held 250 shares. The petitioner claims to be the holder of the remaining 250 shares; this is disputed by the other two, who depose that, while share certificates for those shares were allotted to him, he never paid for them and that they were duly forfeited by the company on October 13, 1961; this is denied by the petitioner in his counter-affidavit. But the admitted position is thus that there were three contributing shareholders in the private company and no more, and that the petitioner held not less than 25 per cent, of these shares.

Secondly, it is not disputed that the original directors of the company were the petitioner and Hajura Singh. The petitioner claims that they are both of them still the directors. But Hajura Singh and Mrs. Rana allege that on October 13, 1961, by reason of his having not attended any board meetings since February 10, 1961, the petitioner's office as director was vacated and that as from that date the directors were Hajura Singh and Mrs. Rana, the latter having, according to them, been elected a director on February 6, 1961. The petitioner denies that Mrs. Rana was ever so elected, or that he himself ever forfeited his directorship. His version of events is that, while he was in hospital for a period of two months as a result of a motor accident which he undisputedly sustained on November 8, 1959, Hajura Singh and Mrs. Rana acquired control of the company and that, ever since then, they have excluded him from any share in its management or control. Hajura Singh and Mrs. Rana on their part aver that the petitioner has retained possession of the company's account books for the years 1956 to 1959 and wrongly refuses to deliver them up. The petitioner denies that they are in his possession.

The petitioner further alleges that on December 1, 1958, a resolution had been passed by the shareholders appointing him as chairman of the board of directors and entrusting him with the entire management of the company. This is denied by the other two, who allege that the record to that effect in the company's minutes was inserted by the petitioner without their authority or consent. It is common ground that they instituted criminal proceedings against the petitioner for forgery, in respect of the insertion of that entry in the minutes, and that the charge was later withdrawn by the police after four prosecution witnesses had given evidence.

Lastly, it is common ground that when, on April 26, 1960, the petitioner attempted to enter a room

upon the company’s premises, Hajura Singh caused

him to be ejected by the police, the only point in dispute being which of the two of them had the right to occupy that room.

In short, the position which emerges from all these and other conflicting allegations and accusations in the affidavits is that, at least since the beginning of 1960, there has been bitter and unresolved quarrelling between the petitioner on the one hand and his two co-shareholders on the other hand, going to the root of the conduct of the company's business. It is true that it is nowhere stated specifically that the company's affairs have reached a deadlock; indeed the four principal creditors of the company have in their affidavits expressed the desire that the company should not be wound up. But it is common ground that the petitioner is, wrongfully, being excluded from all participation in the management of the company as a result of the quarrelling.

In these circumstances, the principle which in my view must be applied is that laid down in *In re Yenidji Tobacco Co. Ltd.* (1), [1916] 2 Ch. 426, namely that in the case of a small private company which is in fact more in the nature of a partnership, a winding-up, under the "just and equitable" clause in the relevant company legislation, will be ordered in such circumstances as those in which an order for the dissolution of a partnership would be made. In that case the shareholders were two only, and they had quarrelled irretrievably.

Lord Cozens-Hardy said, at p. 432:

> "I think that in a case like this, we are bound to say that circumstances which would justify the winding-up of a partnership between these two by action are circumstances which should induce the court to exercise its jurisdiction under the just and equitable clause and to wind up the company . . . If ever there was a case of deadlock, I think it exists here; but, whether it exists or not, I think the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed and which ought to be terminated as soon as possible."

And Warrington, L.J., said at p. 434:

> "In substance, therefore, it seems to me these two people are really partners. It is true they are carrying on the business by means of the machinery of a limited company, but in substance they are partners; the litigation in substance is an action for dissolution of the partnership, and I think we should be unduly bound by matters of form if we treated either the relations between them as other than that of partners or the litigation as other than an action brought by one for the dissolution of the partnership against the other; but one result which of course follows from the fact that there is this entity called a company is that, in order to obtain what is equivalent to a dissolution of the partnership, the machinery for winding-up has to be resorted to. Now, if this had been an ordinary partnership and an action had been brought for dissolution, it seems to me quite clear that the plaintiff, who is the petitioner in this case, would have had sufficient ground for a dissolution of partnership according to the ordinary principle by which the court is guided in such matters".

The principle laid down in *In re Yenidji Tobacco Co. Ltd.* (1), was followed in *In re Davis and Collett Ltd.* (2), [1935] 1 Ch. 693, where the facts were even more similar to those in the present case. Crossman, J., in that case said, at p. 702:

> "Counsel for the respondent, who has argued this case with great force and has admirably put every point which he could possibly have put on the respondent's behalf, suggests to me that there is nothing wrong here in any

> way, and that I ought to leave the petitioner here in the position in which he now is, turned out, as I think, substantially from anything to do with the management of the company and prevented really from taking part in it, and that he has no remedy at all in this matter. I should greatly regret to have to find that the position in law was that a person could be treated as the petitioner has here been treated and should have no remedy at all . . . Looking at the matter all round and considering the evidence as a whole, I cannot help coming to the conclusion that this is a case where it is just and equitable that the company should be wound up. I do not think it is necessary for me to go into the details of the evidence here or to try to sum up the evidence; but I find that this is a case where, if it was a case between partners, I should be bound to come to the conclusion that there ought to be a dissolution of the partnership."

In re Yenidji Tobacco Co. Ltd. (1), and *In re Davis and Collett Ltd.* (2), were both, it is true, cases where there were only two shareholders in the private companies concerned, whereas in the present case there were three. But that does not affect the principle, which is that where the private company is in reality in the nature of a partnership, as here, then it will be wound up in circumstances in which it would be dissolved if it were in form a partnership. *In Rayfield v. Hands* (3), [1960] 1 Ch. 1, a case not otherwise relevant, the company concerned consisted of four members: Vaisey, J., at p. 9, observed:

> ". . .it is, I think, material to remember that this private company is one of that class of companies which bears a close analogy to a partnership; see the well known passages in *In re Yenidji Tobacco Co.*"

In the present case I have not the slightest hesitation in holding that, if this were a partnership, an order for its dissolution ought to be made at the instance of one of the quarrelling partners. The material point is not which party is in the right; and that is why I have refrained from making findings of fact relevant to that controversial issue, a task which would in any event have been exceedingly difficult upon the affidavits alone. The material point is the very existence of the quarrel, which has made it impossible for the company to be run in the manner in which it was designed to be run, or for the parties' disputes to be resolved in any other way than by a winding-up. The wishes of the company's creditors, though not immaterial, are by comparison of minor importance.

On these grounds this petition must be granted, with costs, and there will be an order for the winding-up of the company in the usual form.

Winding-up order made.

For the petitioner:
Fraser Murray, Thornton & Co., Dar-es-Salaam
S. H. M. Kanji

For an opposing shareholder:
Donaldson & Wood, Dar-es-Salaam
R. L. Wood

For another opposing shareholder:
Sayani & Co, Dar-es-Salaam
N. R. D. Sayani

[1962] 1 EA 61 (SCK)

Division:	HM Supreme Court of Kenya at Kisumu
Date of judgment:	26 February 1962
Case Number:	166/1961
Before:	Farrell J
Sourced by:	LawAfrica

[1] Unincorporated body – Criminal liability – Whether criminal proceedings will lie against unincorporated body – Maize Marketing Ordinance, 1959, *s*. 24 (*K*.) – *Criminal Procedure Code*, *s*. 3 (3), *s*. 89, *s*. 90, *s*. 96 *and s*. 207 (*K*) – *Interpretation and General Clauses Ordinance*, 1956, *s*. 2 (*K*.) – *Criminal Justice Act*, 1925, *s*. 33 – *Penal Code* (*Revised Edition*), *s*. 23 (*K*.).

[2] Criminal law – Trial – Plea – Charge against unincorporated society – Plea by chairman of society – No evidence whether chairman authorised by society to plead – Nullity – Maize Marketing Ordinance, 1959, *s*. 24 (*K*.) – *Criminal Procedure Code*, *s*. 3 (3), *s*. 89, *s*. 90, *s*. 96, *s*. 207 (*K*.) – *Interpretation and General Clauses Ordinance*, 1956, *s*. 2 (*K*.) – *Criminal Justice Act*, 1925, *s*. 33 – *Penal Code* (*Revised Edition*), *s*. 23 (*K*.).

Editor's Summary

An unincorporated society was charged with contravening an order made under s. 24 of the Maize Marketing Ordinance, 1959, namely, that it caused a number of bags of maize to be moved without a permit. In the particulars of the charge the names of the secretary and chairman were specified and the chairman appeared at the trial representing the society and said "I plead guilty". The magistrate without inquiring whether the chairman was authorised to plead for the society accepted the plea and convicted the society. An appeal was then brought in the name of the chairman and at the hearing it was immediately apparent that the appeal was incompetent as the appellant was neither the original accused nor the person convicted. As an issue of general importance was involved, the court decided to deal with the case in revision. The issue was whether criminal proceedings will lie against an unincorporated society. It was submitted that the charge against the society was bad in law.

Held –

(i) by virtue of the definition of "person" in s. 2 of the Interpretation and General Clauses Ordinance, 1956, a body unincorporate is a "person" in law; accordingly it was possible for the society to be guilty of the offence charged.

(ii) section 23 of the Penal Code (Revised Edition) is authority for the proposition that an unincorporated body is capable of committing a criminal offence; nevertheless no criminal proceedings can be brought against it owing to procedural difficulties.

(iii) the charge against the society was bad in law because criminal proceedings will not lie against an unincorporate body; the plea of guilty was a nullity as it was not made by a person duly authorised in fact or in law to plead on behalf of the society.

Appeal allowed. Conviction and sentence set aside.

Cases referred to in judgment:

(1) *R. v. Hussein Mohamed Moti* (1953), 20 E.A.C.A. 161.

(2) *M. S. Sondhi Ltd. v. R.*, (1950) 17 E.A.C.A. 143.

(3) *Davey v. Shawcroft*, [1948] 1 All E.R. 827.

(4) *R. v. Cory Bros. & Co. and Others*, [1927] 1 K.B. 810; [1927] All E.R. Rep. 438.

Judgment

Farrell J: On October 30,1961, seven individual persons were charged on a count of contravening an order made under s. 24 of the Maize Marketing Ordinance, 1959, by moving a number of bags of maize without a permit, and in a separate count an almost identical charge was made against the Kenya African Food Sellers Union (hereinafter referred to as "the union"), the allegation in this count being that the union caused the bags of maize to be moved. In the particulars of the latter count the names of the secretary and chairman of the union were specified, the latter being given as Stephen Obiro s/o Ogal, the nominal appellant in these proceedings. Pleas of not guilty were entered in respect of all the accused, and a hearing date was fixed. At the hearing the first six accused changed their pleas, and each was found guilty on his own plea and convicted. With regard to count 2 the record shows that Stephen Obiro appeared representing the union and said, "I plead guilty". The plea was accepted and thereupon the union was found guilty on its own plea and convicted.

The charge against accused number seven was withdrawn, and the first six accused were conditionally discharged. The learned resident magistrate then proceeded to deal with the union in the following terms:

> "As to count 2 only the union has been charged and its representative has pleaded guilty on its behalf. Its offence is the more serious since it involved its employees in the commission of an offence."

A fine of Shs. 1,000/- was imposed on the union and the maize in respect of which the offence was committed was ordered to be forfeited.

Counsel was duly instructed to appeal against this conviction and sentence, and being in some natural difficulty as to the proper procedure for presenting an appeal on behalf of an unincorporated society, presented an appeal in the name of Stephen Obiro. When the matter came before this court, it was immediately apparent that the appeal was incompetent as the appellant was neither the original accused nor the person convicted in the lower court. As, however, an issue of some general importance was involved, the court decided to deal with the case in revision and to allow counsel to be heard with a view to assisting the court in deciding whether or not the conviction and sentence should be allowed to stand.

The issue of general importance to which I have referred is the question whether criminal proceedings lie against an unincorporated society or association. There is very little direct authority on the point. For the Crown it is pointed out that in s. 2 of the Interpretation and General Clauses Ordinance, 1956, "person" is defined as including "any company or association or body of persons, corporate or unincorporate". Section 24 (2) of the Maize Marketing Ordinance, 1959, provides that

> "any person who contravenes or fails to comply with an order made under this section . . . shall be guilty of an offence, and shall be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment".

Imprisonment is obviously an inappropriate sentence for a body of persons, but a fine is not, and as a body unincorporate is a "person" in law, it appears to follow that the union in this case is capable of being guilty of the offence.

That, however, is not the end of the matter, for the question then arises how an unincorporated body is to be brought before the court. Criminal proceedings are instituted by a complaint and the issue of a summons in accordance with the provisions of s. 89 and s. 90 of the Criminal Procedure Code. There is no difficulty in the making of a complaint against an unincorporated body, but how is it to be summoned?

Section 96 provides for the

service of a summons on an incorporated company or other body corporate, but there is no corresponding provision in the Code providing for the service of a summons on an unincorporated body. Section 22 (2) of the Societies Ordinance provides for the service of notices on a society, but is limited to notices issued under the Ordinance or rules made thereunder. The first difficulty in the way of proceedings against a body such as the union is that there does not appear to be any procedure recognised by the law whereby a summons can be served upon it. I may add that in the present case there is no indication in the record or the documents on the file to show whether any summons was issued against the Union or how the summons (if any) was served.

Even if some means can be found of bringing an unincorporated body before the court, a further difficulty arises in deciding how it is to plead to the charge. In the instant case, a person named in the charge as the chairman of the union appeared and pleaded on behalf of the union. There is nothing in the record to show that the learned resident magistrate made any inquiry to ascertain whether he was in fact authorised by the union to plead on its behalf, and in any case there is no provision in law enabling a representative to appear and plead on behalf of an unincorporated body. Under s. 207 of the Criminal Procedure Code it is the accused person who must plead to the charge, and even an advocate is not ordinarily permitted to plead on his behalf: *R. v. Hussein Mohamed Moti* (1) (1953), 20 E.A.C.A. 161. The same difficulty was considered in relation to the taking of a plea from a body corporate in *M. S. Sondhi Ltd. v. R.* (2) (1950), 17 E.A.C.A. 143, where after referring to the provisions of s. 96 of the Criminal Procedure Code the judgment proceeded (at p. 144):

> "There would appear to be no provision in the Criminal Procedure Code governing the reception of a plea from a company in a criminal proceeding and in its absence Mr. Kelly suggests that a court should follow the provisions of s. 33 of the U.K. Criminal Justice Act, 1925. We agree with Mr. Kelly to this extent that where a company is charged before any court with a criminal offence the court should satisfy itself before taking any plea from any person that he is a representative of the company for the purpose of answering the charge."

No opinion was expressed by the Court of Appeal upon the suggestion of counsel that the English procedure should be followed: nevertheless it may be pertinent to inquire whether there is any English procedure which could be followed in respect of the taking of a plea from an unincorporated society. No case has, however, been cited to me nor have I been able to find any in which an unincorporated body has been charged with a criminal offence under English law. The question of the criminal liability of an unincorporated body was, however, considered by a Divisional Court of the Q.B.D. in *Davey v. Shawcroft* (3), [1948] 1 All E.R. 827. The legislation with which the court was concerned in that case was complex and its details need not concern me. It is sufficient to refer to the following passage from the judgment of Goddard, L.J. (as he then was) at p. 828:

> "At the root of the argument of counsel for the appellant was the contention that by the Interpretation Act, 1889, s. 2, it is provided that in the construction of every enactment relating to an offence punishable on indictment or on summary conviction the expression 'person' shall, unless the contrary intention appears, include a body corporate. He contended that as the committee were not a body corporate, s. 2 had no application, and he also said that, in view of the terms of s. 2, s. 19 of the Act of 1889 had no application to any criminal matter, but applied only to civil matters or rights. That section provides:

> ‘In this Act and in every Act passed after the commencement of this Act the expression “person” shall, unless the contrary intention appears, include any body of persons corporate or unincorporate.’
>
> The first answer to this contention is that the committee are not being prosecuted. They are not a party to any criminal proceedings. If members of an unincorporate body commit an offence they can be prosecuted, but they must be charged or indicted individually.”

Later, on the same page, a similar opinion is expressed as to the criminal liability of a firm:

> “If an offence were committed in the ordinary course of the firm’s business, it may well be that each individual partner would be liable to prosecution, though they would have to be prosecuted as individuals and not in the firm’s name.”

The remarks of the learned Lord Justice about the liability of an unincorporate body or firm to be prosecuted in criminal proceedings were to some extent obiter dicta, but there is no reason to doubt that they correctly describe the English procedure and practice in this respect. If that is so, the provisions of s. 3 (3) of the Criminal Procedure Code cannot be prayed in aid to supply any omissions in the Code with regard to the procedure to be followed in bringing an unincorporated body to trial.

In the first of the passages cited above reference was made to a submission that s. 19 of the Interpretation Act, 1889, had no application to any criminal matter. No opinion was passed on that submission, but in any case it is clear that no similar submission could be made in respect of the corresponding provision in s. 2 of the Interpretation and General Clauses Ordinance, 1956, to which reference has already been made. As I have indicated, it seems clear that under the law of the Colony, an unincorporated body can be criminally liable, but nevertheless no criminal proceedings can be brought against it owing to the procedural difficulties to which I have referred. The position is thus similar to that which obtained in England in relation to the criminal liability of corporations before the enactment in the Criminal Justice Act, 1925, of procedural provisions.

> “designed to abolish the inconvenience that formerly existed of a corporation not being triable at assizes or quarter sessions”:

see *R. v Cory Bros. & Co., Ltd. and Others* (4), [1927] 1 K.B. 810; [1927] All E.R. Rep. 438 (headnote).

It may be relevant at this point to refer to s. 23 of the Penal Code (Revised Edition), a section inserted in the Code as recently as 1960. The section reads as follows:

> “Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.”

This section is further authority, if any were needed, for the proposition that an unincorporated body is capable of committing a criminal offence, and at the same time provides a means of enforcing the law by proceedings against

the individuals responsible for its management which might have been but was not adopted in the instant case.

Counsel appearing before me as amicus curiae has argued that the charge against the union was bad in law. For the above reasons I hold that his contention is well founded. I would, if necessary, hold that the plea of guilty was a nullity as it was not made by a person duly authorised in fact or in law to plead on behalf of the union. As, however, such a ruling would leave the charge to be dealt with in further proceedings I prefer to found my decision on the more general ground, that criminal proceedings do not lie against a body unincorporate.

The conviction and sentence of the lower court are set aside. Any part of the fine which has been paid must be returned to the union, together with the maize which has been forfeited or its value.

Appeal allowed. Conviction and sentence set aside.

For the appellant:
A. H. Malik & Co, Kisumu
A. H. Malik

For the respondent:
The Attorney-General, Kenya
G. O. L. Dyke (Crown Counsel, Kenya)

R v Vinubhai Chunibhai Amin

[1962] 1 EA 65 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 January 1962
Case Number:	177/1961
Before:	Sir Kenneth O'Connor P, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Sir Ronald Sinclair, C.J., and Rudd, J

[1] Criminal law – Bankruptcy – Trading while insolvent – Meaning of "insolvent" – Bankruptcy Ordinance (*Cap*. 30), *s*. 29, *s*. 137(1)(*r*) (*K*.) – *Bankruptcy Act*, 1914, *s*. 26 (3) (*c*) – *Bankruptcy Act*, 1882, *s*. 28(3)(*f*).

[2] Bankruptcy – Trading while insolvent – Meaning of "insolvent" – Bankruptcy Ordinance (*Cap*. 30), *s*. 29, *s*. 137(1)(*r*) (*K*.) – *Bankruptcy Act*, 1914, *s*. 26(3)(*c*) – *Bankruptcy Act*, 1882, *s*. 28(3)(*f*).

Editor's Summary

The respondent was convicted by a magistrate of trading while insolvent contrary to s. 137(1)(*r*) of the Bankruptcy Ordinance. The magistrate held that insolvency in relation to bankruptcy meant an inability to pay debts as they became due. The Supreme Court allowed the respondent's appeal holding that the word "insolvent" meant an inability to pay Shs. 20/- in the pound on a careful, prudent and unhurried realisation of the assets. On a further appeal the Crown submitted that the correct meaning of the word "insolvent" in s. 137(1)(*r*) was an inability to pay debts as they became due, irrespective of what unrealised assets the debtor might have.

Held –

(i) the word "insolvent" in s. 137(1)(*r*) of the Bankruptcy Ordinance means an inability to pay Shs. 20/- in the pound on a careful, prudent and unhurried realisation of the assets.

(ii) inability to meet debts as they become due is a factor, and a very important factor, in determining whether a person is insolvent; but it is not the only factor which, irrespective of anything else, determines that a person is insolvent within the meaning of s. 137(1)(*r*) of the Bankruptcy Ordinance.

Appeal dismissed.

Cases referred to in judgment:

(1) *Re Scharrer* (1888), 4 T.L.R. 627.

(2) *Re Brown* (*John*) *& Co*. (1906), 22 T.L.R. 291

(3) *In re Skegg* (1890), 25 Q.B.D. 505.

(4) *In re Bryant*, [1895] 1 Q.B. 420.

Judgment

Newbold JA, read the following judgment of the court: This was an appeal by the Crown from a judgment of the Supreme Court of Kenya sitting in appellate jurisdiction allowing an appeal by the respondent against a conviction by the resident magistrate, Nairobi, on a count of trading when insolvent contrary to s. 137(1)(*r*) of the Bankruptcy Ordinance (Cap. 30 of the Laws of Kenya) (hereinafter referred to as "the Ordinance"). At the conclusion of the argument of Mr. Hamel, who appeared for the Crown, we dismissed the appeal and stated that we would give our reasons in writing. We also, at that time, refused an application, made by Mr. Johar on behalf of the respondent, for an order for costs against the Crown and stated that we would make no order as to costs.

A short point of law arose on this appeal. The respondent was convicted on June 27, 1961, by the resident magistrate, Nairobi, on a count of trading when insolvent, contrary to s. 137(1)(*r*) of the Ordinance, the learned resident magistrate holding that insolvency in relation to bankruptcy meant an inability to pay debts as they became due. The respondent appealed to the Supreme Court against his conviction and sentence. The Supreme Court allowed his appeal and quashed his conviction and sentence. The Crown then appealed to this court against the judgment of the Supreme Court on the ground that the learned judges of the Supreme Court erred in law in holding that the word insolvent in s. 137(1)(*r*) of the Ordinance was an inability to pay Shs. 20/- in the pound on a careful, prudent and unhurried realisation of assets.

The learned judges of the Supreme Court, having stated that it was well settled that there was no insolvency within the meaning of para. (*c*) of sub-s. (3) of s. 26 of the English Bankruptcy Act, 1914, if a careful, prudent and unhurried realisation of the assets would produce enough to pay Shs. 20/- in the pound on the amount of the liabilities and having referred to a passage at p. 628 in the decision of Mr. Registrar Linklater in *Re Scharrer* (1) (1888), 4 T.L.R. 627, continued as follows:

> "Section 28 of the Bankruptcy Act, 1883 and s. 26 of the Bankruptcy Act, 1914 are in similar terms to s. 29 of the Kenya Ordinance. In particular para (*c*) and para. (*i*) of s. 29 of the Kenya Ordinance are identical with para. (*b*) and para. (*f*) of sub-s. (3) of s. 28 of the Bankruptcy Act, 1883, referred to by Mr. Registrar LINKLATER in Re Scharrer. Para. (*c*) and para. (*i*) of sub-s. (3) of s. 29 of the Kenya Ordinance read:
>
> '(*c*) that the bankrupt has continued to trade after knowing himself to be insolvent;
>
> '(*i*) that the bankrupt has, within three months preceding the date of the receiving order, when unable to pay his debts as they became due, given an undue preference to any of his creditors;'
>
> Following *Re Scharrer* and the other cases to which we have referred, and for the same reasons as were expressed in those cases, we are of opinion that the same meaning must be given to the term 'insolvent' in para. (*i*) (sic) above, namely inability to pay Shs. 20/- in the pound. In para. (*r*) of

> sub-s. (1) of s. 137 of the Kenya Ordinance 'insolvent' is used in the context of words similar to those in para. (*c*) of sub-s. (3) of s. 29 of the Ordinance and we can find no reason for giving it a different meaning. In *London and Counties Assets Company Limited v. Brighton Grand Concert Hall and Picture Palace Limited* (supra), on which the magistrate relied, the court was construing the meaning of the word 'insolvent' used in a different context in Articles of Association. In our view that decision has no relevance in this case."

Mr. Hamel submitted that the Supreme Court erred in following the decision of the Registrar in *Scharrer's* case (1), and in *Re Brown* (*John*) & *Co*. (2) (1906), 22 T.L.R. 291, and that the correct meaning of the word insolvent in s. 137(1)(*r*) of the Ordinance was an inability to pay debts as they became due, irrespective of what unrealised assets the debtor might have. In support of his submissions he referred to a number of cases in which there were dicta to the effect that insolvency was an inability to pay debts as they became due. A number of those authorities related to the meaning of the word insolvent in instruments or legislation other than the bankruptcy laws. It may well be that the word insolvent in certain circumstances means an inability to pay debts as they become due. The question in this case, however, is whether it has that meaning in s. 137(1)(*r*) of the Ordinance, a section which creates a criminal offence. In sub-s. (3) of s. 29 of the Ordinance there are two paragraphs, one, para. (*c*), referring to a bankrupt trading after knowing himself to be insolvent; the other, para. (*i*), referring to undue preference given to creditors after the bankrupt was unable to pay his debts as they became due. On the general principles of construction a different meaning would normally be assigned to different words or phrases used in the same sub-section. These two paragraphs are identical to para. (*b*) and para. (*f*) of s. 28 (3) of the English Bankruptcy Act, 1883, which in turn were reproduced as para. (*c*) and para. (*i*) of s. 26 (3) of the English Bankruptcy Act, 1914. The learned editors of Halsbury's Laws of England (3rd Edn.) Vol. 2, p. 524 and p. 525 when commenting on para. (*c*) of s. 26 (3) of the 1914 Act state:

> "There is no insolvency within the meaning of this offence if a careful, prudent and unhurried realisation of the assets would produce enough to pay Shs. 20/- in the pound on the amount of the liabilities"

and they also state that there is a distinction between insolvency for the purposes of para. (*c*) and inability to pay debts as they become due for the purposes of para. (*i*). In support of their statement of the law they refer to *Scharrer's* case (1), and *John Brown's case* (2). Mr. Hamel, however, referred to *In re Skegg* (3) (1890), 25 Q.B.D. 505 and *In re Bryant* (4), [1895] 1 Q.B. 420, both decisions of the Court of Appeal on para. (*f*) of s. 28 (3) of the English Bankruptcy Act, 1883, in which the learned Lord Justices referred to undue preference being shown when the bankrupt was insolvent. In particular he referred to the dictum of Lord Esher, M.R., at p. 424 in *Bryant's* case (4), where he stated:

> "Here the registrar had found that this bankrupt, within three months before his bankruptcy, was insolvent; for that, putting it shortly, is the meaning of being 'unable to pay his debts as they became due'."

In both these cases it is to be noted that at the material time the bankrupt was in fact insolvent, that is, his liabilities exceeded his assets. Indeed, Lord Esher continued in *Bryant's* case (4), immediately after the words quoted above:

> "He must have known, or he ought to have known, that he was insolvent. He was, in fact, insolvent."

The dicta in each of these cases must be related to the facts of each case. The

finding in each case was that during the material time the liabilities exceeded the assets and the bankrupt's discharge was held up on the ground that during the three months preceding the receiving order when unable to meet his debts as they became due the bankrupt had shown undue preference to a creditor. What in effect the Court of Appeal decided in each case was that as the debtor was insolvent, in the sense of the liabilities exceeding the assets, this resulted in the debtor being unable to pay his debts as they became due, and the dicta should be related to that position. This is vastly different from saying that because the debtor was unable to meet his debts when they became due therefore he was insolvent. These two cases are not, in our view, authority for saying that inability to meet debts as they became due was insolvency within the meaning of s. 29 (3) of the Ordinance nor that when the legislature used two different expressions in the same sub-section it meant the same thing. We therefore consider that the word insolvent in s. 29(3)(*c*) of the Ordinance means an inability to pay Shs. 20/- in the pound on a careful, prudent and unhurried realisation of the assets. We consider that the same word should have the same meaning in s. 137(1)(*r*) of the Ordinance. That section creates an offence and we consider it inconceivable that the legislature could have intended that a person, with assets the market value (and we stress the words market value) of which was £10,000 and with total liabilities of less than that amount but who was unable to meet at a particular moment a debt of £100, should be regarded as insolvent and as having committed an offence if he continued to trade and within a year thereafter a receiving order was made against him. We should like to make it clear that inability to meet debts as they become due is a factor, and a very important factor, in determining whether a person is insolvent; but it is not the only factor which, irrespective of anything else, determines that a person is insolvent within the meaning of s. 137(1)(*r*) of the Ordinance.

For these reasons we agreed with the decision of the learned judges of the Supreme Court and dismissed the appeal.

Appeal dismissed.

For the appellant:
The Attorney-General of Kenya
H. F. Hamel (Deputy Official Receiver, Kenya) and *H. H. Mainprice* (Legal Assistant, Department of Registrar-General, Kenya)

For the respondent:
Winayak, Johar & Co., Nairobi
T. R. Johar

Japhet George Aguthu v R
[1962] 1 EA 69 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	3 January 1962
Case Number:	1172/1961
Before:	MacDuff and Edmonds JJ

Sourced by: LawAfrica

[1] Criminal law – Charge – Duplicity – Charge of stealing between certain dates – Evidence disclosing two separate takings – Whether charge bad as alleging two separate offences – Failure of justice – Penal Code, s. 282 (*K.*) *– Criminal Appeal Act*, 1907, *s.* 4 (1).

Editor's Summary

The appellant was charged before and convicted by a magistrate of stealing by a servant. The particulars of the offence alleged that some time between May and August 29, 1961, being a servant to the Kenya Meat Commission, Athi River, he stole from the Commission 170 gunny bags to the value of shs. 416/50. At the trial evidence was led that there were in all 170 jute sacks missing from the Commission store on August 29, 1961, and that on August 29, 1961, a security officer of the Commission found on a tractor near the main store 100 brand new jute gunny sacks similar to those used by the Commission specifically for canning meat. The tractor driver stated that he had picked up the sacks on the instructions of the appellant and had on a previous occasion carried gunny sacks for the appellant from the same store and the appellant's houseboy said he had seen sacks at the appellant's house in June 1961. On appeal against conviction the appellant's case was that the charge was bad as it purported to charge two separate offences in one count, and that the appellant had been prejudiced since the magistrate should have directed his mind to each of the two alleged takings separately.

Held –

(i) the charge itself was not duplex but it would have been more proper had the appellant been charged on separate counts in respect of each theft.

(ii) from the magistrate's judgment it appeared that he had failed to consider the facts in respect of each taking separately and that he had utilised the facts in respect of one taking to bolster up either the corroboration of the driver or the guilt of the appellant in respect of the other taking; had the magistrate not done so he might not have reached the same conclusion in respect of each separate taking; therefore,

(iii) the court was unable to say that there had been no failure of justice with the result that, on this ground alone, the conviction could not be allowed to stand.

Appeal allowed. Conviction and sentence set aside.

Cases referred to in judgment:

(1) *R. v. Bailey*, [1924] All E.R. Rep. 466.

(2) *R. v. Tomlin*, [1954] 2 All E.R. 272.

(3) *R. v. Thompson*, [1914] 2 K.B. 99.

(4) *R. v. Johnson*, 30 Cr. App. R.159; [1945] 2 All E.R. 105.

(5) *R. v. Goodwin*, [1944] K.B. 518; [1944] 1 All E.R. 506.

(6) *R. v. Ballysingh*, 37 Cr. App. R. 28.

Judgment

Macduff J, read the following judgment of the court: The appellant was charged with the following offence:

> "Charge: Stealing by servants, contrary to s. 282 of the Penal Code.
>
> "Particulars of Offence: Japhet G. Igutu, some time between May, 1961, and August 29, 1961, within the Machakos District of the Southern Province, being a servant to the Kenya Meat Commission, Athi River, stole from the said Kenya Meat Commission 170 gunny bags to the value of Shs. 416/50."

He was convicted and sentenced to twelve months' imprisonment. He now appeals against conviction and sentence. The facts were that the appellant was employed by the Kenya Meat Commission as welfare officer. On August 29, 1961, Mr. Dunman, a security officer to the Kenya Meat Commission at Athi River, was in the store area. He saw a tractor and trailer being manhandled into position, the tractor driver being one Kimu Mbatha. At this time the tractor was about thirty yards from the main store. On the tractor Mr. Dunman found 100 brand new jute gunny sacks which were used by the Commission specifically for canning meat. The tractor driver, Kimu, told Mr. Dunman that the appellant was responsible and that he had picked up the sacks on his instructions.

Kimu also gave evidence about this incident to the effect that about 12.45 p.m. on that day he had been found with 100 new gunny sacks from the store on his trailer and that he had informed Mr. Dunman that the appellant had told him to put them on, that he had got these gunny sacks from the store on the instructions of the appellant and that he was to take them out while there were no Europeans about. At this stage he did not know what was intended to be done with the sacks but he said that the appellant had said he would come and give him further instructions. He also gave evidence of having carried gunny sacks for the accused from the same store on a previous occasion, about two and a half months earlier, when he had carried them to the home of the accused, that these sacks were similar to the 100 sacks then found in his possession and were in the same condition, and that he had got the sacks away on the previous occasion because the appellant had been at the gate with the askari on duty and he had proceeded through it without interference.

One, Peter Musau, a houseboy for the appellant, was also called, who gave evidence of having seen sacks similar to the gunny sacks found on August 29, at the home of the accused about the month of June, 1961, that these sacks were brought by the same tractor driver, put inside the house of the appellant and that at the end of the month they had been put in a basket and taken away.

This evidence showed two separate thefts. The first about June, 1961, of presumably 70 sacks, and the second on August 29, 1961, of 100 sacks. There was also evidence that there were in all 170 jute sacks missing from the Commission store on August 29, 1961.

The first ground of appeal is:

> "(1) The charge is bad in law and in form in that it purported to charge two separate offences in one count."

It was pointed out to counsel that the charge itself is not bad in form because it does not purport to charge two separate counts. What has happened is that the evidence in support of the charge has disclosed two separate and distinct takings, each of which could have been the subject of a separate count. This we think counsel accepted and we allowed him to argue as a subsequent ground of appeal that the appellant should have been charged with two separate offences, and that he has been prejudiced in this not having been done to the extent that it has occasioned a failure of justice.

Counsel for the appellant quoted to us the case of *R. v. Bailey* (1), [1924] All E.R. Rep. 466. This was a case where the appellant had been charged on sixteen separate counts and the trial judge had failed to direct the jury that

they must consider each count by itself and weigh with care the evidence referring to each charge and that they must not supplement the evidence on one count with that relating to another. Not only had the trial judge failed to give that necessary direction but he had gone even further and there were some passages in his summing up which might have conveyed to the jury that they might consider the evidence as a whole. That case has no direct application in the present appeal except by parity of reasoning that the magistrate should have directed his mind to each of the two takings separately and that in so far as he may have failed to do so such failure has occasioned a miscarriage of justice.

The second case quoted to us, *R. v. Tomlin* (2), [1954] 2 All E.R. 272, was a case of what is known as general deficiency, where it was held that where it was impossible to split up the aggregate sum and to trace individual items, it was proper to include the total sum in a count alleging a general deficiency. This authority applies particularly in those cases where it is impossible to prove the dates of the actual taking or to prove separate takings. It has a bearing on the facts of the present appeal, however, in that at p. 274, Pearson, J., who read the judgment of the Court of Criminal Appeal, remarked:

> "Where separate offences can be charged in separate counts, the court regards as improper an 'omnibus' count in an indictment charging an aggregate of offences over a long period."

In England the position would appear to be governed by the provision of the proviso to s. 4, sub-s. (1) of the Criminal Appeal Act, 1907, the principles of which are akin to those set out in s. 382 of the Criminal Procedure Code. In *R. v. Thompson* (3), [1914] 2 K.B. 99, an indictment under the Punishment of Incest Act, 1908, charged in one count that offences were committed on divers days between the month of January, 1909, and October, 1910, and in another count that offences were committed on divers days between October 4, 1910, and the end of February, 1913. On appeal it was held that the indictment was bad in that it charged more than one offence in each count but that as the prisoner had not in fact been embarrassed or prejudiced in his defence there had been no substantial miscarriage of justice and that the appeal must therefore be dismissed under s. 4, sub-section (1) of the Criminal Appeal Act, 1907. That case was commented on and applied in a later case of *R. v. Johnson* (4), 30 Cr. App. R. 159, a case in which the facts were more analogous to those concerned in the present appeal. Singleton, J., who read the judgment, remarked at p. 164:

> "In Thompson, 9 Cr. App. R. 252; [1914] 2 K.B. 99, which was a case heard by a full court of five judges, the headnote in the Criminal Appeal Reports says:
>
> > 'An objection to a count as bad for duplicity, or to the number of counts as embarrassing, must be based on the ground that the defence is likely in fact to be prejudiced by such counts, and this is a matter for the discretion of the judge, subject to the revision of this court, which, if that discretion is improperly exercised, will quash a conviction, whatever view it takes of the merits of the case.'
>
> The Lord Chief Justice in that case, after dealing with the time at which such an objection could or should be taken, said (9 Cr. App. R., at p. 260; [1914] 2 K.B., at p. 104):
>
> > 'If we had thought that any embarrassment or prejudice had been caused to the appellant by the presentment of the indictment in this form, we should have felt bound to quash the conviction, whatever our views might be as to the merits of the case. It must not be thought that we are deciding that such objections should not be allowed to prevail either at the trial or in this court. An indictment so

> framed might undoubtedly hamper the defence, and if it did we should give effect to the objection. There are also other objections to an indictment which must be held good at any time, as, for example, an objection on the ground of want of jurisdiction. One of the objects of s. 4 was to prevent the quashing of a conviction upon a mere technicality which had caused no embarrassment or prejudice. Whilst giving the right of appeal upon any wrong decision of any question of law, the object of the Legislature was that justice should be done in spite of a wrong decision, and that the court should not interfere if it came to the conclusion that, notwithstanding the wrong decision, there had been no substantial miscarriage of justice.'
>
> Accordingly, in that case the court, finding there had been neither embarrassment nor prejudice, declined to quash the conviction, even though it might be said that the indictment was bad upon the fact of it. That case has been cited before this court on different occasion, and if we had been satisfied that the objection to this indictment was sound, still we should have thought it right in the circumstances to apply the proviso to s. 4, for it is perfectly clear that not the slightest embarrassment or prejudice has been caused in this case."

In *R. v. Goodwin* (5), [1944] K.B. 518, a somewhat analogous situation arose, although the appeal was allowed on another ground. The court remarked at p. 524:

> "The court wish to add that where the facts of a case afford evidence not only of an offence against s. 7 of the Prevention of Crimes Act, 1871, but also of another offence, such as attempted larceny or an offence under s. 4 of the Vagrancy Act, 1824, which does not involve giving proof to the jury of the prisoner's bad character, it is much more satisfactory that the prisoner should be charged with that other offence. Once a jury knows that the prisoner is given to committing a particular class of crime, it is difficult for them, notwithstanding their best endeavours, to treat him in the same fair and impartial way as they would if they knew nothing about his past."

The last case we have been able to find is that of *R. v. Ballysingh* (6), 37 Cr. App. R. 28.

The headnote to that case reads:

> "Where, in a case of shoplifting, the evidence for the prosecution shows that a number of articles have been taken from different parts of a large store, the proper course is to make each taking the subject of a separate count for larceny.
>
> "Where, however, in such a case all the articles alleged to have been stolen were included in one count, and defending counsel had not objected to the form of the indictment, having been told by counsel for the prosecution before the trial that, if he did object, leave to amend the indictment would be sought so as to charge each article separately.
>
> "Held, that the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, should be applied and the conviction affirmed."

It would appear, therefore, that in the present appeal the charge itself is not duplex. During the course of hearing that charge, the evidence has shown that there were two separate offences. In the words of the authorities it would be more proper that the appellant be charged on separate counts in respect of each theft. In the event that the failure so to charge him has occasioned no failure

of justice the conviction can be allowed to stand. If, on the other hand, in the result there has been a failure of justice, the conviction must be quashed.

In the instant case, when dealing with the evidence in his judgment, the magistrate has said:

> "In relation to the evidence before me, at the outset I propose to treat the evidence of P.W.2 as that of an accomplice. Bearing this in mind, however, I am perfectly satisfied that P.W.2. is a credible witness. I must now consider whether there is independent corroboration of his evidence affecting the accused by connecting or tending to connect him with the crime. This of course need not be direct evidence but may be circumstantial evidence of his connection with the crime. In relation to the delivery of the earlier shipment of sacks to the house of the accused this is corroborated by the evidence of the houseboy P.W.3. In relation to the 100 sacks on 29.8.61 there is the evidence of Mr. Dunman of the finding of the sacks, and the evidence of P.W.4. that on that very day but some three hours earlier the accused visited him and offered him some sacks to offset his debt. There is no question in my mind but that both P.W.3. and P.W.4. are completely independent witnesses. Can therefore their evidence be regarded as sufficient independent corroboration of the evidence of P.W.2. In my view it can. It is true it is circumstantial in nature but the sum total of the inculpatory facts is in my view utterly incompatible with the innocence of the accused and incapable of any explanation other than that of his guilt. There are in my view no co-existing or any other facts indicating anything else but the guilt of the accused. I was utterly unimpressed with the demeanour and evidence of the accused in the light of the evidence as a whole. He was in my view a palpable liar. In relation to the amount of sacks stolen, it is true that neither P.W.2. nor P.W.3. can give the amount recovered on the first occasion. I am quite satisfied, however, that a total of 170 sacks was missing, that 100 were taken on 29.8.61 and from the evidence as a whole I am further satisfied that this points to one thing alone, namely, that the other 70 sacks formed the subject of the earlier removal to the house of the accused. I am accordingly quite satisfied that 170 sacks, the property of K.M.C. were between June and 29.8.61 stolen by the accused."

From this it does appear that the magistrate has failed to consider the facts in respect of each taking separately and that he has utilised the facts in respect of one taking to bolster up either the corroboration of the driver or the guilt of the appellant in respect of the other taking. We are unable to say that had the learned magistrate not done so he must necessarily have reached the same conclusion in respect of each separate taking. Consequently we are unable to say that there has been no failure of justice with the result that, on this ground alone, the conviction cannot be allowed to stand.

The conviction and sentence are quashed. The appellant is to be set at liberty forthwith.

Appeal allowed. Conviction and sentence set aside.

For the appellant:
Swaraj Singh, Nairobi

For the respondent:
The Attorney-General, Kenya
C. Njonjo (Acting Senior Crown Counsel, Kenya)

New Zealand Insurance Co Ltd v Andrew Spyron
[1962] 1 EA 74 (HCT)

Division: High Court of Tanganyika at Dar-Es-Salaam

Date of judgment:	3 March 1962
Case Number:	189/1961
Before:	Daniel Ag J
Sourced by:	LawAfrica

[1] Arbitration – Stay of proceedings – Insurance policy – Defendant claiming credit for alleged claim under policy – Arbitration clause in policy – Term making award condition precedent to litigation – Defence filed – Application for stay at hearing – Whether defendant entitled to stay after filing defence – Arbitration Ordinance (*Cap.* 15), *s.* 6 (*T.*).

Editor's Summary

In respect of a claim by the plaintiff, an insurance company, for Shs. 20,164/11 the defendant consented to judgment for Shs. 14,164/11. He filed a defence in which he denied liability for Shs. 6,000/- for which he alleged the plaintiff had failed to give him credit. The credit claimed arose from a motor insurance policy containing an arbitration clause to the effect that arbitration should be a condition precedent to any action. The defendant sought a stay so that the matter could be referred to arbitration.

Held – under s. 6 of the Arbitration Ordinance the defendant should have applied for a stay at any time after appearance and before filing his defence; the defendant's failure to follow the procedure prescribed by s. 6 disentitled him to a stay.

Application for stay dismissed. Order that hearing of the suit do proceed.

Cases referred to in judgment:

(1) *Trivedi & Company v. Hercules Insurance Company Ltd.*, Tanganyika High Court Civil Appeal No. 31 of 1961 (unreported).

(2) *Willesford v. Watson* (1873), 8 Ch. App. 473.

(3) *Scott v. Avery* (1856), 5 H.L. Cas. 811; 10 E.R. 1121.

(4) *Old East African Trading Co. v. Ibrahimji Moosajii & Others* (1925), 10 K.L.R. 93.

(5) *Parker Gaines & Company Ltd. v. Turpin*, [1918] 1 K.B. 358.

Judgment

Daniel Ag J: Learned counsel for the defendant in this suit has consented to judgment in the sum of Shs. 14,164/11. He claims that he is not liable to pay the balance of Shs. 6,000/- since the plaintiff insurance company has failed to credit his client with this amount. This sum concerns an alleged payment on a claim for the loss of aviation gasolene while being carried on one of the defendant's vehicles covered by a policy issued by the plaintiff company.

Learned counsel for the defendant applies for a stay of the instant proceedings so that this matter may be referred to arbitration as provided for in s. 9 of the said policy issued by the plaintiff company. This is

a normal commercial vehicle policy (No. AM 5562) and has been put in as an annexure to the written statement of defence.

This application is strenuously opposed by Mr. R. Houry, learned counsel for the plaintiff company despite para. 4 of his reply in which it seems he does regard reference to arbitration as at least a possibility.

The material wording of s. 9 of this policy runs as follows:

> "All the differences arising out of this policy shall be referred to the decision of an arbitrator . . . and the making of an award shall be a condition precedent to any right of action against the company."

The question that immediately arises looking first at the policy itself is whether this claim for a credit of Shs. 6,000/- is a difference arising out of this policy. It is not immediately obvious to me, I have to confess, how a claim of this nature can be within the terms of this policy having regard to the wording of s. 1 of the policy which reads:

> "The company shall indemnify the insured against loss of or damage to the motor vehicle, its accessories and spare parts."

Despite this, however, Mr. Dodd assures me that the contents of his client's vehicle were also insured under the said policy. He can, he states, adduce evidence of a documentary nature to support his contention. Mr. Houry, on the other hand, insists that such a claim cannot possibly come within the terms of the policy. Paragraph 2 of the written statement must clearly, he argues, be taken to be referring to another insurance policy which it is said contains no such arbitration clause. This claim therefore should, he submits, be proven in this court in the ordinary way. In other words, he is saying that there is no difference arising out of the policy annexed to the written statement of defence and that therefore nothing can be referred to arbitration. Perhaps I should mention that in such a case as this the burden of proof is upon the party opposing the stay.

Learned counsel for the defendant relied upon a recent decision of Law, J., in *Trivedi & Company v. Hercules Insurance Company Ltd*. (1), Tanganyika High Court Civil Appeal No. 31 of 1961 (unreported). This case I find, however, is distinguishable from the instant one since there the question really was whether an agreement to arbitrate had been, prima facie, proved to be in existence on the particular day in question. Here we are concerned with the question as to whether this claim by the defendant is a difference arising out of the policy and thus is a matter that should be referred to arbitration under s. 9 of the policy.

The learned judge was, however, in the case above quoted, referred to various authorities in Russell on Arbitration (16th Edn.). One of these was the case of *Willesford v. Watson* (2) (1873), 8 Ch. App. 473, where Lord Selborne, L.C., at p. 477 said:

> "It struck me throughout that the endeavour of the appellants has been to require this court to do the very thing which the arbitrators ought to do. That is to say, to look into the whole matter, to construe the instruments and to decide whether the thing which is complained of is inside or outside the agreement."

This statement is pertinent to our present inquiry.

The above-mentioned case concerned the lease of a mine which contained an agreement to refer disputes between the lessor and the three lessees to arbitrators. The lessees sank a shaft and through the shaft drew minerals from an adjoining mine. The lessor filed a bill to restrain the lessees from so doing. Two of the three lessees applied for an order to stay proceedings in the suit so that the matter might be referred to arbitration. It was held that on the construction of the lease the court would not decide but would leave it to the arbitrators to decide whether the matters in dispute between the parties were within the agreement to refer. I can see no difference of principle in the instant case. It is for the arbitrator to decide therefore whether this claim for a credit of Shs. 6,000/- does come within the terms of the policy or not.

In para. 3 of the written statement the defendant claims erroneously, as this ruling will, it is hoped, subsequently show, that since this dispute has not, as provided, been referred to arbitration no proper cause of action is disclosed and the suit should be dismissed. However, it should be mentioned that, as an alternative prayer in the written statement, learned counsel does ask that the claims by both parties be referred to an arbitrator and it is presumably as a result of this alternative prayer that counsel is now applying for a stay of the instant proceedings.

I think it should be mentioned that as a matter of general construction the wording of s. 9 of this policy, viz.

> "an award shall be a condition precedent to any right of action against the company,"

means that if in the normal case an insured brought an action on the policy rather than referring the dispute to arbitration, the court would be bound to hold that there was no cause of action and that such action will be dismissed (*Scott v. Avery* (3) (1856), 5 H.L. Cas. 811), unless the right to arbitration has been waived or the condition precedent removed under the power conferred upon the court under the Arbitration Ordinance. The significant words of this context are "right of action against the company". It is interesting to note that following upon this appears the statement:

> "If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve months from the date of such disclaimer have been referred to arbitration . . . the claim for all purposes shall be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

The pleadings show that there is a dispute as to whether in fact any claim has been made against the company. If there has been a claim and the company has disclaimed liability the defendant is bound to refer the matter to arbitration within a period of twelve months from the date of such disclaimer. Failure to do so would mean that the money will in any event be irrecoverable under the terms of the contract of insurance.

I come now to a rather important consideration to which unfortunately neither counsel has referred. Under the Arbitration Ordinance (Cap. 15) "submission" means a written agreement to submit present or future differences to arbitration whether an arbitrator is named thereunder or not.

Section 6 of the Ordinance is as follows:

> "Where any party to a submission to which this Part applies, or any person claiming under him, commences any legal proceedings against any other party to the submission or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance, and before filing a written statement, or taking any other steps in the proceedings, apply to the court to stay the proceedings and the court if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Nothing is clearer from this section than that learned counsel, Mr. Dodd, should, before the filing of the written statement and at any time after appearance, have applied to the court to stay the proceedings. Up to the time the plaint was filed there is nothing at this stage to show that there was any dispute between the parties which should have been referred to arbitration. After filing of the plaint it was in the circumstances incumbent upon learned counsel

to apply for a reference to arbitration. The plaintiff's claim it will be noted is merely a claim for balance due on premiums under certain policies.

What I must decide, therefore, is whether defendant's omission to apply for stay of proceedings before the filing of the written statement of defence disentitles him from afterwards applying for a stay. There is ample authority to show that he is so disentitled. (*Old East African Trading Company v. Ibrahimji Moosajii and Others* (4) (1925), 10 K.L.R. 93 and *Parker Gaines & Company Ltd. v. Turpin* (5), [1918] 1 K.B. 358.)

The proper procedure, in applying for a stay, is by notice of motion either in court or in chambers with affidavit in support. (See Russell on Arbitration (16th Edn.), p. 87.) If I may say so, with respect, it was incorrect for learned counsel to ask for dismissal of this suit in the circumstances of the case.

In conclusion, though I would be agreeable to find that a difference has arisen within the terms of the policy, I feel bound to rule that in view of defendant's failure to follow the procedure as prescribed by s. 6 of the Arbitration Ordinance that he is now disentitled to make an application for a stay of proceedings. The application for stay is accordingly dismissed and it is ordered that the hearing of the suit proceed.

Application for stay dismissed. Order that hearing of the suit do proceed.

For the plaintiff:
George N. Houry & Co., Dar-es-Salaam
Robin Houry

For the defendant:
Dodd & Co., Dar-es-Salaam
H. G. Dodd

R v Haji Jaffer
[1962] 1 EA 78 (HCT)

Division:	High Court of Tanganyika
Date of judgment:	15 November 1962
Case Number:	203/1961
Before:	Murphy J
Sourced by:	LawAfrica

[1] Criminal law – Practice – Trial – Preliminary enquiry – Accused committed for trial – Subsequent entry of nolle prosequi – Accused then charged with three new offences – Offences arising out of same facts – No evidence adduced by prosecution – Evidence adduced upon previous charge relied on – Accused convicted – Whether trial a nullity – Criminal Procedure Code, s. 81 (1), *s.* 204, *s.* 227, *s.* 329 (5), *s.* 346 (*T.*) *– Penal Code, s.* 234 (*T.*).

Editor's Summary

After a preliminary enquiry, the accused was committed for trial on a charge of manslaughter arising from the driving of a motor vehicle. Subsequently a nolle prosequi was entered and the accused was then charged again before the same magistrate with three offences arising from the same facts. At the hearing the magistrate stated that the case was a continuation of the preliminary enquiry, and in spite of a submission by the accused's advocate that the prosecution should produce their witnesses again the magistrate, relying on s. 227 of the Criminal Procedure Code, convicted the accused of two of the offences. Leave to appeal out of time was later sought and refused after which the accused applied for revision.

Held –

(i) the application for revision was incompetent in view of s. 329 (5) of the Criminal Procedure Code; but the court was not precluded from considering the matter of its own volition.

(ii) section 227 of the Criminal Procedure Code applies only where either the magistrate holding the preliminary enquiry decides that the offence is of such a nature that it can suitably be dealt with under his own powers or where the depositions are returned by the Director of Public Prosecutions to the subordinate court with a view to summary trial.

(iii) the magistrate was wrong in regarding the case as a continuation of the preliminary enquiry; the omission to hear the prosecution evidence was not a mere irregularity which was curable by s. 346 ibid and therefore the trial was a nullity.

Conviction quashed. Sentence set aside.

Cases referred to in judgment:

(1) *R. v. Noormahomed Kanji* (1937), 4 E.A.C.A. 34.

(2) *Poole v. R.*, [1960] E.A. 644 (C.A.).

Judgment

Murphy J: On September 8, 1961, I refused an application to admit an appeal out of time in this case, no "good cause" having been shown under the second proviso to s. 314 of the Criminal Procedure Code. The case has now come before me again on an application for revision made on behalf of the accused. In my view the application is incompetent by reason of s. 329 (5) of the Criminal Procedure Code. This however does not preclude me from dealing with the matter in revision as if no application had been made, and this is the course which I propose to take.

The accused was originally committed for trial to the High Court by a magistrate at Kasulu on a charge of manslaughter arising from the driving of

a motor vehicle. After the committal a nolle prosequi was entered. The accused was then charged again before the same magistrate at Kasulu with three offences arising out of the same facts. These offences were respectively an unlawful omission under s. 234 of the Penal Code, permitting a vehicle to be used on a road with defective brakes and permitting a vehicle to be used on a road with defective tyres. It is to be noted that this case did not arise as a result of the depositions in the preliminary enquiry being returned to the magistrate by the Director of Public Prosecutions under s. 239 of the Criminal Procedure Code. The position was simply that the accused was brought before the magistrate on a new charge preferred by the police. Nevertheless when, after several adjournments, the case came on for hearing and the accused pleaded not guilty, the magistrate said that the case was a continuation of the preliminary enquiry proceedings. The accused's advocate submitted that the prosecution should have produced their witnesses again, but the magistrate said that this was unnecessary subject to the right of the defence to have witnesses recalled for cross-examination under s. 227 of the Criminal Procedure Code. The accused's advocate asked for one witness to be recalled, but withdrew this request after the magistrate had indicated that he could place no reliance on that witness's evidence. There was then a submission of no case to answer and this was upheld in regard to the charge under s. 234 of the Penal Code. The magistrate ruled that there was a case to answer on the other two counts. He then heard the defence and the accused was subsequently convicted and sentenced on these two counts. The question now to be decided is whether these convictions can stand in view of the fact that no evidence for the prosecution was given at the trial.

Section 227 of the Criminal Procedure Code, upon which the magistrate relied, applies only in two instances. The first is when the magistrate at the close or during the preliminary enquiry decides that the offence is of such a nature that it can suitably be dealt with under his own powers; and the second is when the depositions are returned by the Director of Public Prosecutions to the subordinate court with a view to summary trial. On the face of it neither of these conditions was present here. However, Mr. Taylor has argued on behalf of the Crown that the magistrate was entitled to invoke s. 227. His argument, as I understand it, is as follows. Under s. 81 (1) of the Criminal Procedure Code the effect of a nolle prosequi is that the proceedings are discontinued and that the accused is discharged in respect only of the charge on which he was committed. The preliminary enquiry proceedings are in no way nullified and may form the basis of further proceedings in the High Court: *see R. v. Noormahomed Kanji* (1) (1937), 4 E.A.C.A. 34, and *Poole v. R.* (2), [1960] E.A. 644 (C.A.). A fortiori, Mr. Taylor argues, the evidence taken at the preliminary enquiry can still form the basis of a conviction before a magistrate. He argues further that when the accused again appeared before the magistrate after the entering of the nolle prosequi, the magistrate was in the same position as if at the close of the preliminary enquiry he had decided that the case could suitably be dealt with under his own powers; s. 227 of the Criminal Procedure Code accordingly became applicable.

With respect, this argument is in my opinion misconceived. In *Noormahomed Kanji* (1) and *Poole* (2), it was held in effect that after the entering of a nolle prosequi, the depositions taken in the lower court may be used again for the purpose of filing a new information. It is an entirely different matter to say that they may be used as evidence in a new trial before a magistrate and I cannot see that one follows from the other. Section 227 of the Criminal Procedure Code applies "at the close of or during the enquiry", the enquiry meaning the preliminary enquiry before the magistrate. It is quite impossible to stretch the meaning of the words "at the close of the enquiry" to cover the position where the accused is brought again before the magistrate for trial on

an entirely new charge. At that stage the magistrate is embarking upon the trial of a new case and is bound to comply with the procedure laid down in Part VI of the Criminal Procedure Code, including, if the accused pleads not guilty, the hearing of witnesses under s. 204.

For these reasons I consider that the magistrate was wrong in regarding the case as a continuation of the preliminary enquiry proceedings. I do not think that this is a mere irregularity which is curable by s. 346 of the Criminal Procedure Code. In effect there was an omission to hear the prosecution evidence and this must in my view render the trial a nullity. Further, in considering whether to apply s. 346 I am bound, in accordance with the section, to have regard to the fact that an objection was raised at the trial to the procedure adopted by the magistrate.

The accused to whom I have referred so far and in respect of whom the application for revision was brought was in fact the second accused both at the preliminary enquiry and at the subsequent trial. At the trial the first accused was charged under s. 234 of the Penal Code and after he had pleaded not guilty his trial proceeded forthwith, the case of the second accused being adjourned for him to obtain legal advice. (I would observe in passing that this was also irregular; as the two accused were charged together they should have been tried together.) The first accused was found guilty and was bound over. His trial was even more irregular than that of the second accused in that it does not appear from the record that he was even given the opportunity of having witnesses called for cross-examination.

The convictions of both accused are set aside. The first accused's bond is cancelled and the fines paid by the second accused are to be refunded. In the event of either or both of the accused being charged again with these offences the trial must start de novo and must not be based on the preliminary enquiry proceedings.

Conviction quashed. Sentence set aside.

For the applicant:
K. A. Master, Q.C., and *G. S. Patel*, Dar-es-Salaam

For the Crown:
The Attorney-General, Tanganyika
A. E. Taylor (Crown Counsel, Tanganyika)

Michael s/o Meshaka v R
[1962] 1 EA 81 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	23 December 1961
Case Number:	149/1961
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Newbold JA
Sourced by:	LawAfrica

Appeal from: High Court of Tanganyika, Murphy, J.

[1] Appeal – Jurisdiction – Revision – Trial and conviction by magistrate – Case sent to judge for confirmation of sentence – Conviction and sentence altered – Subsequent appeal against original conviction and sentence – Jurisdiction to hear appeal after revisional order made – Criminal Procedure Code (*Cap.* 20), *s.* 7, *s.* 11 (4), *s.* 312, *s.* 314, *s.* 319, *s.* 320, *s.* 321, *s.* 322, *s.* 325, *s.* 329, *s.* 332 *and s.* 344 (*T.*).

Editor's Summary

The appellant had been convicted by a magistrate of rape and sentenced to two years' imprisonment and eight strokes. Two days later, with a view to appeal, he applied for a copy of the judgment and about the same time the relevant papers were sent to the High Court for confirmation of sentence. The sentence came before a judge for confirmation before the time for appeal had expired, despite which the judge revised the finding, altered the conviction to one of indecent assault, set aside the sentence of corporal punishment and reduced the sentence to eighteen months' imprisonment. Subsequently, the appellant having duly filed his appeal, when it came before the court for hearing the judge indicated that he would be disposed to allow the appeal on the merits but was unable to entertain it because of the order made in revision by the first judge. The appellant thereupon appealed again challenging the decision of the High Court that it had no jurisdiction to hear the appeal.

Held –

(i) the order of the first judge was a revisional order of the High Court and could not be considered to be still the order of the subordinate court made in conformity with a revisional order of the High Court.

(ii) as no right of appeal from an order of the High Court made either in revision or in confirmation is conferred by the Criminal Procedure Code or any other enactment, no appeal lay and the High Court was right in holding that the appeal could not be entertained; nevertheless the case was fit for application of the prerogative of mercy.

Appeal dismissed.

Cases referred to in judgment:

(1) *Lobozi s/o Katabaro v. R.* (1956), 23 E.A.C.A. 583.

(2) *R. v. Nealon* (1950), 17 E.A.C.A. 120.

(3) *R. v. Sironga* (1918), E.A.L.R. 148.

(4) *Suleman Ahmed v. R.* (1922), E.A.L.R. 19.

(5) *Simpson v. District Council of Nakuru* (1939), 6 E.A.C.A. 83.

(6) *Ntira s/o Magesa v. R.*, [1960] E.A. 149 (C.A.).

Judgment

The following judgment prepared by **Sir Kenneth O'connor P,** was read by direction of the court: This is an appeal from the High Court of Tanganyika. It raises the question whether the High Court has power to entertain an appeal after a judge of the High Court has made an

order on the case in the exercise of his revisional jurisdiction. We were informed that the facts were as follows:

On March 11, 1961, the appellant was convicted by a magistrate of rape and sentenced to two years' imprisonment and eight strokes. (In Tanganyika first class magistrates have power to try cases of rape.) The appellant then stated, and the magistrate recorded, that he, the appellant, wished to appeal.

Two days later, on March 13, the appellant applied for a copy of the judgment of the magistrate.

About that time the papers were sent to the High Court for confirmation of the sentence.

The sentence came up for confirmation before a judge of the High Court on May 3, 1961. The learned judge altered the conviction of rape to a conviction of indecent assault; and he set aside the sentence of corporal punishment and altered the sentence of two years' imprisonment to one of eighteen months' imprisonment. This was not mere confirmation of a sentence: it amounted to revision of the finding and the sentence.

In *Lobozi s/o Katabaro v. R.* (1) (1956), 23 E.A.C.A. 583, this court stated that it was a most undesirable practice that a revisional order enhancing a sentence should be made before the period of giving notice of appeal has run out, or where such notice has been given, before the appeal has been heard and determined. That was a case where the sentence had been enhanced; but the dictum applies with equal force to the order made in the present case. As this court said in *Lobozi's case* (1), at p. 585:

> "We are of opinion, however, that, save in cases where justice requires that an obviously improper conviction or illegal sentence be at once quashed or rectified, revisional powers should not be exercised before inquiry has been made whether an appeal has been or is likely to be lodged."

The reason is that if revisional powers are exercised before an actual or potential appeal is disposed of, this may result in the accused losing his right of appeal to the High Court and to this court.

In the present case, the time for appealing had not expired when the revisional powers were exercised. Under s. 314(*b*) of the Tanganyika Criminal Procedure Code the time requisite for obtaining a copy of the judgment appealed against is to be excluded from the thirty days (from the date of the finding) within which an appeal is required to be lodged. If inquiry had been made, it should have been ascertainable without difficulty that, notwithstanding that the accused had applied for a copy of the judgment of the magistrate on March 13, that judgment (which was a little over one page in length) had not yet been supplied when the matter was dealt with in revision by the learned judge on May 3. In fact, so we were informed, a copy of the judgment was not received by the appellant till June 8. He prepared his petition on June 10 and forwarded it to the High Court on June 14, well within the time allowed by s. 314.

On June 29, another judge admitted the appeal and, on July 14, it came before a third judge who was disposed to allow it on the merits, but held that he was unable to entertain the appeal because of the revisional order made by the first judge of the High Court. The result, as the case now comes before this court, is that the first judge who acted (no doubt, in ignorance of *R. v. Lobozi* (1), before the time for appealing had expired, has, if the order appealed from is correct, deprived a convicted person of what another judge of the High Court considers to be a good appeal to the High Court and, since no appeal from an order of the High Court made in revision lies to this court (see s. 325 of the Criminal Procedure Code and *R. v. Nealon* (2) (1950), 17 E.A.C.A. 120), may have deprived the convict of any redress at all other than that which may be obtainable by the exercise of the prerogative of mercy. We have now to decide whether the order appealed from, that is the order of the learned judge

of the High Court declining jurisdiction on the appeal to that court, is correct.

The provisions of the Criminal Procedure Code which it is necessary to consider are the following:

Section 7 deals with the sentences which a subordinate court of the first class may pass and their confirmation. It authorises a first class magistrate to pass a sentence of two years' imprisonment

> "Provided that . . . no sentence exceeding twelve months' imprisonment . . . shall be carried into effect, and no fine exceeding one thousand shillings shall be levied and no order for payment of a sum of money exceeding one thousand shillings shall be executed, until the record of the case . . . has been transmitted to, and the sentence has been confirmed by, the High Court".

This proviso merely requires that certain sentences shall not be carried into effect until confirmed. When they are confirmed, they may be carried into effect. If they are not confirmed, they may not be carried into effect. That is all that the proviso enacts or implies. The sentences if not quashed or altered are, and remain, the sentences of the subordinate court. When, however, records of cases come up for confirmation to the High Court, the judge frequently alters the sentence: he may even alter the conviction and may do so, in certain circumstances, without hearing the convict.

His authority to do so is sub-s. (4) of s. 11 which provides:

> "(4) The High Court may exercise the same powers in confirmation as are conferred upon it in revision by Part X of this Code."

The powers so exercised, though exercised in confirmation proceedings, are revisional, and not merely confirmatory, powers.

Section 312 enacts, inter alia, that, save as thereinafter provided, any person aggrieved by any finding, sentence or order by a subordinate court may appeal to the High Court.

Section 314 prescribes the time within which appeals must be brought.

Section 319 sets out the powers of the High Court on appeals from subordinate courts.

Section 320 provides (1) that when a case is decided on appeal by the High Court, it shall certify its judgment or order to the court by which the conviction, sentence or order appealed against was recorded or passed; and (2) that the court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court and, if necessary, the records shall be amended in accordance therewith. This section deals with decisions on appeal and not in revision or confirmation. Its only relevance is as a guide to the construction of the similar words of s. 332 which have caused difficulty and will be noticed hereafter. It is plain that, under s. 320, the leading order is the order of the High Court and the only orders which the subordinate court is required to make are orders conformable to the judgment or order of the High Court. For instance, if the High Court, on appeal, quashes a conviction without more, the subordinate court must order the release of the prisoner: if the High Court reduces the sentence, the subordinate court must alter the warrant to conform. Examples might be multiplied.

Section 325 provides that either party to proceedings under this Part of the Code (i.e. the Part which deals with appeals from subordinate courts) "other than proceedings by way of revision under s. 327 to s. 332" may appeal to the Court of Appeal for Eastern Africa. It is plain that no appeal to the Court of Appeal from an order of the High Court made in revision, or, for that matter, in

confirmation under s. 11 (4), is conferred by this section; and this is the only section which gives an appeal to this court from a decision which did not originate in the High Court or in a subordinate court exercising extended powers (s. 344). As already mentioned, it was held in *R. v. Nealon* (2), under a section similar to s. 325, that this court could not entertain an appeal from an order of the Supreme Court of Kenya made in revision.

Section 329 (1) empowers the High Court acting in revision – (*a*) in the case of a conviction, to exercise any of the powers conferred on it as a Court of Appeal by s. 319, s. 321 and s. 322 of the Code and to enhance the sentence; and (*b*) in the case of any order other than an order of acquittal, to alter or reverse such order. These powers are restricted in some respects by the following sub-sections of s. 329; but those provisions are not material to the present case.

Section 332 reads as follows:

> "332. When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith."

The decision of the question now before this court depends to a great extent upon the construction to be put upon s. 332. If the order appealed from was the order which the first learned judge made in the present case (which, as we have held, was a revisional order although made in pursuance of s. 11 (4) then, since no appeal is conferred by the Code from an order of the High Court to the High Court, the attempted appeal to the High Court against that order could not be entertained. Further, no appeal from it would lie to this court as no right of appeal to this court from an order of the High Court made either in revision or in confirmation is conferred by the Code or any other enactment. If, on the other hand (notwithstanding that the conviction was of an offence different from that of which the appellant was originally convicted by the subordinate court and that the sentence was altered) the finding and sentence could be considered to be still the finding and sentence of the subordinate court (albeit made in conformity with a revisional order of a judge of the High Court) then an appeal would lie to the High Court under s. 312 of the Code, and thereafter on matters of law to this court.

The authorities bearing on the question whether an appeal lies or not are conflicting. The first two cases are cases on similar sections in the Criminal Procedure Code of Kenya.

R. v. Sironga (3) (1918), E.A.L.R. 148 was a case in which Hamilton, C.J., and Pickering, J., were sitting in the revisional jurisdiction of the Supreme Court. A judge of the High Court had confirmed an illegal sentence and the questions raised were: (i) whether an order passed by the High Court in confirmation could be revised by the High Court; and (ii) whether an appeal lay to the High Court from a sentence of a subordinate court, notwithstanding that it had been confirmed by the High Court. Question (i) was answered in the negative; question (ii) in the affirmative. An extract from the judgment of Hamilton, C.J., at p. 149 is as follows:

> "The practice of this court hitherto has been to postpone making orders in confirmation or revision where notice of appeal has been given, but where an appeal has been entered subsequent to such orders having been made to proceed to deal with the appeal as though such orders did not exist. I am satisfied that this is the correct procedure in such cases, for the reason that the sentence whether confirmed or varied remains the sentence of the subordinate court.

> "Section 19 (1) of the Criminal Procedure Ordinance relating to confirmation of sentence states that no sentence by a subordinate court shall be carried into effect until the sentence has been confirmed by the High Court. And s. 346 provides that when the High Court revises the sentence of a subordinate court it shall certify its decision or order to that court which 'shall thereupon make such orders as are conformable to the decision so certified'.
>
> "It is thus clear that the Ordinance regards the sentence of the subordinate court whether confirmed or varied by the High Court as being still in its final form the sentence of the subordinate court."

In *Suleman Ahmed v. R.* (4) (1922), E.A.L.R. 19, Pickering, J., and Barton, Ag. J., sitting in the appellate jurisdiction of the Supreme Court, dissented from the judgment of HAMilton, C.J., in *R. v. Sironga* (3). The facts of the *Suleman Ahmed case* (4), so far as material, were: The appellant, and others, had been convicted by a magistrate of offences and sentenced. The file was sent to the Supreme Court for confirmation of the sentences. The Chief Justice set aside the convictions and substituted convictions under another section of the Penal Code and he (so he said) confirmed the sentences. As the original convictions had been quashed and convictions under another section substituted, it would, we think, have been more correct to say that what he did was to substitute new sentences of similar nature and duration. This must be what is meant by "alter the finding, maintaining the sentence" in the provision of the Kenya Criminal Procedure Code corresponding to s. 319 (1) of the Tanganyika Code. Their lordships who decided *Suleman Ahmed's case* (4), said: "This was of course an order in revision". They went on to hold that no appeal lay from an order of a judge of the Supreme Court exercising revisional powers. They continued at p. 21:

> "It was then suggested that an order in revision ought to be regarded as an order varying the judgment of the magistrate and that these appeals should be entertained as appeals from the convictions and sentences passed by the Senior Commissioner as varied by the order of the learned Chief Justice. It was contended that the terms in which the provisions of s. 346, Criminal Procedure Ordinance are couched supported that suggestion. This view met with the approval of Sir Robert Hamilton, C.J., in the case of *R. v. Sironga* (1918), E.A.L.R. 148. In the course of his judgment Sir Robert stated that in his opinion it was clear that the Criminal Procedure Ordinance regarded the sentence of a subordinate court whether confirmed or varied by the High Court as being still in its final form the sentence of the subordinate court.
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> "The passage just cited was not a part of the actual decision in the matter then before the court, which was an application to revise a revisional order. But an opinion of the late Chief Justice, though in fact expressed as an obiter dicta, carries great weight and this court should accept it in the course of the present appeal except for very clear reasons. We feel however that the wording of s. 346 does not carry the meaning attributed to it by Sir Robert Hamilton. Indeed the words which occur in that section, 'The court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified', appear to us to be incompatible with the view that an order made by the Supreme Court upon revision is merged in and becomes a portion of the judgment of the magistrate in respect of which the order in revision has been made. The final words of s. 346 are a corollary of the prior s. 333(*e*). In this particular case the Senior Commissioner has withdrawn the warrants under which the appellants were serving imprisonment and has replaced them by

> warrants setting forth a conviction under s. 147, I.P.C. By this act the Senior Commissioner made an 'order conformable to the decision' of the Supreme Court. The appellants are now imprisoned under warrants issued by the magistrate in such a form as accurately to embody the order of the Supreme Court. That order entered a conviction against each appellant under s. 147, I.P.C., and from that order no appeal lies. Finally we would point out that the dictum cited from the judgment of Sir Robert Hamilton would appear more consistent with a rulling that a revisional order can itself be revised than the decision actually arrived at in the case of *R. v. Sironga*. These appeals therefore so far as they are appeals against the convictions entered by the magistrate are vain since those convictions have already been quashed by an authority exercising competent jurisdiction. We are, however, in our opinion, able in these causes to consider the portions of the memoranda asking that the sentences be reduced. The learned Chief Justice has merely confirmed these sentences passed by the magistrate and against those sentences appeals lie."

In *Simpson v. District Council of Nakuru* (5) (1939), 6 E.A.C.A. 83, the appellant was originally acquitted on a charge brought against him in a subordinate court. A case was then stated to the Supreme Court of Kenya which directed the subordinate court to convict and sentence the appellant. He was accordingly convicted and sentenced. The appellant appealed to this court which decided that no appeal lay to it at that stage. The appellant then applied to the Supreme Court of Kenya for liberty to appeal to it out of time. This application was dismissed on the ground that no appeal lay. Against that dismissal the appellant appealed to this court. It was held by this court that an appeal lay to the Supreme Court from a conviction by the subordinate court made in compliance with a direction of the Supreme Court. In our opinion, *Simpson's case* (5), should be regarded as relating to the position where an order of a subordinate court is dealt with by a direction of the Supreme Court (or High Court) made on a Case Stated and no analogy should be drawn between such a direction and an order varying the order of a subordinate court made by the High Court in revision.

In *Lobozi s/o Katabaro v. R.* (1), this court noted the conflict between *R. v. Sironga* (3), and *Suleman Ahmed v. R.* (4), on the question whether an order made by the Supreme Court in revision is merged in and becomes a portion of the judgment of the magistrate from which appeal would lie, or whether it must be considered to be an order made in revision disposing of the case, from which no appeal would lie. This court said at p. 585:

> "The conflict expressed in these two decisions may some day have to be resolved, but we cite these cases, not because we necessarily agree wholly with one or the other, but merely to illustrate the difficulties which may arise from the practice of making revisional orders to the prejudice of a convicted person before the period for giving notice of appeal has expired or before an appeal has been heard and determined.
>
> "We are disposed to agree with the view taken in both *Sironga's* and *Suleman Ahmed's* cases that an order confirming a sentence does not prevent consideration of the sentence in the course of an appeal. We think the same rule applies to an order confirming a conviction and we understand that this is the view generally taken and acted upon in the superior courts of the East African territories.
>
> "We are of opinion, however, that save in cases where justice requires that an obviously improper conviction or illegal sentence be at once quashed or rectified revisional powers should not be exercised before inquiry has been made whether an appeal has been or is likely to be lodged."

That leaves open the question at issue in this case.

Ntira s/o Magesa v. R. (6), [1960] E.A. 149 (C.A.) turned upon a different section and is not, we think, in point.

In our opinion, the reasoning in *Suleman Ahmed v. R.* (4), as to the effect of an order made in revision was correct. A sentence of a subordinate court which is merely confirmed by the High Court remains a sentence of the subordinate court. But where, as here, a conviction of a subordinate court has been set aside by the High Court exercising revisional powers, a conviction of another offence has been substituted and a sentence has been imposed by the High Court in lieu of the sentence imposed by the magistrate, the order of the magistrate has gone: the operative order is the order of the High Court. The provision of s. 322 of the Code requiring the magistrate to make orders conformable to the High Court's decision refers to ancillary orders of the kind mentioned above and does not affect the fact that the decision and order are the decision and order of the High Court. From that decision and order no appeal lies either to the High Court or to this court, for the reason that none is conferred by the Tanganyika Code.

Recent legislation in Kenya has given an appeal from a decision of the Kenya Supreme Court made in revision to the Court of Appeal. The authorities in Tanganyika may think fit to promote similar legislation in that Territory to obviate the injustices which may arise from the present position.

With regard to the present case, we have reluctantly come to the conclusion that the learned judge was right in holding that he could not entertain the appeal. Similarly, we cannot consider any of the grounds of appeal which the appellant sought to adduce. We cannot give redress. The appeal to us must be dismissed.

The authorities concerned may consider this a fit case for the application of the prerogative of mercy.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika
W. R. Wickham (Crown Counsel, Tanganyika)

Aida Nunes v John Mbiyo Njonjo and Charles Kigwe
[1962] 1 EA 88 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	4 January 1962
Case Number:	53/1960
Before:	Sir Alastair Forbes VP, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Harley, J.

[1] Contract – Agreement to purchase business – Purchase conditional on grant of sublease – No time stipulated within which to complete sublease – Whether time the essence of the contract – Purchaser in possession of premises – Sublease not granted through delay – Notice by purchaser repudiating agreement – Claim for moneys paid under agreement – Whether purchaser entitled to repudiate agreement without notice.

Editor's Summary

By an agreement dated September 9, 1957, the appellant agreed to sell to the respondents the goodwill of a bar and restuarant with certain fixtures and fittings for Shs. 30,000/-. The purchase was to be completed on October 1, 1957, and the appellant agreed, subject to the consent of the head landlord, to grant a sublease of the premises on which the business was carried on for a term of five years from June 1, 1957. It was also further provided that the purchase should be subject to the grant of the sublease and if the appellant failed to grant the sublease then the agreement would become null and void and all purchase moneys paid thereunder would become repayable. The parties chose an advocate to prepare the sublease but whether the advocate was acting for the respondents alone or for both parties was later disputed. In November, 1957, both parties signed a document purporting to be the sublease and though it was sent for stamping and registration the Registrar of Titles refused registration for reasons which were surmountable. Little, if any, further action was taken to prepare a sublease which could be registered. On June 1, 1957, the respondents obtained possession of the portion of the premises in which the bar was carried on but for various reasons did not obtain possession of the restaurant premises until May, 1958. The respondents duly paid the Shs. 30,000/- but never having been granted a valid sublease, they caused a letter dated September 9, 1959, to be sent to the appellant claiming that as the sublease had not been granted within a reasonable time the agreement was null and void and repayment of Shs. 30,000/-. At the end of November, 1959, the respondents vacated the premises and on December 30, 1959, sued for recovery of the sum paid. The trial judge held that since the appellant had failed to procure a lease the respondents were entitled to leave the premises and claim back the money as the agreement had become void. On appeal, it was argued on behalf of the appellant that the provision in the agreement that it should become null and void if the appellant failed to grant a sublease did not make the agreement automatically void on such failure but voidable, that as no time had been fixed in the agreement for the grant of the sublease the respondents could not avoid the agreement until they had served a notice requiring the sublease to be granted within a specified and reasonable time and there had been a failure to comply with the notice, and further that the delay in the granting of the sublease was caused by the advocate who was the respondents' agent. The respondents contended that the agreement placed a duty on the appellant to grant the sublease within a reasonable time and that when, as in this case, there was inordinate delay despite demands for the sublease, there was no need to serve a notice.

Held –

(i) the agreement did not automatically become void if the sublease was not granted; but it became voidable at the election of the respondents.

(ii) when time has not been made the essence of a contract it is clear that, at least in contracts for the sale of land and the grant of leases, one of the parties cannot avoid the contract on the ground of unreasonable delay by the other until notice has been served making time the essence.

(iii) in holding that the respondents could avoid the agreement because the onus was on the appellant to grant the sublease and she had failed to do so, the trial judge had erred.

(iv) in the circumstances the respondents could have avoided the agreement only if they made time the essence of the contract by fixing a reasonable time within which the sublease must be granted coupled with a notice that, if not then granted, the agreement would be avoided, and this they had failed to do.

Appeal allowed.

Cases referred to in judgment:

(1) *Hughes v. Palmer*, 144 E.R. 839.

(2) *Davenport v. R.* (1877), 3 App. Cas. 115.

(3) *Farrant v. Olver*, 127 L.T. 145.

(4) *Simpson v. Connolly*, [1953] 2 All E.R. 474.

The following judgments were read:

Judgment

Newbold JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya whereby it was ordered, inter alia, that the appellant (then the defendant) do pay to the respondents (then the plaintiffs) the sum of Shs. 30,798/76, together with interest thereon, and the costs of the suit.

Certain facts will be set out in greater detail later, but the broad facts are that under an agreement in writing made on September 9, 1957, the appellant agreed to sell to the respondents the goodwill of the Chania Bar and Restaurant, together with certain specified fixtures and fittings, for the sum of Shs. 30,000/-, it being provided that the purchase should be completed on October 1, 1957. The Chania Bar and Restaurant was carried on in a portion of premises at Thika which the appellant held under a Crown lease. In the agreement the appellant also undertook, subject to the consent of the head landlord, to grant a sublease of the portion of the premises used for the purposes of the Chania Bar and Restaurant to the respondents for a term of five years from June 1, 1957, at a specified rental. The agreement also provided that the purchase should be subject to the granting of the sublease, and if the appellant failed to grant the sublease then the agreement would become null and void and all purchase moneys paid would become repayable. It was agreed by the appellant and the respondents that the sublease should be prepared by an advocate, Mr. Parry, but there is a dispute as to whether Mr. Parry was acting for the respondents alone or for both the appellant and the respondents. A document purporting to be the sublease was prepared by

Mr. Parry and signed by the appellant and respondents in November, 1957. This was then sent to the Registrar of Titles for stamping and registration, the requisite fees being paid, but for various reasons, none of which was insurmountable, the document was not registered and was returned to Mr. Parry. Little, if any, further action was taken to prepare a sublease which could be registered. The respondents obtained possession on June 1, 1957, of the portion of the premises in which the Chania Bar was carried on, but for various reasons they did not obtain possession of the premises in which the Chania Restaurant was carried on until May, 1958. The respondents paid the Shs. 30,000/- payable by them under

the agreement but have never been granted a valid sublease. On September 9, 1959, a letter was written to the appellant on behalf of the respondents claiming that as the sublease had not been granted within a reasonable time the agreement was null and void and the sum of Shs. 30,000/- was repayable to the respondents and demand was made therefor. Letters then passed between the respective advocates for the appellant and the respondents, the respondents vacated the premises at the end of November, 1959, and filed suit for the recovery of this sum on December 30, 1959. The suit was defended and a counterclaim brought which in turn was defended. At the hearing before the learned judge a number of matters were considered, but this appeal is concerned with one issue only, that is whether the respondents were entitled to the repayment of Shs. 30,000/-: if they were, the decision of the learned judge ordering payment of the sum of Shs. 30,798/76 is correct; if they were not then the decision in that respect, save as to a trifling sum of Shs. 80/-, is to be set aside.

The learned judge, having stated generally that on the question of credibility he preferred the evidence of the first respondent to that of the appellant and her husband and that the appellant was certainly not objecting or putting difficulties in the respondents' path but had adopted the attitude that she had done all that could reasonably be expected of her, continued as follows:

> "Perhaps the main issue may be summarised this way: 'Did defendant fail to grant a lease and, if so, was plaintiff justified in claiming the agreement to be thereafter void except in so far as it provided for repayment of the Shs. 30,000/-?' If a lessor agrees to grant a lease to a lessee, it is usually up to both parties equally to draft and finalise the document of lease, if such a document is required. Of course it can be a matter of special arrangement who is responsible for the formalities. In this case it seems to me that the onus of getting the lease properly prepared and registered was put fairly and squarely on defendant's shoulders. In this particular case there was a charge on the property. It may or may not have been difficult to get the document exhibit 12 registered as a lease. Mr. Parry had in fact submitted the document to the Department of Lands who replied on December 16, 1957 (exhibit C).
>
> "'I have to notify you that I am unable to register the document submitted by you on the 12th instant, because –
>
> (1) The document is not drawn in the prescribed form of the Registration of Titles Ordinance (Cap. 160).
>
> (2) The title is not clear.
>
> (3) The lease is in respect of a portion of the building, and therefore an architect's plan must be deposited in the Registry, and referred to in the lease.
>
> (4) The original Grant I.R. 11929 is not presented for endorsement purposes.
>
> (5) The consent of the Commissioner of Lands has not been obtained, vide condition 8 contained in the original grant.'
>
> "Now, either these difficulties and objections could be overcome, or they were insurmountable. As I have said, in my view it was the defendant who contracted to grant the lease and have it put in final shape. Plaintiff had made it clear: 'You must get me the lease, or else our agreement is void and the purchase money is repayable'. Defendant never in fact got the lease registered, and indeed neglected to take any active steps towards registration. At the least she or her advocates, if they thought registration possible, should have said: 'Hand the draft over to us and we will take all

> necessary steps at once'. Since defendant in the event failed to procure a lease, plaintiff was entitled to leave the premises and claim his money back. The agreement became void, and plaintiff no longer liable to pay rent."

Mr. Nazareth, who appeared for the appellant, submitted that the respondents were not entitled to the repayment of the Shs. 30,000/- on two main grounds. The first was that the provision in the agreement that it should become null and void if the appellant failed to grant a sublease did not make the agreement automatically void on such failure but voidable; and that as no time had been fixed in the agreement for the grant of the sublease it was not open to the respondents, merely by reason of the delay of the appellant to grant a sublease, to avoid the agreement until they had served a notice requiring the sublease to be granted within a specified time (which should be a reasonable time) and there had been a failure to comply with the notice. The second was that the delay in the granting of the sublease was caused by Mr. Parry, who he submitted was the advocate for the respondents alone and to whom at the wish of the respondents the preparation of the sublease had been entrusted, and that the respondents were not entitled to avoid the agreement on the ground of a delay caused by their agent. Mr. Ransley, who appeared for the respondents, did not seriously dispute that the agreement was not void but voidable on a failure to grant the sublease. He submitted, however, that the agreement placed a duty on the appellant to grant the sublease within a reasonable time; that while the appellant had never actually refused to grant the sublease she had adopted an apathetic attitude to the matter and clearly had made no effort to perform her duty; and that when, as in this case, there was inordinate delay following demands for the grant of the sublease, which formed a part of the consideration for the payment of the Shs. 30,000/- and which the respondents regarded as an essential part of the agreement, then there was no necessity to serve a notice specifying a particular date by which the sublease must be granted before the respondents could exercise their right to avoid the agreement and claim the repayment of the Shs. 30,000/-. As regards the second ground he submitted that Mr. Parry was acting for both parties and thus the delay was caused by the agent of the appellant who was under a contractual duty to grant the sublease.

Clauses 4, 6 and 11 of the agreement are as follows:

> "4. The vendor will use every endeavour to secure the assignment of a portion of the lease granted to her to the purchasers.
>
>
>
> "6. The vendor subject to the consent of the head landlord undertakes to grant a lease to the purchasers of that portion of the premises described and delineated in red on the plan attached hereto for a term of five years from the first day of June, one thousand nine hundred and fifty-seven subject to the terms and conditions contained in the said head lease upon the payment of a monthly rental of shillings one thousand six hundred (Shs. 1,600/-) payable in advance.
>
>
>
> "11. This purchase shall also be subject to the granting to the purchasers of a sublease of the said premises in accordance with the plan attached hereto and in the event of the failure on the part of the vendor to grant such a sublease this agreement shall become null and void and all purchase moneys paid hereunder shall immediately become repayable."

In my view these clauses clearly place on the appellant a duty to grant a sublease and to do so within a reasonable time. I agree with Mr. Nazareth that

cl. 11 does not mean that the agreement automatically becomes void if the sublease is not granted but that it makes the agreement voidable at the election of the respondents. Where under the terms of a transaction it is stated that the transaction shall become null and void if a particular thing is not done or suffered by one of the parties to the transaction then, as a general rule, this means that the transaction is voidable at the election of the party not in default: see *Hughes v. Palmer* (1), 144 E.R. 839; and *Davenport v. R.* (2) (1877), 3 App. Cas. 115. In this case the appellant was under a contractual obligation to grant a sublease for a period of five years from June 1, 1957, and neither by September 9, 1959, when a letter was written on behalf of the respondents claiming to avoid the agreement on the ground of default of such grant, nor by November, 1959, when the respondents vacated the premises, had such sublease been granted. The question is whether in the circumstances of this case the respondents were justified in taking the action which they did in the manner which they did. There had undoubtedly been unreasonable delay and in my view the appellant had not done all she should have done. As Mr. Ransley put it, the appellant was apathetic in the performance of her obligations, but, as the learned judge found, there was no refusal to perform her obligation though there was failure to do so. There was no finding by the learned judge as to whether Mr. Parry was acting for both parties in the preparation of the lease, but it was the respondents' case that he was so acting and as the learned judge generally preferred the evidence of the first respondent I will assume that was the position. Any default on the part of Mr. Parry was thus at least partly the default of the appellant. Nor was there any finding by the learned judge as to whether the first respondent had requested the appellant to grant the lease as required by the agreement, but in his evidence he stated that up to the end of 1958 he had repeatedly asked her to do so and on one occasion he had asked her to grant it within one or two months. I shall assume that he in fact did so. In November, 1957, a document which purported to be the lease was in fact prepared, signed by the parties and submitted for registration, but registration was refused for the reasons set out in the letter quoted in the extract referred to above in the judgment of the learned judge. The evidence, which was not controverted, was that the objections could with reasonable diligence have been surmounted and the sublease granted. About the end of 1958 the second respondent collected the papers from Mr. Parry and thereafter there does not seem to have been any further action in relation to the lease on the part of either the appellant or the respondents until the letter of September 9, 1959. Although there had been unreasonable delay on the part of the appellant in granting the sublease, it is noteworthy that the respondents had in fact been in possession of the premises for nearly two and one-half years; that from the end of 1958 the respondents had not made any request for the grant of the sublease; that at the end of 1958 the first respondent had bought out the interest of the second respondent (whose name was on the record purely for nominal purposes); and that though in 1958 the question of possession of the premises in which the Chania Restaurant was carried on was pursued vigorously by Messrs. Gledhill and Oulton, advocates acting on behalf of the respondents, with the appellant no reference was made to the failure to grant the sublease. In these circumstances the letter of September 9, 1959, must have come as a bolt out of the blue to the appellant. Indeed, Mr. Nazareth submitted that from the actions of the respondents and the fact that they remained in possession for so long without a sublease it should be assumed that they had waived the obligation to grant a sublease. This, however, was not pleaded in the defence nor was it a ground of appeal and the findings of fact of the learned judge provide no support for such a submission.

When time has not been made the essence of the contract and the circumstances are not such as to make it obvious that time is the essence, it is clear that,

at least in contracts relating to the sale of land and the grant of leases, a party to the contract cannot avoid it on the ground of unreasonable delay by the other party until a notice has been served after the unreasonable delay making time the essence – see Halsbury's Laws of England (3rd Edn.), Vol. 8, p. 165, para. 282 and the cases there cited. Mr. Ransley relied on a dictum of Sargant, J., in *Farrant v. Olver* (3), 127 L.T. 145 at p. 146 when he stated:

> "It is not necessary that time should be made of the essence of the contract when the defendant has so persistently and for so long refused to perform the contract."

He submitted that those words aptly covered the circumstances of the present appeal as the appellant, in spite of repeated oral requests, had failed for an inordinate time to carry out her contractual obligation to grant the sublease and thus there was no necessity to give a notice specifying a particular time within which the sublease must be granted before the respondents could avoid the agreement. It is to be noted that in the *Farrant* case (3), a notice was in fact served specifying a date within which the contract was to be completed: if, therefore, the dictum relates to circumstances in which a date for completion has not been fixed it is obiter and runs contrary to a long line of settled decisions both in law and in equity. Further, the dictum relates to a refusal to perform the contract, but the facts as found in this appeal are that there was no refusal to perform but a failure to perform. I do not regard the *Farrant* case (3), as authority for the proposition that, in the circumstances of this case, the respondents, after being in possession for nearly half the period for which the sublease was to be granted and after taking no action for at least nine months before the letter of September 9, 1959, could suddenly and without notice avoid the agreement. In *Simpson v. Connolly* (4), [1953] 2 All E.R. 474, a case not referred to by counsel, Finnemore, J., said at p. 476 in relation to contracts for the sale of land:

> "The purchaser or vendor cannot just say: 'The time has gone and the contract is at an end'. Some kind of notice must be given or what has been called in this case an ultimatum to say that: 'After a certain time if you do not complete this matter we shall treat the contract as at an end'. No such ultimatum was given in this case, and, therefore (it is argued), when the plaintiff said to the defendant in July that he was no longer bound by this agreement, whatever it was, he was acting wrongly, because he had not the power to do so."

Finnemore, J., went on to hold that the particular agreement in that case was not for the sale of land but to discharge a debt if land was transferred and as the land was not transferred within a reasonable time the debt could be sued for without first serving a notice specifying the time within which the land ought to be transferred. The dictum of Finnemore, J., concisely and clearly sets out the law applicable on the facts of this appeal and as no sufficient notice specifying a reasonable time limit was given in this case the respondents were not entitled to avoid the agreement in the manner in which they purported to do so. For the respondents to avoid the agreement it is not sufficient, as the learned judge held, that the onus should be on the appellant to grant the sublease and that she failed to do so; in the circumstances of this case the respondents could not avoid the agreement unless, after the unreasonable delay, the respondents made time of the essence of the contract by fixing a reasonable time within which the sublease must be granted coupled with a notice that if not then granted the agreement would be avoided. This was not done and with respect to the learned judge I think he erred in coming to the decision which he did.

In my view the appeal should be allowed and the judgment and decree of the Supreme Court, in so far as it ordered that the appellant do pay to the respondents the sum of Shs. 30,798/76, together with interest thereon, and the costs of the suit, should be set aside and instead there should be substituted an order dismissing the suit with costs. The respondents admittedly owe the sum of Shs. 80/- to the appellant and this was claimed in the counterclaim. The learned judge dismissed the counterclaim with costs but took account of the Shs. 80/- by deducting it from the amount of Shs. 30,000/- which he ordered should be paid to the respondents. In her memorandum of appeal the appellant did not specifically refer to the order on the counterclaim, although appealing in general against the whole of the learned judge's decision. At the commencement of the hearing of the appeal, however, Mr. Nazareth informed us that the appellant was not in fact appealing against the order on the counterclaim and no argument was directed thereon. I think the proper order in relation to the sum of Shs. 80/- should be that the decree of the Supreme Court on the counterclaim be varied by ordering that the plaintiffs do pay to the defendant the sum of Shs. 80/- on the counterclaim but that the defendant do pay the costs of the counterclaim. The appellant should have the costs of the appeal, and there should be a certificate for two counsel.

Sir Alastair Forbes VP: I agree and have nothing to add. There will be an order in the terms proposed by the learned justice of appeal.

Crawshaw JA: I also agree.

Appeal allowed.

For the appellant:
D. N. & R. N. Khanna, Nairobi
J. M. Nazareth, Q.C, and *R. N. Khana*

For the respondent:
Sampson & Ransley, Nairobi
P. J. Ransley

Saleh Ahmed v R
[1962] 1 EA 95 (SCZ)

Division:	HH The Sultan's Court for Zanzibar at Zanzibar
Date of judgment:	24 March 1962
Case Number:	5/1962
Before:	Horsfall Ag CJ
Sourced by:	LawAfrica

[1] Criminal law – Failing to attend judicial proceedings when required – Notice to attend court of Mudir – Refusal to accept notice – Notice not delivered personally but read aloud – Whether offence

committed – Administrative Authority Decree (*Cap.* 32), *s.* 5 (5) (*Z.*) – *Criminal Procedure Decree* (*Cap.* 14) (*Z.*).

Editor's Summary

The accused appealed against a conviction of failing to appear before the Mudir when called upon to do so under s. 5 (5) of the Administrative Authority Decree. The accused had repeatedly refused to accept from a process server a notice requiring his attendance and the process server had then read the notice aloud in the presence of witnesses whereupon the accused had replied that he would not attend before the Mudir. On appeal it was submitted, inter alia, that the conviction could not be sustained as there was no evidence that the notice was personally delivered to the accused.

Held – section 5 (5) of the Administrative Authority Decree requires that notice in writing must be personally delivered to the person whose attendance is required and accordingly reading the notice aloud was not personal delivery.

Conviction and sentence quashed. Accused acquitted and discharged.

Judgment

Horsfall Ag CJ: The accused was convicted of failing to appear before the Mudir when called upon to do so under s. 5 (5) of the Administrative Authority Decree (now Cap. 32 of the Revised Laws).

It is alleged, inter alia, by Mr. Talati for the accused that the conviction cannot be sustained because there is no evidence that the notice in writing was personally delivered to the accused and secondly there is no evidence that the accused failed to attend before the Mudir at the time and place within the Mudiria specified in the notice.

Crown counsel rightly, in my view, did not seek to sustain the conviction. As the case generally affects Mudirs in the exercise of their public duties I will give reasons why I quash the conviction.

This is a criminal prosecution and, as in all such cases, the prosecution is required to prove the guilt of the accused beyond reasonable doubt according to the elements of the offence as created by s. 5 (5).

There is no dispute that the accused repeatedly refused to accept the notice when requested to do so by the Sheha. The Sheha then read the notice aloud to the accused in the presence of witnesses and the accused replied that he was not going to attend before the Mudir on that or any other day. The magistrate correctly found that the accused had determined to defy the orders of the Mudir, but this is not an offence unless the orders of the Mudir have been communicated to the accused in the way prescribed by the section creating the offence. The section requires that the notice in writing must be personally delivered to the person whose attendance is required. The notice is not a summons within the meaning of the Criminal Procedure Decree, Cap. 14, and the provisions therein relating to the service of summons do not apply.

If an accused will not accept the notice, when requested, the provisions of the section requiring personal delivery are complied with if the server touches him with the paper or, if that cannot be effected without a disturbance, throwing the notice at him. There is no personal delivery in reading the notice aloud. Provided that there has been personal delivery as above explained, there is no objection to the server reading aloud or explaining the meaning of the notice. At the trial the prosecution must lead evidence of how personal delivery was effected and prove that the Mudir signed the notice. A copy must be tendered and, when admitted by the court as evidence, duly marked as an exhibit. There must also be evidence that the accused failed to attend at the appointed time and place. This can be given by anyone who knows the accused and can say that he was at the appointed place at the appointed time and that accused failed to appear. The magistrate has materially misdirected himself in his judgment when he said:

> "If the accused went to the Mudir on 16/11/61 the Sheha would not have put a charge against the accused. He had complained after ascertaining from the Mudir and from the accused's own statement that the accused failed to appear before the Mudir on 16/11/61 at 9 a.m. and thereafter."

The accused never said that he had failed to appear. He said that he was not going to appear. Also it is supposition and at the best only hearsay to assume what the Mudir told the Sheha.

The conviction and sentence is quashed and the accused is acquitted and discharged. If the fine of Shs. 20/- has been paid it is to be returned to the accused.

Conviction and sentence quashed. Accused acquitted and discharged.

For the accused:
Wiggin & Stephens, Zanzibar
P. S. Talati

For the Crown:
The Attorney-General, Zanzibar
W. Dourado (Crown Counsel, Zanzibar)

The Halal Shipping Company Limited v The Trustees of the Port of Aden and Another

[1962] 1 EA 97 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	23 February 1962
Case Number:	68/1961
Before:	Sir Alastair Forbes VP, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden – Light, Additional J.

[1] Shipping – Port – Port storage charges – Shipping agents – Charges debited to deposit account of shipping agents – Liability of shipping agents for charges – Whether charges can be raised from time to time before removal of goods – Specific Relief Ordinance, s. 41 (*A.*) *– Port Trust Ordinance, s.* 2, *s.* 39, *s.* 44*A and s.* 48 (*A.*) *– Port Trust By-laws, by-law* 22 (*A.*).

Editor's Summary

The appellants as shipping agents maintained with the first respondent, the Port Trust, a deposit account on conditions that goods stored in the premises of the first respondent should be released on presentation of a delivery note endorsed with an authority for the debiting of storage charges to the appellants' deposit account. On October 11, 1959, goods consigned to the second respondent were landed by the appellants and stored in the premises of the first respondent. The second respondent did not take delivery and the goods were sold by the first respondent in November, 1960, under statutory power. The goods had deteriorated and the price realised did not equal the storage charges. Between October, 1959, and June 29, 1960, the first respondent had debited the deposit account with storage charges amounting in all to Shs. 5,230/95. The appellants were duly notified of the debits but did not protest until June 29, 1960. Later they sued for a declaration that the first respondent was not entitled to debit their account with these charges for which they were not liable and that if they were so liable they were entitled to be indemnified for the same by the second respondent as consignee. This suit having been dismissed, they appealed and counsel for the first respondent took the preliminary point that the appeal was incompetent as the Supreme Court had no jurisdiction to make the declarations sought in view of s. 41 of the Specific Relief Ordinance. Counsel for the appellants then applied for and obtained leave to amend the plaint so as to include a prayer for a mandatory injunction that the first respondent should recredit the charges to the account of the appellants or pay this sum to the appellants. The appellants' argument was that under s. 39 (2) of the Port Trust Ordinance, storage charges only became due when goods were removed from the premises, that under the conditions upon which the deposit account was opened a debit could only be made when the goods were removed and that the appellants had not by failing to object to previous debits lost their right to claim that all the debits were wrongly made. Section 39 (2) provides that "charges . . . in respect of goods to be removed from the premises of the board shall be payable by the owner before the goods are removed . . ." By-law 22 of the By-laws made under the Ordinance reserves to the board the right "to collect at such time as it may determine, rent and other charges which have accrued upon goods remaining on a public wharf or on premises of the board".

Held –

(i) the object of s. 39 (2) of the Port Trust Ordinance is to restrict the release of goods until the charges for the goods have been paid; if it had been intended that the charges in respect of the goods to be removed should be payable only "on" or "immediately before" removal, then the legislation would have so stated, especially having regard to the phraseology used in respect of landed goods.

(ii) under by-law 22 the Port Trust may collect the charges at such time as it determines, which in this case was the moment when the deposit account was debited with storage charges; the by-law was intra vires as the method of payment must include the time at which payment was to be made.

(iii) the storage charges accrued due and were payable by the appellant in accordance with the provisions of the Ordinance and the relevant By-laws at the times they were debited by the Port Trust to the deposit account.

Appeal dismissed.

Case referred to in judgment:

(1) *Gullino* (*Aden*) *Ltd. v. The Trustees of the Port of Aden*, [1960] E.A. 247 (C.A.).

The following judgments were read by direction of the court:

Judgment

Newbold JA: This is an appeal by the appellants (hereinafter called the shipping agents) against a judgment and decree of the Supreme Court of Aden dated April 11, 1961, dismissing with costs a suit which had been brought by the shipping agents against the first respondent (hereinafter called the Port Trust) and the second respondent (hereinafter called the consignee). In the plaint the shipping agents asked for declarations, as against the Port Trust, that they were not liable to the Port Trust for certain storage charges and that the Port Trust was not entitled to debit the account of the shipping agents with such charges; and, as against the consignee, that if they were liable to the Port Trust for such charges they were entitled to be indemnified by the consignee in respect of such liability.

When the appeal came on for hearing Mr. Sanghani, who appeared for the Port Trust, took the preliminary point that the appeal was incompetent as the Supreme Court had no jurisdiction to make the declarations asked for in the suit having regard to the provisions of s. 41 of the Specific Relief Ordinance (Cap. 140 of the Laws of Aden). Mr. Nunn, who appeared for the shipping agents, argued that the Supreme Court had jurisdiction to make the declarations sought and also asked that the plaint should be amended to include a prayer, as against the Port Trust, for a mandatory injunction that the Port Trust do recredit the account of the shipping agents with the amount of the relevant storage charges previously debited or, in the alternative, that the Port Trust do pay to the shipping agents the amount so debited, and, as against the consignee, for an order that the consignee do pay to the shipping agents the amount of such charges as the shipping agents are liable to pay to the Port Trust. Mr. Iyer, who appeared for the consignee, did not oppose the preliminary point raised by Mr. Sanghani but stated he would wish the appeal to be heard on its merits; he did however oppose the application for the amendment. We allowed the application for amendment, stating that we would give our reasons therefor in our judgments, and ordered that the amendments asked for be made and that the shipping agents should pay the costs of the Port Trust and consignee in relation to the application in any event.

Section 41 (1) of the Specific Relief Ordinance reads as follows:

> "41(1) Any person entitled to any legal status, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such status or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

> "Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

Mr. Sanghani submitted that the jurisdiction to make a declaratory order is, by virtue of the proviso, taken away where the plaintiff has a right to relief other than a mere declaratory judgment and does not seek that relief; that the plaint in this case sought only a declaratory judgment without seeking any further specific relief; that the suit was basically a money claim in respect of an incorrect debit and that if the shipping agents were correct they were entitled either, as against the Port Trust, to be repaid the amount incorrectly debited or, as against the consignee, to be reimbursed the amount for which they were liable to the Port Trust; and that those specific reliefs should have been sought in the plaint and as they were not the Supreme Court had no jurisdiction to grant the declarations sought.

Mr. Nunn submitted that in the plaint there was, in addition to the prayer for the declarations, a prayer for "such other relief as shall be thought just and proper"; that though in para. 8 of the defence of the Port Trust, it was pleaded that the claim for a declaratory decree was not maintainable at law the point was not argued before the Supreme Court and if it had been he would have applied for an amendment seeking specific relief and that in these circumstances he asked for the amendments seeking specific relief at this stage.

Section 41 of the Specific Relief Ordinance gives to the court in certain circumstances a power to grant a declaration, but even if the required circumstances exist the power is one to be exercised in the discretion of the court. It has long been recognised that this discretion should be exercised with the greatest care when no specific relief is asked for in addition to the declaration; and the proviso to the section precludes the making of a declaration where the plaintiff, being able to seek specific relief, omits to do so. The reason for the proviso is obvious: if a specific remedy is open to the plaintiff but he does not seek it at the same time this might lead to an unneccessary further suit. In this case it was clearly open to the shipping agents to seek specific relief against either the Port Trust or the consignee; they omitted to do so and sought only a declaratory judgment.

In the result, therefore, the court would have no jurisdiction to make the declaration sought. If this point had been brought to the attention of the Supreme Court it should either have allowed an amendment seeking the appropriate specific relief or, if no application for such amendment was made, declined to grant the declaration on the ground of lack of jurisdiction to do so. It is true that the defence of the Port Trust did plead that the claim for a declaratory judgment was not maintainable in law, a point of law it was unnecessary to plead, but it did not refer to any section and the point though pleaded was not argued before the Supreme Court but taken in argument for the first time before us. In these circumstances we considered that the amendment which would no doubt have been applied for before the Supreme Court if the point had been argued, and for which application was made before us, should be allowed, and accordingly we made the order set out earlier.

I turn now to the appeal. Mr. Nunn during the course of his argument withdrew the appeal of the shipping agents against the judgment and decree of the Supreme Court insofar as it related to the consignee and the appeal in respect of the consignee was accordingly dismissed with costs. It is thus only necessary to consider the facts and the law in relation to the position of the shipping agents and the Port Trust.

The relevant facts, briefly, are that the shipping agents maintain with the Port Trust a deposit account on certain conditions which, in essence, are that the goods stored in the Port Trust premises will be released on presentation of

what, in effect, is a delivery note endorsed with an authority to debit the storage charges, etc. in respect of the goods to the shipping agents' deposit account. On October 11, 1959, certain goods consigned to the consignee were landed by the shipping agents and stored in the premises of the Port Trust. The consignee did not take delivery of the goods, which remained on the premises of the Port Trust until they were sold on November 3, 1960, by the Port Trust in the exercise of their statutory powers. The goods had deteriorated as a result of the long period of storage and the price realised was insufficient to pay the storage charges. Between October 23, 1959, and June 29, 1960, the deposit account of the shipping agents was debited on a number of occasions with the storage charges in respect of the goods and on each debit being made the shipping agents were notified but did not protest until June 29, 1960, after which no further debits were made. At that date the total sums debited amounted to Shs. 5,230/95. It is this sum which the shipping agents claim that the Port Trust was not entitled to debit and which should be repaid to, or recredited to the account of, the shipping agents by the Port Trust.

Mr. Nunn submitted that under s. 39 (2) of the Port Trust Ordinance (Cap. 122 of the Laws of Aden and hereinafter referred to as the Ordinance) the storage charges only became due when the goods were removed; that under the conditions on which the deposit account was opened a debit to the account was to be made only when the goods were removed; and that the shipping agents had not by failing to object to previous debits lost their right to claim that the debits were wrongly made. He conceded that if under the Ordinance and the By-Laws made thereunder the storage charges accrued due and were payable by the owner (as defined in the Ordinance) at any time or times before the removal of the goods, then the Port Trust was entitled to debit the deposit account as they had done.

If therefore the statutory provisions are such as to result in the storage charges accruing due and being payable by the owner at any time or times prior to the removal of the goods this would dispose of the appeal and it would be unnecessary to consider the contractual position resulting from the conditions on which the deposit account was to be operated, or any question of estoppel, a point raised by Mr. Sanghani and arising out of the acceptance by the shipping agents of the earlier debts.

The power of the Port Trust to recover storage charges was considered by this court in *Gullino* (*Aden*) *Ltd. v. The Trustees of the Port of Aden* (1), [1960] E.A. 247 (C.A.), but the legislation then considered has subsequently been considerably amended in material respects. The decision in that case, therefore, save insofar as it relates to general propositions of law has no direct relevance to the construction of the amended legislation. Section 39 (2) and s. 44A of the Ordinance and by-law 22 of the By-laws made under the Ordinance now read as follows:

> "39(2) Tolls, rates and charges in respect of goods to be landed shall become payable by the owner immediately on the landing of the goods, and in respect of goods to be removed from the premises of the board or to be shipped for export shall be payable by the owner before the goods are removed or shipped or taken on board a lighter for the purpose of being shipped.
>
> "44A. Notwithstanding the provisions of any other law to the contrary, the board may recover by suit, any tolls, dues, rents, rates, charges, damages, expenses, costs, or, where the proceeds of any sale held under the provisions of s. 43 of this Ordinance have been insufficient to meet a debt due, any outstanding balance of such debt, or any penalties or fines payable to or recoverable by the Board under this Ordinance or any by-law made in pursuance thereof.

> "22. The board reserves the right to collect at such time as it may determine, rent and other charges which have accrued upon goods remaining on a public wharf or on the premises of the board."

Section 39 (2) of the Ordinance clearly places a liability on the owner to pay the storage charges – a liability which did not exist in the sub-section in the form in which it was considered in the *Gullino case* (1). The owner as defined in s. 2 of the Ordinance includes the shipping agents; thus there is clearly a right in the Port Trust to receive the storage charges from the shipping agents. The sole remaining question is whether the storage charges became due and payable by the owner before the removal of the goods. Mr. Nunn submitted that under s. 39 (2) of the Ordinance those charges only became due when the goods were removed and that by-law 22 was ultra vires as the power given to make by-laws in relation to the method of payment did not include power to determine the time of payment. Mr. Sanghani submitted that such a construction of s. 39 (2) would mean the substitution of the word "on" for the word "before" and also the disregard of by-law 22, which he submitted was intra vires.

I agree with Mr. Sanghani's submissions. I see no reason to construe the word "before" in the phrase "before the goods are removed" in any way other than in accordance with its natural meaning. It is to be noted that in the same sub-section it is stated that the charges in respect of the landing of goods are to be payable "immediately on the landing" whereas the charges in respect of goods to be removed are to be payable "before the goods are removed". The difference in phraseology, in my view, clearly connotes a difference in the time when the charges become payable. Without this provision it might be contended that the charges did not become payable until after removal. The object is to restrict the release of the goods until after charges have been paid; if it had been intended that the charges in respect of the goods to be removed should be payable only "on" removal or "immediately before" removal then the legislation would have so stated, especially having regard to the phraseology used in respect of landed goods. By-law 22 makes it quite clear that the Port Trust may collect the charges at such time as it determines, which in this case is the moment when the deposit account was debited with the storage charges, and in my view the by-law is intra vires as the method of payment must include the time at which payment is to be made.

In my view, therefore, the storage charges accrued due and were payable by the shipping agents in accordance with the provisions of the Ordinance and the By-laws at the times they were debited by the Port Trust to the deposit account. This being so, it is unnecessary to consider any liability which may exist in relation to the contractual position of the Port Trust and the shipping agents or any question of estoppel.

I would dismiss the appeal against the first respondent with costs. As I stated earlier the appeal against the second respondent was also dismissed with costs.

Sir Alastair Forbes VP: I agree and have nothing to add. The appeal is dismissed with costs.

Crawshaw JA: I see no real difficulty in this matter. Section 48 of the Port Trust Ordinance (hereinafter referred to as the Ordinance) empowers the making of by-laws, and sub-s. (1)(*d*) in particular enables by-laws to be made,

> "for settling the method of payment of tolls, charges and rates to be levied under this Ordinance;"

Pursuant to the powers contained in s. 48, By-laws were made in 1958, of which by-law 22 reads as follows:

> "22. The board reserves the right to collect at such times as it may determine, rent and other charges which have accrued upon goods remaining on a public wharf or on the premises of the board."

In a Schedule to the By-laws the relevant charges are prescribed at so much "per week or part thereof". Mr. Nunn, for the shipping agents, submitted that this does not mean that the charges are payable weekly, but in the absence of anything to the contrary in the By-laws it is my view that that is the clear meaning. Mr. Nunn further submitted that if that is the meaning, the provision is ultra vires s. 48(1)(*d*) of the Ordinance, as there is a difference between the time within which payment must be made and "method of payment". I am afraid I am unable to agree with him; in my opinion "method of payment" could properly include provision as to time. Mr. Nunn submitted also that if the provisions in the By-laws were to mean that the charges became payable weekly they would be ultra vires s. 39 (2) of the Ordinance which, inter alia, provides that charges in respect of goods to be removed from the premises of the board "shall be payable before the goods are removed". Here again I find myself unable to agree with Mr. Nunn. To my mind the provision does not signify, as I understand Mr. Nunn submits it does, that payment is not required to be made until immediately before the goods are removed, but means no more than that removal of the goods will not be permitted until the charges have been paid; it does not I think in any way limit more exact provisions as to time of payment being made by By-laws promulgated under s. 48.

I understood Mr. Nunn to say that if the charges did become due and payable weekly, then he did not challenge the right of the Port Trust to recover from the shipping agents as coming within the definition of "owner" in s. 2 of the Ordinance; nor in those circumstances did he challenge the right of the Port Trust to debit the charges as they became due against the shipping agents' deposit with the Port Trust.

I would dismiss the appeal against the first respondent with costs, the appeal against the second respondent having already been dismissed with costs.

Appeal dismissed.

For the appellants:
Westby Nunn & Kazi, Aden
W. Nunn

For the first respondent:
P. K. Sanghani' Aden

For the second respondent:
S. N. Iyer, Aden

Balwantrai D Bhatt v Ajeet Singh And Another
[1962] 1 EA 103 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	7 March 1962
Case Number:	82/1960

Before: Sir Alastair Forbes VP

Sourced by: LawAfrica

(Reference on taxation under r. 6 (2) of the Eastern African Court of Appeal Rules, 1954, from the Registrar's decision.)

[1] Costs – Taxation – Practice – Form of bill – Bill as drawn not factual statement of services rendered – Change of advocate – Bill disallowed in toto – How bill should be drawn – Eastern African Court of Appeal Rules, 1954, *r.* 6 (2).

Editor's Summary

The advocates acting for the successful respondents in an appeal remained on the record till taxation when other advocates were instructed who filed a bill in normal form showing all the work and disbursements claimed as having been done or made by them. At the taxation they stated that the only work actually done by them was to draw up the order and lodge the bill of costs. The taxing officer following *Bhagwanji Premchand and Others v. J. M. Gomes and Others* (1956), 23 E.A.C.A. 296, disallowed the bill in toto whereupon the matter was referred to a single judge under r. 6 (2) of the Eastern African Court of Appeal Rules, 1954. On the reference the respondents sought to have the taxing officer's ruling reversed and the bill referred back to him for taxation; alternatively they asked for an order that the bill be amended, if necessary.

Held – the bill was not a true factual statement of services rendered, as it purported to be an account of services rendered to the respondents, of disbursements made and of instructions given to counsel on their account by advocates who had not done this work.

Bhagwanji Premchand and Others v.J. M. Gomes and Others (1956), 23 E.A.C.A. 296, applied.

Ruling of the taxing officer affirmed. Leave granted to withdraw the bill and to file a fresh bill.

Cases referred to in judgment:

(1) *Bhagwanji Premchand and Others v. J. M. Gomes and Others* (1956), 23 E.A.C.A. 296.

(2) *Hormasjee v. Byramjee* (1943), 20 K.L.R. (Pt. 2) 11.

Judgment

Sir Alastair Forbes VP: This is a reference by the respondents in the appeal (hereinafter referred to as "the respondents") under r. 6 (2) of the Eastern African Court of Appeal Rules, 1954, from a decision of the Registrar as taxing officer. The respondents were successful in the appeal, the appeal being dismissed with costs, and a certificate granted for two counsel. The respondents' bill of costs was filed by Messrs. Mandla & Co. The two principal items were instructions to Mr. D. N. Khanna to oppose the appeal (Shs. 7,500/-), and instructions to Mr. F. R. D'Souza to assist Mr. D. N. Khanna (Shs. 5,000/-). There was no indication that the remaining items had been incurred by any firm of advocates other than Mandla & Co., or that the instructions to Mr. Khanna or Mr. D'Souza had been given by any firm of advocates other than Mandla & Co. The facts, however, were that the respondents originally instructed Messrs. Shah,

Gautama, Maini and Patel; that, at the desire of the respondents, Messrs. Shah, Gautama, Maini and Patel instructed Mr. D. N. Khanna, and subsequently, Mr. D'Souza; that the firm

of Shah, Gautama, Maini and Patel was dissolved before the appeal came on for hearing, but remained on the record till the question of taxation arose; that Shah, Gautama, Maini and Patel were then taken off the record and Mandla & Co. were instructed to tax the costs.

At the taxation it was objected that the bill filed was "fictitious, fantastic and exorbitant". On the point that the bill was not a true bill the taxing officer drew Mr. Mandla's attention to a ruling of Sir Newnham Worley, then President of this court, in *Bhagwanji Premchand and Others v. J. M. Gomes and Others* (1) (1956), 23 E.A.C.A. 296, and granted a short adjournment for him to consider the matter. On resumption, Mr. D. N. Khanna accompanied Mr. Mandla and argued that the bill was properly drawn and contained no wrong statement; he cited the decision of Lucie-Smith, J., in *Hormasjee v. Byramjee* (2) (1943), 20 K.L.R. (Pt. 2) 11; and he sought to distinguish Sir Newnham's ruling to which I have referred. In a written ruling the taxing officer, relying on Sir Newnham's ruling, said:

> "It is clear that, as Mr. Mandla quite properly stated, the only work actually done by him was to draw up the order and lodge the bill of costs. It appears to me therefore that this bill is not a true representation of the facts.
>
> "Accordingly, following the ruling referred to above, I would disallow the bill in toto."

On the reference the respondents sought to have the taxing officer's ruling reversed and the bill referred back to him for taxation of the items in the bill; alternatively, they asked for an order that the bill be amended if necessary.

At the beginning of the hearing of the reference I intimated to Mr. Khanna, who appeared for the respondents, that without going into the merits of the reference, I was prepared to give leave to the respondents to withdraw the bill and file either a new bill in parts, or separate bills, showing the true factual position. Mr. Khanna, though without abandoning his application to file an amended bill or bills if necessary, elected to press for the reversal of the taxing officer's decision on the merits.

The first matter for me to consider is whether this bill falls within Sir Newnham's ruling. If it does, I am bound by it.

Mr. Khanna argued, as he had done before the taxing officer, that Sir Newnham's ruling ought to be confined to the facts of that case; that that ruling laid down no general principle; and that in any event there were no mis-statements in the bill in the instant case. He also suggested that Practice Note No. 7 of 1956 ((1956), 23 E.A.C.A. 394), which relates to bills of costs in the Court of Appeal, was ultra vires in so far as it related to the bill of costs where solicitors had been changed during the proceedings.

The circumstances to which Sir Newnham's ruling referred (they are summarised in the taxing officer's ruling and I need not repeat them) were indeed unusual. But, as it seems to me, the principles which Sir Newnham stated and applied are general principles. The relevant passage in Sir Newnham's ruling, which was relied on by the taxing officer, is as follows at p. 297:

> "A bill of costs is a factual statement of services rendered and disbursements made and, if any of the facts alleged in the bill are shown to be untrue, e.g. if it is shown that a particular service charged for has not been rendered or that a particular disbursement has not in fact been made, the relevant item in the bill will be taxed off. The commonest example of this in England is probably the inclusion in the bill of counsel's fees which had not been paid when the bill was presented: e.g. In *re Taxation of Costs: In re a Solicitor,* [1943] Ch. 48: *Re a Solicitor*, [1951] 1 All E.R. 592 and

> *Polak v. Marchioness of Winchester*, [1956] 1 W.L.R. 818. Now, if the bill before me is judged by that standard it should probably be taxed at Sh. nil for it is not a true representation of the facts. It purports to be an account of services rendered to the appellants and disbursements made on their account by Messrs. Shah and Gautama and makes no mention of Mr. Nazareth. I have no doubt that it was a genuine and well-meant attempt to meet the peculiar circumstances resulting from Mr. Nazareth's having taken silk: it is nevertheless, an inaccurate bill."

On the principles applied by Sir Newnham it seems to me that the bill in the instant case is no more an accurate bill than was that which Sir Newnham was considering. It purports, on the fact of it, to be an account of services rendered to the appellants, of disbursements made on their account, and of instructions given to counsel on their account, by Mandla & Co. It is not a true factual statement; and on the principles stated by Sir Newnham, by which, as I have said, I am bound, I think the taxing officer was right to tax the bill at Shs. nil, no application to amend having been made to him.

The question in issue is purely a matter of form. The respondents were awarded their costs and should, I think, be given the opportunity of recovering them by being allowed to file a bill in proper form. The form appropriate appears to be adequately prescribed by Practice Note No. 7 of 1956, and I see no reason to hold that that Note is ultra vires. The relevant part of the Note reads:

> "1. It is first essential to remember the difference between the advocate who is, or whose firm are, 'solicitors on the record' and any other advocate employed by them as 'counsel'. No one but the solicitors on the record for the time being can lodge or tax a bill.
>
> "2. If the solicitors have been changed during the proceedings, the bill of the first solicitor may be annexed to that of the current solicitor and its total shown as a disbursement. It may be shown as 'by anticipation', if unpaid. It will be taxed in the ordinary way, the current solicitor being heard on it. If evidence is required the first solicitor may be called."

I accordingly give leave to withdraw the present bill and file a fresh bill in the form suggested in the Practice Note. The respondents have not succeeded in maintaining the original bill, which was the issue contested before me. I had already intimated I was prepared to give leave for a fresh bill to be filed. In the circumstances the respondents must pay the appellant's costs of the abortive taxation and of this reference which I assess together at Shs. 200/-

Ruling of the taxing officer affirmed Leave given to withdraw the bill and file a fresh bill.

For the respondents/applicants:
Mandla & Co., Nairobi
D. N. Khanna and *S. S. Mandla*

For the appellant/respondent:
D. N. Nene, Nairobi
E. P. Nowrojee

Bulemezi Plantations Co v R
[1962] 1 EA 106 (HCU)

Division: HM High Court of Uganda at Kampala

Date of judgment: 22 January 1962

Case Number: 71/1961

Before: Sir Audley McKisack CJ

Sourced by: LawAfrica

[1] Factory – Dangerous machinery – Statutory duty – Duty to fence securely – Injury to workman – Prosecution – Two counts – Whether single offence or two distinct offences created by statute – Factories Ordinance, 1952, *s.* 23 (1), *s.* 72 (1), *s.* 75 (*U.*) – *Factories Ordinance,* 1950, *s.* 23 (1), *s.* 72 (1), *s.* 73 *and s.* 75 (*T.*) – *Factories Act,* 1937, *s.* 130, *s.* 131, *s.* 133 – *Factory and Workshop Act*, 1901, *s.* 135 *and s.* 136 – *Penal Code*, *s.* 20 (*U.*).

Editor's Summary

The petitioner was charged on two counts, firstly, of contravening s. 23 (1) of the Factories Ordinance, 1952, in consequence of which a workman suffered bodily injury, contrary to s. 75 of the Ordinance, and secondly, of failing to fence securely certain dangerous parts of machinery, contrary to s. 23 (1) and s. 72 (1) of the Ordinance. The petitioner pleaded guilty to the first count, and was convicted. When called on to plead to the second count, counsel submitted that the offences charged in the two counts were, in reality, one and the same offence, and that the petitioner ought not to be called on to plead to the second count after pleading guilty to the first count. The magistrate ruled against this submission whereupon the petitioner pleaded guilty and was convicted. The petition for revision sought that the conviction on count two be quashed.

Held – s. 75 of the Factories Ordinance, 1952, creates a separate and independent offence because para. (*b*) of the proviso to s. 75 clearly contemplates the possibility of a prosecution for contravention of the Ordinance under s. 72 (1) followed by a further prosecution under s. 75 where death or injury has resulted from the same contravention. *Rajabal Visram Meghji v. R.* (1956), 23 E.A.C.A. 428 and *R. v. Taylor,* [1908] 2 K.B. 237 applied.

Petition dismissed.

Cases referred to in judgment:

(1) *Rajabal Visram Meghji v. R.* (1956), 23 E.A.C.A. 428.

(2) *R. v. Taylor,* [1908] 2 K.B. 237.

Judgment

Sir Audley Mckisack CJ: The petitioner, who is the occupier of a factory, failed to fence securely certain machinery in the factory, and a workman was injured by reason of this failure. The petitioner was prosecuted on a charge containing two counts, which were as follows:

> "Count 1. Contravening a provision of s. 23 (1) of the Factories Ordinance, 1952, in consequence of which a person suffered bodily injury, contra s. 75 of the said Ordinance.
>
> "Count 2. Failing to fence securely certain dangerous parts of machinery, contra s. 23 (1) and s. 72 (1) of the

Factories Ordinance, 1952."

At the trial in the district court of Mengo the petitioner pleaded guilty to the first count, and was convicted on that plea. When he was called on to plead to the second count, his advocate, Mr. Clerk, argued that the offences charged

in the two counts were, in reality, one and the same offence, and that the petitioner ought not to be called on to plead to the second count after pleading guilty to the first count. The learned magistrate, however, ruled against him and charged the petitioner on count 2, to which the petitioner then pleaded guilty. The magistrate imposed a fine of Shs. 500/- on count 1, and cautioned the petitioner on count 2.

The petition for revision asks that the magistrate's ruling be reversed and that the conviction on count 2 be quashed.

The magistrate has recorded his reasons for his ruling, and they are detailed and carefully considered ones. He held that he was bound by the decision in *Rajabal Visram Meghji v. R.* (1) (1956), 23 E.A.C.A. 428, which dealt shortly with a similar question in relation to the Factories Ordinance, 1950, of Tanganyika, and he considered the English authority, *R. v. Taylor* (2), [1908] 2 K.B. 237, was also against Mr. Clerk's submission.

Mr. Clerk, who has also appeared for the petitioner at the hearing of this petition, seeks to distinguish those decisions on two grounds; firstly, that the wording of the Uganda Factories Ordinance, 1952, differs from that of the relevant parts of the statutes considered in those two cases; and, secondly, that s. 20 of the Penal Code of Uganda contains relevant provisions which were not considered in either of those cases.

The relevant parts of the Uganda Factories Ordinance are s. 23 (1), omitting the proviso thereto, s. 72 (1), s. 73 and s. 75. Those provisions are as follows:

> "23(1) Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."
>
> "72(1) In the event of any contravention in, or in connection with, or in relation to a factory of the provisions of this Ordinance, or of any rule or order made thereunder, the occupier, or (if the contravention is one in respect of which the owner is by or under this Ordinance made responsible) the owner of the factory shall, subject as hereafter in this Ordinance provided, be guilty of an offence."
>
> "73. Subject as hereinafter in this Ordinance provided, any person guilty of an offence under this Ordinance for which no express penalty is provided by this Ordinance shall be liable to a fine not exceeding six hundred shillings or, in default of payment, to imprisonment for a term not exceeding three months, or to both such penalties, and, if the contravention in respect of which he was so convicted is continued after the conviction, he shall (subject to the provisions of s. 74 of this Ordinance) be guilty of a further offence and liable in respect thereof to a fine not exceeding one hundred shillings for each day on which the contravention was so continued."
>
> "75. If any person is killed, or dies, or suffers any bodily injury, in consequence of the occupier or owner of a factory having contravened any provision of this Ordinance or of any rule or order made thereunder, the occupier or owner of the factory shall be liable to a fine not exceeding two thousand shillings, or to imprisonment for a term not exceeding three months, or to both such penalties; and the whole or any part of the fine may be applied for the benefit of the injured person or his family or otherwise as the court may determine:
>
> Provided that –
>
> (*a*) in the case of injury to health, the occupier or owner shall not be

liable to a penalty under this section unless the injury was caused directly by the contravention; and

(*b*) the occupier or owner shall not be liable to a penalty under this section if a charge against him under this Ordinance, in respect of the act or default by which the death or injury was caused has been heard and dismissed before the death or injury occurred."

The Factories Ordinance, 1950, of Tanganyika contains similar provisions in sections having the same numbers as those of the Uganda Ordinance. Both those Ordinance are closely modelled on many of the provisions of the Factories Act, 1937, of the United Kingdom, and in particular s. 130 to s. 133 of that Act are very similar to s. 72 to s. 75 of the two Ordinances.

In *Meghji's* case (1), the Court of Appeal for Eastern Africa had this to say of s. 75 of the Tanganyika Ordinance (at p. 429) –

> "Lastly, we think with respect that both the learned judge and the resident magistrate took an erroneous view of the two counts charged. In our view s. 75 does not merely prescribe an penalty for an aggravated contravention of a provision of the Ordinance, as the High Court thought, but creates an entirely separate and independent offence, which is that some person is injured in consequence of a contravention. This view is supported by the comment in Redgrave's Factories Truck and Shop Acts (18th Edn.), 342 and by the case of *R. v. Taylor*, [1908] 2 K.B. 237, the sections under consideration in those authorities being in substance the same as the two sections under which these two charges were brought."

It is Mr. Clerk's contention, however, that there is a vital difference in the wording of the Uganda s. 75, as compared with the Tanganyika s. 75 and also with the equivalent section (s. 133) of the English Act, which makes *Meghji's* case (1), inapplicable to the former. The Uganda section does not contain the words "without prejudice to any other penalty", whereas the other two do contain those words. It follows that, in the Uganda Ordinance, the penalty provided by s. 75 overrides or displaces lesser penalty in s. 73, and this construction is made more certain by the fact that s. 73 opens with the words "subject as hereinafter in this Ordinance provided". It is also to be noted that s. 76 of the Uganda Ordinance (like s. 76 of the Tanganyika Ordinance) does have the words "without prejudice to any other penalty"; it specifies certain offences (including the forgery and uttering of certificates) and says that the offender

> "shall without prejudice to any other penalty be guilty of an offence under this Ordinance and liable to imprisonment for a period not exceeding three years".

The result, in Mr. Clerk's submission, is that s. 75 of the Uganda Ordinance does not create a separate and independent offence but merely provides an increased penalty for the offence already created by s. 72 (1). I would find much force in this argument were it not for the proviso to s. 75 of the Uganda Ordinance. Para. (*b*) of that proviso (which is also found in s. 75 of the Tanganyika Ordinance and s. 133 of the English Act) clearly contemplates the possibility of a prosecution for a contravention of the Ordinance under s. 72 (1) followed by a further prosecution under s. 75 where death or injury has subsequently resulted from the same contravention.

In *R. v. Taylor* (2), the divisional court considered the effect of s. 135 and s. 136 of the Factory and Workshop Act, 1901. Those two sections were the forerunners of s. 131 and s. 133 of the Factories Act, 1937. The earlier sections are not identical with the later ones – the wording of s. 136 of the 1901 Act

(which relates to the penalty in case of death or injury) is much wider than the wording of s. 135 (which provides the general penalty for contraventions of the Act), whereas there is not the same distinction between the comparable sections of the 1937 Act. But s. 136 of the 1901 Act did contain a proviso similar to proviso (*b*) of s. 75 of the Uganda Ordinance, and in the course of his judgment in *Taylor's* case (2), Darling, J., had this to say (at p.243):

> "I think the proviso (*b*) in s. 136 is very strong to shew that s. 135 and s. 136 are dealing with entirely separate and distinct offences. There are throughout this Act a large number of different provisions and regulations which have to be observed by the occupiers of factories and workshops and the non-observance of which is made an offence. Then s. 136 creates another offence in different circumstances. It would seem that, but for the proviso (*b*) to s. 136, even the dismissal of a summons under s. 135 would not have prevented proceedings being taken under s. 136. That shews, I think, very clearly that the two sections are entirely distinct, because the proviso (*b*) was required to enable a person, who had been charged with an offence under s. 135 and acquitted, to plead that acquittal as a defence when charged with an offence under s. 136. I was for some time much impressed with Mr. Walsh's argument, but I could not, and cannot now, see how proceedings could be taken under s. 136, if there had already been proceedings under s. 135, unless a fresh summons were taken out. This consideration also supports the view that the two sections are dealing with separate offences."

Those observations appears to me to be equally appropriate to the Uganda section. Mr. Clerk's construction of s. 75 would make the proviso (*b*) extremely difficult to understand.

Nor do I think that the provisions of s. 20 of the Uganda Penal Code (on which Mr. Clerk also relies) in any way assist his case. That section reads as follows –

> "20. A person shall not be punished twice either under the provisions of this Code or under the provisions of any other law for the same offence."

Once it is accepted that s. 75 of the Uganda Factories Ordinance does create a separate offence, then it seems to me that s. 20 of the Penal Code has no bearing on the question I have been considering. That section speaks of "the same offence", not the same act or omission. Possibly the position might have been otherwise if the original s. 20 of the Penal Code, repealed and replaced in 1955, were still in force, since the original section did refer to "the same act or omission", But it is no longer the law in Uganda that a person is not liable to be punished twice for the same act.

In the instant case the two offences, viz., of contravening a provision of the Ordinance and of a contravention resulting in bodily injury were, as I have said, joined in the same charge. Presumably this was done in case the prosecution succeeded in proving only the contravention and not that a person was injured in consequence of that contravention. A similar course appears to have been taken by the prosecution in the trial which was the subject of the appeal in *Meghji's* case (1), and the Court of Appeal there expressed no disapproval of this course. Moreover, my understanding of their judgment is that they held that the trial magistrate had erred in thinking that the two counts were merely alternative and in discharging himself from reaching a finding on the second count.

In the result I see no grounds for acceding to the petitioner's application to reverse the magistrate's ruling, or to quash the conviction on count 2.

Petition dismissed.

For the petitioner:
Mayanja, Clerk & Co., Kampala

A. V. Clerk

For the Crown:
Director of Public Prosecutions
S. W. W. Wambuzi (Crown Counsel, Uganda)

M’nduyo M’kanyoro v R
[1962] 1 EA 110 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	5 January 1962
Case Number:	138/1961
Before:	Sir Kenneth O’Connor P, Sir Alastair Forbes VP and Crawshaw JA
Appeal from:	H.M. Supreme Court of Kenya – Templeton and Madan, JJ.

[1] Criminal law – Evidence – Accomplice – Ceremony at which unlawful oath administered – Administrator of oath convicted – Conviction on evidence of person taking oath – Compulsion – Ceremony not reported to police – Witnesses unable to plead compulsion because of failure to report – Whether witnesses necessarily accomplices – Penal Code, s. 17, *s.* 22, *s.* 61, *s.* 62, *s.* 62*A*, *s.* 63, *s.* 63*A* (*K.*) *– Criminal Procedure Code* (*Cap.* 27), *s.* 381 (*K.*) *– Indian Evidence Act*, 1872, *s.* 133.

Editor’s Summary

The appellant was convicted by a magistrate of administering an unlawful oath to one M’Kanyoro contrary to s. 62(1)(*f*) of the Penal Code. At the trial M’Kanyoro and another witness testified that in fear they took a Mau Mau oath administered by the appellant in the presence of several armed men. Neither witness reported the incident to the police and therefore, could not rely on compulsion as a defence to a charge of taking an unlawful oath. Both witnesses did, however, report to their headman. The magistrate held that the two witnesses had acted under compulsion and, following *Dedan Mugo s/o Kimani v. R.* (1951), 18 E.A.C.A. 139, that they were not accomplices and convicted the appellant on their evidence. On appeal the judges of the Supreme Court held that they were bound by but doubted the authority of that case in view of the decision in *Davies v. The Director of Public Prosecutions*, [1954] 1 All E.R. 507. The appellant appealed again when it was argued on his behalf that the conviction depended on the testimony of two witnesses who were accomplices in the crime charged, that there was no corroboration of their evidence and that the magistrate had not said that he would convict without corroboration; further that if the witnesses acted under compulsion as defined under s. 17 of the Penal Code they would not be accomplices, but that for this section to apply there must be two or more offenders and there must be actual threats made by the other offender or offenders, of which there was no such evidence; and finally that if *Dedan’s* case was good law, s. 63 would not apply as the witnesses had not been charged.

Held –

(i) s. 63 of the Penal Code as originally enacted only precludes a person who has taken an oath, and who is actually charged with the offence thereunder, from setting up the defence of compulsion unless he makes the declaration required by the section within the time prescribed; it cannot be invoked against persons who have never been charged.

Dedan Mugo s/o Kimani v. R. (1951), 18 E.A.C.A. 139, explained and followed.

(ii) the court was bound by its own decisions in *Dedan Mugo s/o Kimani v. R.* (1951), 18 E.A.C.A. 139 and *R. v. Mukwate and Another*, Kenya Supreme Court Emergency Criminal Case No. 64 of 1955 (unreported) and was of the opinion that they were rightly decided.

(iii) a prosecution witness, who has been compelled unwillingly to take a Mau Mau oath and is not in fact an accomplice, is not, when a witness in the prosecution of another person for the offence of administering that oath, to be treated as an accomplice merely because he, if he were himself to be charged with one of the specified offences, would have his consent to the administration

of the oath statutorily presumed under s. 63A, or a defence of compulsion statutorily curtailed under s. 63.

Appeal dismissed.

Cases referred to in judgment:

(1) *Dedan Mugo s/o Kimani v. R.* (1951), 18 E.A.C.A. 139.

(2) *Davies v. Director of Public Prosecutions,* [1954] 1 All E.R. 507.

(3) *R. v. Mukwate and Another*, Kenya Supreme Court Emergency Criminal Case No. 64 of 1955 (unreported).

(4) *R. v. Charles Cratchley*, 9 Cr. App. R. 232.

(5) *R. v. Pickford*, 10 Cr. App.R. 269.

Judgment

The following judgment prepared by **Sir Kenneth O'Connor P.,** was read by Sir Alastair Forbes, VP: This is a second appeal by the appellant against his conviction, on May 2, 1961, by a resident magistrate in Kenya of administering an unlawful oath to one M'Kanyoro contrary to s. 62(1)(*f*) of the Penal Code. The Penal Code of Kenya has, since the commission of the offence and the hearing of this case, been superseded by a new Penal Code which came into force on September 4, 1961; but the law which was applicable at the date of the offence was the old Code, and, accordingly, references in this judgment of the Penal Code and sections thereof are references to the old Code and its sections.

The facts of this case, so far as it is necessary to set them out, are as follows:

The first prosecution witness, M'Kanyoro, whose evidence was accepted by the learned magistrate, testified that about 8.0 p.m. near a footpath, he was oathed by the appellant. He said,

> "I allowed myself to be oathed because there were many people armed with bows and arrows. I thought they might kill me. Oathing occurred in bush. Accused took me there."

The witness then described the oath and continued:

> "This was a Mau Mau society. The oath of Mau Mau. Accused said it was Mau Mau."

He said that he had known the appellant for many years.

The second prosecution witness testified that he was with M'Kanyoro who was oathed by the accused. He said, inter alia:

> "It was on a footpath. Accused was with many people. They had pangas and bows and arrows. The accused held my hand."

He then described the oath and continued:

> "I was forced to take this oath by the accused. I thought they would cut me with pangas."

The defence was a complete denial which the magistrate disbelieved. He accepted the prosecution evidence.

The question whether the first and second witnesses for the prosecution were accomplices was considered by the learned magistrate in his judgment. It was common ground that neither of them had reported to the police as indicated in s. 63 or s. 63A of the Penal code, though they had reported to the headman. The learned magistrate held, following *Dedan Mugo s/o Kimani v. R.* (1) (1951), 18 E.A.C.A. 139, that they were not accomplices. He held that they had acted under compulsion. In connection with the first prosecution

witness the magistrate mentioned s. 17 of the Penal Code. He did not mention any section specifically in connection with the second prosecution witness. Both witnesses impressed the learned magistrate as reliable witnesses and the appellant impressed him as quite unreliable.

On appeal to the Supreme Court learned counsel for the Crown seems to have conceded that the first and second prosecution witnesses were technically accomplices in the administration of the unlawful oath to the first prosecution witness, in that they had not reported to the police within five days, though they had reported to the headman. He submitted that *Dedan's* case (1) was wrongly decided.

In the Supreme Court the learned judges who heard the first appeal said:

> "The learned trial magistrate, relying upon s. 22 of the Penal Code and also upon the decision in *R. v. Dedan Mugo s/o Kimani*, 18 E.A.C.A. 139, held that the two witnesses who gave evidence for the prosecution and who were the two persons to whom the appellant was alleged to have administered the oath, were not accomplices.
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> "In *Dedan Mugo's* case, in rejecting the submission that an accomplice may be defined as a person who can be jointly charged with the principal offender, the Court of Appeal said:
>
> > 'In the present case, the complainant was never so charged. We are satisfied that he was in fact compelled to take oath . . . In our opinion, he was not an accomplice, and the first ground of appeal relied on therefore fails.'
>
> "Since the decision in *Dedan Mugo's* case, definition of the term 'accomplice' has been considered by the House of Lords in *Davies v. Director of Prosecutions*, [1954] 1 All E.R. 507, and the learned Lord Chancellor stated it to be as follows:
>
> > 'There is in the authorities no formal definition of the term "accomplice": and your lordships are forced to deduce a meaning for the word from the cases in which X. Y and Z have been held to be, or held liable to be treated as, accomplices. On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category: (i) on any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours).'
>
> "We respectfully entertain gave doubt as to whether, if *Dedan Mugo's* case had been decided after pronouncement of the House of Lords referred to above, the decision would have been the same, but inasmuch as we are bound by it, we have no choice but to dismiss this appeal.
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> "While we must dismiss the appeal for the reason already stated, we express the wish that the appellant be assisted to lodge an appeal to the Court of Appeal so that the effect of the decision in *Davies v. Director of Prosecutions* may be considered by that court."

With the greatest respect to the learned judges who decided the first appeal, we cannot see that the case of *Davies v. Director of Public Prosecutions* (2), [1954] 1 All E.R. 507, has the decisive effect upon the question at issue which they attributed to it. It was law long before *Davies*' case (2) was decided that

persons who were participes criminis in respect of the actual crime charged fell within the category of accomplices. This, as Lord Simmonds, L.C., said in the above passage, was apparent from the cases "on any view". *Davies v. Director of Public Prosecutions* (2), was and is a case of the greatest importance and highest authority on the law relating to accomplices and the consequences of a failure by the trial judge to give an adequate direction to the jury regarding their evidence; but, in laying down that persons who were participes criminis in the actual crime charged were accomplices on any view, *Davies*' case (2), merely declared existing and well-known law. It cannot, we think, be supposed, and there is nothing in *Dedan Mugo's* case (1), to give rise to that supposition, that the learned judges of this court who decided *Dedan's* case (1), were ignorant of that proposition or would have come to a different conclusion had it been reiterated before they delivered their judgment. We think, with respect, that the statement by the learned judges of the Supreme Court that the judges who decided *Dedan's* case (1), rejected the submission that an accomplice may be defined as a person who can be jointly charged with the principal offender is due to a misapprehension by them of the basis of the judgment in *Dedan's* case (1). We will revert to *Dedan's* case again. It is necessary first to consider the relevant provisions of the Penal Code. These are as follows:

> "Section 62. Any person who –
>
> (1) administers, or is present at and consents to the administering of, any oath or engagement in the nature of an oath, purporting to bind the person who takes it to act in any of the ways following, that is to say –
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> (*f*) not to inform or give evidence against any associate, confederate or other person; or
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> (2) takes any such oath or engagement not being compelled to do so, is guilty of a felony and is liable to imprisonment for ten years."

This section follows s. 61 (which relates to administering or being present at the administration of oaths to commit capital offences, and to taking such oaths not being compelled to do so.) It will be observed that in each of these sections – s. 61 and s. 62 – the taking (as distinct from the administering, etc.) of the oath is only an offence if the taker is not compelled to take it. In other words (subject to s. 63 which will next be noticed) it is not an offence to take one of the specified oaths if the taker is compelled to take it. These provisions are specific and distinct from s. 17 of the Penal Code which deals with compulsion as affecting criminal responsibility generally.

Section 63 deals with how far compulsion is a defence for persons who take certain oaths or engagements in the nature of oaths, and reads as follows:

> "63. It shall not be a defence for a person who takes any oath or engagement in the nature of an oath mentioned in s. 61, s. 62 or s. 62A of this Code to prove that he was compelled to do so unless within five days after the taking of such oath or engagement in the nature of an oath or, if he is prevented by physical force or sickness, within five days after the termination of such physical force or sickness, he reported to the police, of if he is in the actual service of the military forces in the Colony or in the police force either he so reported as aforesaid or he reported to his commanding officer, everything he knows concerning the matter, including the person or persons by whom and in whose presence, and the place where, and the time when, the oath or engagement was administered or taken."

Clearly this refers back to the words “not being compelled to do so” which appear in sub-s. (2) of s. 61 and s. 62. It probably also affects s. 17. (The reference to s. 62A is obscure and has been omitted from the corresponding section in the new Penal Code.)

The main effect of s. 63 seems to be to disable a person who has taken an oath of the kind mentioned in s. 61, s. 62 or s. 62A and who has not reported as indicated, from setting up as a defence that he was compelled to take the oath. In our view, the words “It shall not be a defence” make it clear that the section is referring to defendants accused of taking an oath (or an engagement in the nature of an oath) of one of the kinds mentioned. In our opinion the section does not apply to persons who are not defendants.

Section 63A reads:

> “63A. Any person who is present at the administering of an oath or engagement in the nature of an oath mentioned in s. 61, s. 62 or s. 62A of this Code shall be deemed to have consented to the administering of such oath or engagement unless within five days thereafter, or, if he is prevented by physical force or sickness, within five days after the termination of such physical force or sickness, within five days after the termination of such physical force or sickness, he reports to the police, or, if he is in the actual service of the military forces in the Colony or in the police force he so reports as aforesaid, or he reports to his commanding officer, everything he knows concerning the matter, including the person or persons by whom and in whose presence, and the place where, and the time when, the oath or engagement in the nature of an oath was administered.”

This section appears to refer back to the words “Any person who is present at and consents” in sub-s. (1) of s. 61 and s. 62 and in sub-s. (2) of s. 62A. The intention of this provision would appear to be to absolve the prosecution from proving consent to the administration of an oath in the case of a defendant charged with being present and consenting to the administration of an oath under s. 61 (1) or s. 62 (1) or s. 62A (2) who had not reported as indicated.

Section 17 of the Penal Code reads:

> “17. A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence, nor do any threats excuse the causing of, or the attempt to cause, death.”

The argument addressed to us by learned counsel for the appellant may be summarised as follows. His object was to attack the conviction by showing that the first and second prosecution witnesses, on whose testimony the conviction depended, were accomplices in the crime charged against the appellant of administering an unlawful oath to the first prosecution witness, that there was no corroboration of their testimony and that the magistrate had not said that he would convict on their testimony uncorroborated. Learned counsel conceded that if those witnesses acted under compulsion as defined by s. 17, they were not accomplices. But he submitted that under s. 17 there must be two or more offenders and there must be actual threats made by the other offender or offenders and that there was no evidence of any such. He also referred to s. 63, but said that if *Dedan’s* case (1) was good law, that section would not apply as these witnesses had not been charged. It is, of course, correct that under s. 17 there must be two or more offenders and there must be threats on the part of the other offender or offenders of the nature mentioned

in the section. But if, as we understood, it was contended that there must be an articulate threat actually expressed instantly to kill the person concerned or to do him grievous bodily injury, then we do not think that that contention is well-founded. A threat of the nature required by the section may be inferred from conduct and surrounding circumstances. The African inhabitants of this Colony are, by now, well aware of what may, and probably will instantly happen to them if they refuse to take a Mau Mau oath from an administrator who is backed by an armed assembly. Each case must depend on its facts; but, in our opinion, there was in this case evidence on which the learned magistrate could reasonably find that the first prosecution witness acted under compulsion within s. 17. It is not, however, necessary to invoke s. 17 in order to exonerate an accused person on a charge brought under s. 61 (2) or s. 62 (2), since absence of compulsion is expressly made an ingredient of an offence under those sub-sections and those sub-sections do not, as does s. 17, specify from whom the threats must emanate or the nature of the threats which must be used.

Counsel for the appellant argued further that by virtue of s. 63A the first two prosecution witnesses must be deemed to have consented to the administering of the oath; therefore, they were equally guilty with the appellant though they had not been charged; they were participes criminis and, therefore, accomplices; and he said that *Dedan Mugo's* case (1), had been wrongly decided and in any event could not now be good law as s. 63A had since been enacted.

Learned counsel for the Crown submitted that the first two prosecution witnesses in this case did come within s. 17 and that they acted under compulsion. He went on (rather surprisingly) to concede that they were nevertheless accomplices, participes criminis in the offence charged. This conclusion was based on the thesis that they could have been charged jointly with the appellant and could not, because of s. 63 which removes the statutory defence of compulsion, have set up compulsion as a defence or, because of s. 63A, have said that they did not consent. He also submitted that *Dedan Mugo's* case (1), was wrongly decided. The argument for the Crown amounts to this: that men who were, in fact, compelled to take an unlawful oath, who did not, in fact, have guilty minds, but consented under compulsion and to whom s. 17 would apply, must be held to be accomplices in the offence of administering an unlawful oath to one of them because they could have been charged as accessories in that offence and (not having reported) must be deemed under s. 63A to have consented to the administration of the oath and, by virtue of s. 63, could not set up compulsion as a defence. Learned Crown counsel submitted, however, that the witnesses, having reported to the headman, were only technically accomplices, that there was in fact corroborative evidence and that no failure of justice had occurred and s. 381 of the Criminal Procedure Code should be applied.

The first part of Crown counsel's argument is very similar to the argument set up by the appellant in *Dedan Mugo's* case (1). In that case the appellant had been convicted by a Kenya magistrate of the offence of administering an unlawful oath contrary to s. 62 (1), Penal Code. His appeal was dismissed by the Supreme Court. It was contended on behalf of the appellant that the complainant and principal witness, Johanna, whose evidence was uncorroberated, was an accomplice because under s. 63 as originally enacted he was a person who took an oath and such a person cannot set up the defence of compulsion unless within fourteen days of taking it he declared by information on oath before a magistrate the whole of what he knew concerning the matter. It was held that s. 63 as originally enacted operated only to preclude a person who has taken an oath and who is actually charged with the offence thereunder, from setting up the defence of compulsion unless he had made the declaration within the time prescribed. An extract from the judgment at p. 140 and p. 141 reads:

"In support of his first ground, Mr. Kapila relied upon s. 63 of the Penal Code as originally enacted. (This section has now been repealed and replaced by the Penal Code (Amendment, No.2) Ordinance, 1950, but as that Ordinance was not enacted until after the conviction of the appellant, and was not made retrospective, it must be disregarded for the purposes of this appeal.)

"Section 63 as originally enacted reads as follows:

'63. A person who takes any such oath or engagement as is mentioned in the two last preceding sections cannot set up as a defence that he was compelled to do so, unless within fourteen days after taking it, or, if he is prevented by actual force or sickness, within fourteen days after the termination of such prevention, he declares by information on oath before a magistrate, or, if he is on active service in the military forces of the Colony or in the police force, either by such information or by information to his commanding officer, the whole of what he knows concerning the matter, including the person or persons by whom and in whose presence, and the place where and the time when the oath or engagement was administered or taken.'

"Mr. Kapila submitted that as the complainant Johanna did not comply with the provisions of this section, he could himself have been charged jointly with the appellant with an offence against s. 62, and, if he had been so charged, could not successfully have set up a defence of compulsion but must have been convicted. He was, therefore, an accomplice. If he was an accomplice, then there was no corroboration of his evidence implicating the appellant. The trial magistrate did not treat Johanna as an accomplice, and failed to direct himself on the rule which ordinarily requires corroboration of the evidence of an accomplice.

"Mr. Kapila defined an accomplice as, inter alios, a person who can be jointly charged with the principal offender, and cited in support of this definition Woodroffe's commentary upon s. 133 of the Indian Evidence Act, 1872, at p. 952 of the 9th edition of his Law of Evidence. (The Indian Evidence Act, 1872, is in force in this Colony by virtue of para. (*b*) of art. 11 of the East Africa Order-in-Council, 1897.)

"In reply to this ingenious argument, Mr. Todd, for the respondent (Crown) submitted that s. 63 (as originally enacted) could not come into operation until the person taking the oath had been actually charged with an offence against s. 61 or s. 62. When so charged, such a person was precluded from setting up as a defence that he was compelled to take the oath unless he could show that he had complied with the terms of the section. The section had no relevance in deciding whether or not a person who had never been charged with an offence against s. 61 or s. 62 was, or was not, an accomplice.

"We are of the opinion that s. 63 as originally enacted must be construed as applying only in the circumstances to which it specifically relates – that is, that its only operation is to preclude a person who has taken an oath or engagement as mentioned in the last two preceding sections, and who is actually charged with an offence thereunder, from setting up as a defence that he was compelled to do so, unless he has made the declaration required by the section within the time prescribed. It cannot be invoked against a person who has never been charged with an offence. In the present case, the complainant was never so charged. We are satisfied that he was in fact compelled to take the oath, and that he made a full report to the police

> within a few hours of the incident. In our opinion he was not an accomplice, and the first ground of appeal relied on therefore fails."

This court was not there rejecting the submission that a person who can be jointly charged with a principal offender is an accomplice, but was indicating that s. 63, a statutory provision which applies only to defendants, must not be artificially extended to make a witness who was not a defendant into an accomplice when in fact he was not an accomplice.

In *R. v. Mukwate and Another* (3), Kenya Supreme Court Emergency Criminal Case No. 64 of 1955 (unreported), a similar point was considered by the Supreme Court of Kenya. In brief, the facts were that three men, who were a tailor's assistants, were summoned, about 9.0 p.m. to the house of the accused and told to go inside. Other men were there – one of whom had a knife and stick. The tailor's assistants and one Matundu were told that this was a Mau Mau oath ceremony and that if they did not take a Mau Mau oath, they would be killed. The accused administered the oath to them. There was no independent corroboration of the evidence of the tailor's assistants and Matundu. An extract from the judgment of the then Chief Justice is as follows:

> "I directed the assessors on the matter of accomplice evidence and took an opinion specifically from each of them as to whether, as a question of fact, the three tailor's assistants and Matundu took the oath voluntarily or under compulsion. The assessors all said that it was taken under compulsion. With these opinions I agree and I find, as a fact, that the three tailor's assistants and Matundu were not willing participants in the oath-taking ceremony and had no criminal intent. 'An accomplice confesses himself a criminal' (*R. v. Mullins*, 3 Cox C.C. 526, 531). These men do not. These were youths or very young men under compulsion of a man armed with a knife, backed by a terrorist organization which had notoriously been responsible for many murders in towns and villages and might well be then and there responsible for another. They were not participes criminis. Accordingly, in my view, they are not accomplices, any more than a police spy taking part in a criminal offence without a criminal intent is an accomplice. I think that, notwithstanding that they did not report until after their arrest, the case of *Dedan Mugo v. R.* (1951), 18 E.A.C.A. 139, 141, supports, or is certainly not contrary to this view."

We think that there is no doubt that it was correct to hold in *Mukwate's* case (3), that participants in the conduct charged who had no guilty intent and who consented to participate only under compulsion were not accomplices: See e.g. *R. v, Charles Cratchley* (4), 9 Cr. App. R. 232 and *R. v. Pickford* (5), 10 Cr. App. R. 269. In the latter case (a prosecution for living on the immoral earnings of a woman) Lord Reading, L.C.J., said at p. 271:

> "There may be cases where it is plain that the woman was an accomplice . . . But there are other cases where it is by no means clear that the woman was an accomplice: she may have acted under compulsion."

Mukwate's case (3) came to this court on appeal. The question of accomplice vel non was dealt with in the judgment of this court as follows:

> "The case for the prosecution rested on the evidence of four men all of whom deposed to having had an oath administered to them by the first appellant in the presence of the second. The trial court held, and we do not question the correctness of the finding, that none of those four men were accomplices whose evidence required corroboration. None of the four made any immediate report of the incident and their stories did not reach the ears of authority until many months later."

When *Mukwate's* case (3) was decided s. 63 and s. 63A were in the form set out above.

The judgment of this court in *Dedan Mugo's* case (1) and in *Mukwate's* case (3) are binding upon us. Moreover, we agree with them and think that they were rightly decided. We should require very strong authority to constrain us to hold that a witness (other than an accused person) who, having no guilty mind, is not an accomplice in fact, is rendered an accomplice merely by statutory provisions which by their wording and context are clearly intended to apply to accused persons in the conduct of their defences. Clearly, the object of the legislature in enacting s. 63 and s. 63A was to facilitate proof in oathing prosecutions and not to make it more difficult. If by the words used the legislature had achieved a result contrary to their clear intention, effect would, if the wording were plain, have to be given to the language used. But we know of no canon of construction which obliges us to stretch the language used in order to impede the plain object of the enactment.

We have dealt with this question at more length than we should otherwise have done out of respect to the learned judges of the Supreme Court. As the matter has now come up for the third time, we desire to lay it down quite definitely (subject to correction by the legislature or on further appeal) that a prosecution witness who has been compelled unwillingly to take a Mau Mau oath and is not in fact an accomplice is not, when a witness in the prosecution of another person for the offence of administering that oath, to be treated as an accomplice merely by reason of the fact that he, if he were himself to be charged with one of the specified offences, would have his consent to the administration of the oath statutorily presumed under s. 63A, or a defence of compulsion statutorily curtailed under s. 63.

The appeal is dismissed.

Appeal dismissed.

For the appellant:
A. W. Tagart, Nairobi

For the respondent:
The Attorney-General, Kenya
A. J. F. Simmance (Crown Counsel, Kenya)

Sarwano Mawanda v R
[1962] 1 EA 119 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	4 January 1962
Case Number:	141/1961
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	Appeal from H.M. High Court of Uganda – Jones, J.

[1] Criminal law – False pretences – Obtaining a car – Acceptance of car with cancelled registration and licence in part exchange – Registration book of car not endorsed with cancellation – Registration book produced as proof of ownership – Cancellation of registration and licence not disclosed – Whether false pretence – Whether false pretence operated on mind of complainant – Penal Code, s. 289 (*U.*).

Editor's Summary

The appellant owned a car which was licensed up to the end of 1960. In September the appellant was convicted of a traffic offence and his licence and the registration of the car were cancelled for twelve months but the registration book was not endorsed nor was the licence removed and cancelled. Some days later he went with his son to a garage which agreed to take his car in part exchange for another car to be acquired by the appellant's son on hire-purchase terms guaranteed by the appellant. A director of the garage asked for and obtained from the appellant and examined the registration book of his car in order, as he said, to ascertain whether the appellant was the owner, but that the licence might have been cancelled was, he said, never in his mind. The appellant having been charged with obtaining goods by false pretences under s. 289 of the Penal Code, the magistrate held, at the close of the prosecution case, that the appellant had no case to answer on the ground that the appellant's conduct in producing the registration book only when asked for it did not amount to a false pretence. On a case stated, the High Court reversed this finding and remitted the case to the magistrate with a direction to require the appellant to make his defence and thereafter to decide the case. The High Court held that, in producing the unmarked registration book, the appellant was making a false representation by conduct and that his conduct was "some evidence of an intent to defraud" and that it could not be said that there was no evidence that the alleged false pretence did not operate on the director's mind. On the resumed hearing the charge was by leave amended from one of obtaining goods by false pretences to obtaining delivery of goods by false pretences. The magistrate interpreted the order of the High Court as a finding that the appellant's conduct had amounted to a false pretence and convicted the appellant. His appeal to the High Court was dismissed. On a second appeal

Held –

(i) the interpretation by the magistrate of the order of the High Court as ruling that the appellant's conduct had amounted to a false pretence was a misapprehension of the position amounting to a misdirection, and the High Court could not, at that stage, have made the finding attributed to it.

(ii) in view of the director's evidence there was a reasonable doubt whether the effective inducement to him to part with his car was the production by the appellant when requested of an uncancelled registration book in order to check the ownership of the car; accordingly it would be unsafe to allow the conviction to stand.

Appeal allowed. Conviction and sentence set aside.

Cases referred to in judgment:

(1) *R. v. Dargue*, 6 Cr. App. R. 261.

(2) *R. v. Grail*, 30 Cr. App. R. 81.

Judgment

The following judgment prepared by **Sir Kenneth O'Connor P.,** was read by direction of the court: This is a second appeal from a conviction under s. 289 of the Uganda Penal Code. The original charge against the appellant was a charge of obtaining goods by false pretences. This was altered, in circumstances which will be mentioned hereafter, to a charge of obtaining delivery of goods by false pretences. The amended charge against the appellant was that, with intent to defraud, he induced Sadru Garage Ltd., to deliver him a motor vehicle URP. 1 in exchange for a motor vehicle of the appellant's URJ. 367 by falsely pretending to Noordin Allibhai, a director of Sadru Garage Ltd., that the said motor vehicle URJ. 367 was licensed to December 31, 1960, and that the said Sadru Garage Ltd. could lawfully possess and use the said motor vehicle.

In brief, the facts were: The appellant was convicted of a traffic offence at the district court, Kampala, on September 27, 1960 and his licence and the registration in respect of the car URJ. 367 were cancelled for twelve months. He was so informed. The registration book was not, as it should have been, endorsed, nor was the licence removed and cancelled. Eight days later the appellant went to Sadru's Garage and obtained another car in part exchange for URJ. 367. The person whom the appellant interviewed at the garage was Noordin Allibhai, a director of Sadru's Garage Ltd.

Noordin Allibhai's account of what took place is as follows:

> "He [the appellant] did not say why he wanted to exchange it. We discussed terms. Eventually we agreed to him purchasing URP. 1 in exchange for his car, plus some money. I have forgotten the amount – it was to be paid by the Credit and Finance Corporation Ltd., on a hire-purchase agreement with accused.
>
> "I examined the registration book of accused's car URJ. 367. It appeared to be in order and the car appeared to be licensed until December 31, 1960. Accused's son signed an agreement, and accused signed as guarantor. I was selling the car to the accused, not his son.
>
> "Accused told me the car would be in his son's name, but he did all the bargaining and made the arrangement. He took the car URP. 1 away and left his car URJ. 367 with me. I subsequently discovered that the registration of the car URJ. 367 had been cancelled and the car was not licensed. I would not have parted with it if I had known this. My company have lost about Shs. 2,000/- as a result.
>
> "Cross-examined: 'I think it was about 10 a.m. when accused came.
>
> " 'I looked at the registration card of URJ. 367. This was to ascertain whether the vehicle was licensed. I did not think the licence might have been cancelled by the court. That was not in my mind.
>
> " 'I did not ask the accused anything about the licence'."

The magistrate held, at the end of the prosecution case, that the appellant had no case to answer on the ground that the appellant's conduct in producing the registration book only when asked for it did not amount to a false pretence. On a Case Stated, the High Court reversed this finding and remitted the case to the magistrate with a direction to require the appellant to make his defence and thereafter to decide the case.

The High Court held that, in producing the unmarked registration card, the appellant was making a false representation by conduct and that his conduct was "some evidence of an intent to defraud" and that it could not be said that there was no evidence that the alleged false pretence did not operate on Noordin's mind. As already stated, the High Court remitted the case to the magistrate to require the appellant to make his defence and thereafter to decide the case. The learned magistrate seems to have taken this as a ruling, by which he was bound, that the appellant's conduct had amounted to a false pretence. He said

> "the High Court has ruled that his conduct did amount to a pretence and I am bound by this ruling".

We think that this (though an excusable misapprehension) was a misapprehension of the position amounting to a misdirection. The High Court could not, at that stage, have made the ruling attributed to it. The defence had not been heard. All that the learned judge of the High Court could and did say was that the prosecution evidence, if accepted, was sufficient to support a prima facie case of a false pretence having been made by the appellant. There was, of course, no false pretence that Sadru's Garage "could lawfully possess" the motor vehicle. The appellant could and did transfer a lawful right to possession of the vehicle. The question was whether there was a false pretence as to a right of lawful user of it. If so, the further question would arise whether that pretence operated on the mind of Noordin Allibhai so as to cause him to make over the other car to the appellant.

On the resumed hearing, the prosecution applied to alter the charge from one of obtaining goods by false pretences to one of obtaining delivery of goods by false pretences. This was to counter a possible defence that the appellant as he had only obtained the car on a hire-purchase agreement, had not obtained a transfer of its ownership to him, a transfer of ownership being necessary to support a conviction of obtaining goods by false pretences. It should not have been necessary to apply for an amendment to the charge at that stage. The Crown must, or should, have ascertained the facts from Noordin Allibhai before the original charge was framed and should have known of the hire-purchase agreement. No reason appeared why the appellant was not properly charged in the first instance. It was objected by the defence that, as the High Court had directed the appellant to make his defence to the original charge, the magistrate had no power to require him to make his defence to an altered charge. The magistrate held, rightly we think, that he had power to make an amendment to the charge and to require the appellant to plead to the altered charge. "With considerable reluctance" he allowed the amendment. The fact that he had already had a ruling of his upset at the instance of the prosecution on a Case Stated to the High Court was present to his mind and, as stated, he allowed the amendment "with considerable reluctance". Nevertheless, no prejudice resulted to the appellant from the amendment. The appellant pleaded not guilty to the altered charge and there was an adjournment.

On the resumption Noordin Allibhai was recalled and further cross-examined. He said that the appellant had left his car outside the garage door: he, the witness, had not seen the appellant drive up to the show-room. Noordin continued:

> "He pointed out the car to me. I asked him to produce the registration card. As a result of my request, he did so. My sole reason for asking for the card was to see whether he was the owner. It was never in my mind that the registration had been cancelled. I never thought of it."

Thus Noordin Allibhai, when cross-examined after the resumption, testified that his sole reason for asking for the registration card was to see whether

the appellant was the owner of the vehicle (which he was) and that he (Noordin) never had the question of cancellation of the registration in mind. In these circumstances it would be very difficult to hold that the effective inducement to Noordin to deliver the other car to the appellant was a representation that the registration of URJ. 367 was valid and uncancelled and that Sadru's Garage Ltd. could lawfully use it. Noordin never had cancellation of the registration or deprivation of user in mind and had only asked for the card on the question of ownership. It is trite law that to substantiate a charge of obtaining goods or delivery of goods by false pretences the changes of ownership or the delivery

> "must not merely have been preceded by a false pretence but also have been actually caused by it, wholly or at any rate in a material part":

Kenny, Outlines of the Criminal Law (17th Edn.), p. 331; *R. v. Dargue* (1), 6 Cr. App. R. 261; *R. v. Grail* (2), 30 Cr. App. R. 81.

In his defence the appellant elected to give evidence on oath. He said, inter alia, that he had heard of other people selling cars of which the registration had been cancelled; he did not think that there was anything wrong in that; he thought that the purchaser could get a new licence, and, in fact, he knew that he did get one. There is provision in the Traffic Amendment Ordinance, 1960, for revocation, on the application of the owner of the motor-car, of an order cancelling its registration. There was nothing in the evidence to show that the appellant had not honestly believed that Noordin could get the cancellation revoked, except the appellant's failure to mention the cancellation. However, the learned magistrate held that there was an intent to defraud and there was the silence of the appellant to support that finding.

The question whether the delivery of the car was induced by the false pretence as to user does not appear to have been present to the minds of the learned magistrate or of the learned judge on appeal. We have already pointed out that the learned magistrate was under a misapprehension as to the effect of the order of the High Court on the Case Stated; and this misapprehension seems to have resulted in his not considering the effect of the pretence alleged on the mind of the complainant. The learned magistrate said:

> "There can be no doubt that the accused induced delivery of this motor car. If he did so by means of pretence, the pretence was clearly false. The High Court has ruled that his conduct did amount to a pretence and I am bound by this ruling. I find that the complainant parted with the car as a result of the accused's conduct, which amounted to a false pretence."

Assuming that, even if the learned magistrate had correctly interpreted the order of the High Court, he would still have found that the appellant's conduct amounted to a false pretence as to user, he yet did not go on to consider whether that false pretence in fact operated on the mind of the complainant. The learned judge on first appeal said –

> "There is no doubt, from the evidence, that this was a false representation by conduct and that Noordin was induced to part with his car to his detriment on the strength of that representation. He specifically stated that had he known the car's licence and registration had been cancelled, he would not have parted with the car."

This, however, ignores the evidence of Noordin set out above that he never thought of the possible cancellation of the registration, and amounts in our opinion to a misdirection.

In these circumstances we think it is open to us on second appeal to consider whether the evidence established that the delivery of the car was induced by the false pretence as to user. Bearing in mind Noordin's evidence, we think

there is a reasonable doubt as to whether the effective inducement to Noordin Allibhai to part with the car was the production by the appellant, at Noordin's request, of an uncancelled registration book which Noordin only desired to see to check the ownership of the vehicle. We think that it would be unsafe to allow the conviction to stand. Accordingly we set it and the sentence aside.

Appeal allowed. Conviction and sentence set aside.

For the appellant:
Haque, Dalal & Singh, Kampala
Z. Haque and *S. H. Dalal*

For the respondent:
The Attorney-General, Uganda
J. M. Long (Crown Counsel, Uganda)

Islamic Somali Association v Ali Mohamed El-Jabaly
[1962] 1 EA 123 (CAA)

Division:	Court of Appeal at Nairobi
Date of judgment:	12 March 1962
Case Number:	78/1961
Before:	Sir Alastair Forbes VP, Crawshaw and Newbold, JJA
Sourced by:	LawAfrica
Appeal from:	Appeal from H.M. Supreme Court of Aden – Le Gallais, C.J.

[1] Rent restriction – Claim for possession – Possession required for reconstruction – Reconstruction in public interest – Order for possession made suspended until suitable alternative accommodation available – Whether court has jurisdiction to make such an order– Meaning of "require" – Rent Restriction Ordinance, s. 11 (*A.*) *– Eastern African Court of Appeal Rules,* 1954, *r.* 77.

Editor's Summary

The respondent landlord sued for an order for possession of certain premises of which the appellant association was tenant. The suit premises formed part of a large building, the remainder of which was in the possession of the respondent who wished to demolish and rebuild the whole. Accordingly he served a notice to quit on the appellant on May 2, 1959, terminating the contractual tenancy at the end of August, 1959, and, as the premises came within the Rent Restriction Ordinance, he then brought a suit claiming possession on the grounds that he desired to demolish and reconstruct the premises and had the necessary permits and plans for the purpose, and that after reconstruction he desired the premises for his own use.

In his plaint he offered what he alleged was suitable alternative accommodation at a rental of Shs. 328/- per month whereas the appellant association paid Shs. 50/-. The judge found that the respondent did not need the premises for his own use and that the alternative accommodation offered was not suitable both by reason of its nature and rental, but held that the proposed reconstruction was desirable in the public interest, and accordingly made an order for possession, not to be executed until suitable alternative accommodation had been offered and refused. Subsequently, an application was made by the respondent to execute the decree on the ground that suitable alternative accommodation was then available. At the hearing the agent for the premises offered as alternative accommodation stated that he had been orally authorised to let the premises to the appellant association but was awaiting a power of attorney to purchase these premises. The advocate for the appellant association then agreed that the decree might be executed on receipt of the power of attorney. The judge after inspecting the alternative accommodation on June 17, 1961, ordered that the decree be executed in a month’s time provided the power of attorney was presented to

the registrar and the lease of the premises executed, which was eventually done. Subsequently, the appellant association applied for a stay of execution and appealed against the order for possession on the grounds that the order for possession was made under s. 11(1)(*b*) of the Ordinance and therefore the alternative accommodation should have been but was not available at the time of the order, that if the order was made under s. 11(2)(*f*) then it was made without jurisdiction as the finding of the judge was merely that the respondent desired to reconstruct the premises, that it was not reasonable to make the order for possession to the wish of the appellant to stay in the suit premises, the suitability of the said premises, the rental of the alternative accommodation offered and the undue emphasis placed on the aspect of public interest and that the decree and all subsequent proceedings were a nullity.

Held –

(i) the plaint had specifically referred to possession being required for the purpose of demolition and reconstruction and it was clear that the order for possession was made under s. 11(*f*) of the Ordinance and not s. 11(i)(*b*).

(ii) it was implicit in the finding of the judge that the suit premises were required by the respondent within the meaning of s. 11(2)(*f*) of the Ordinance, and for the purposes of this section there was no great distinction to be drawn between the words “desire” and “require”

(iii) while the betterment of premises purely for the financial gain of the landlord may carry a very small element of public interest, any betterment must normally be to the public good and the judge had done no more than bear that factor in mind; too great an emphasis had not been placed on this factor. *Bhatt v. Habib*, [1958] E.A. 536 (T.) distinguished.

(iv) the decree was an absolute order for possession suspended until suitable alternative accommodation was made available to the appellant; s. 11 (3) of the Ordinance gave wide powers of suspension and therefore the decree was not a nullity nor was it made without jurisdiction.

(v) as the Supreme Court had jurisdiction to make the decree and the appellant accepted the alternative accommodation offered and consented to the execution of the decree (subject to one condition incorporated in the order of June 17, 1961, which was met) it was not now open to the appellant association to challenge it.

Appeal dismissed.

Cases referred to in judgment:

(1) *Shrimpton v. Rabbits* (1924), 131 L.T. 478.

(2) *Rhodes v. Conford*, [1947] 2 All E.R. 601.

(3) *Darnell v. Millwood*, [1951] 1 All E.R. 88.

(4) *Chronopoulos v. Kassim* (1954), 21 E.A.C.A. 177.

(5) *Bhatt v. Habib*, [1958] E.A. 536 (T.).

(6) *Mills v. Allen*, [1953] 2 Q.B. 341; [1953] 2 All E.R. 534.

(7) *Yates v. Morris*, [1951] 1 K.B. 77; [1950] 2 All E.R. 577.

The following judgments were read by direction of the court.

Judgment

Newbold JA: This was an appeal against a judgment and decree of the Supreme Court, Aden, dated February 8, 1961, and an order of the Supreme Court dated June 17, 1961, which, taken together, had the effect of granting possession of certain premises occupied by the appellant association (then the second defendant and hereinafter referred to as the appellant) to the respondent (then the plaintiff). The suit for possession of these premises (hereinafter

referred to as “the suit premises”) was originally against Sheikh Mohamed Abdulla as tenant of the suit premises, but the appellant was then added as a defendant. Though at one stage there was a dispute as to who was the tenant, the learned Chief Justice held that the appellant was the tenant, the appeal has been argued on that basis, and, indeed, Mr. Abdulla has not been made a party to the appeal. The appeal was by leave brought out of time and a stay of execution was granted until the determination of the appeal. There was also a cross appeal by the respondent against that part of the judgment which found that a terrace formed part of the suit premises.

The relevant facts are briefly as follows. The respondent was the owner of the suit premises. The suit premises were occupied by the appellant which is an association of about six hundred persons and which, by virtue of the finding, I shall regard as the tenant. The monthly rental was Shs. 50/-. The appellant used the suit premises for the purposes of the association, which included meetings at which between four and five hundred members might attend. The suit premises consisted of a building situate on the roof of three contiguous godowns. The building only occupied a part of the roof area of the three godowns; the remainder, or most of the remainder, of the roof area consisted of a terrace which, as a matter of fact, was and had been for years used by the appellant in conjunction with and as part of the suit premises. The learned Chief Justice found that the terrace formed part of the suit premises, and it was against this finding that the cross appeal was brought. The respondent had acquired the premises after the appellant had become the tenant and not long before the suit was filed. The suit premises were about 50 years old, but the evidence was that they were in reasonable condition and the learned Chief Justice found that, though old, they were “not so dilapidated that their condition greatly affects the issue”. The respondent was desirous of demolishing and reconstructing the suit premises, and on May 2, 1959, he served a notice to quit effective at the end of August, 1959. This had the effect of ending the contractual tenancy, but as the suit premises came within the Rent Restrictions Ordinance (Cap. 136 of the Laws of Aden and hereinafter referred to as the Ordinance) the appellant continued as statutory tenant. The respondent then brought a suit claiming possession on the grounds that he desired to demolish and reconstruct the premises and had the necessary permits and plans for such purpose, and that after reconstruction he desired the premises for his own use. In his plaint he offered what he alleged was suitable alternative accommodation at a rental of Shs. 328/- per month. In evidence it appeared that two of the godowns were vacant, and we were informed that at the date of the appeal the third godown was also in the vacant possession of the respondent. The learned Chief Justice in his judgment, having set out the facts and dealt with certain submissions, stated as follows:

> “The fact that the plaintiff has gone to the trouble to serve a notice and have plans drawn up indicates a present desire to reconstruct the suit premises, and consequently the only issue remaining is whether in all the circumstances it would be reasonable to eject the tenants. (Section 11 (1) Cap. 136)”.

The learned Chief Justice, having found that the respondent did not need the suit premises for his own use, then proceeded to consider the question of the alternative accommodation and the reasonableness of making the order for possession. He came to the conclusion that the alternative accommodation offered was not suitable both by reason of its nature and the rental, and then continued as follows:

> “The public interest is, however, another factor to be considered. The proposed reconstructed premises would provide considerably more living

accommodation. To this extent the reconstruction of the suit premises would be desirable.

"Taking all the circumstances into account I have decided that there should be a decree for the plaintiff, but that it should not be executed unless and until alternative accommodation suitable for the needs of the defendants is made available. Judgment is entered for the plaintiff in these terms, and there will be no order as to costs."

The record shows that on the same day as the judgment was given the following further order was made by the learned Chief Justice, presumably immediately after delivering his judgment:

"Further Order.

"Should other more suitable accommodation be offered by the plaintiff and rejected by the defendants, the matter may be brought before the court again in this present suit by application on the part of the plaintiff."

As a result of the judgment a decree was extracted, the relevant parts of which are as follows:

"It is hereby ordered and decreed that the defendants do put the plaintiff in possession of the suit premises, No. 17/44, situated on Esplanade Road, Crater, Aden, and that this decree should not be executed unless and until alternative accommodation suitable for the needs of the defendants is made available. Judgment is entered for the plaintiff in these terms and there will be no order as to costs."

An application was subsequently made by the respondent to execute the decree on the ground that suitable alternative accommodation was then available, and on June 17, 1961, the learned Chief Justice heard evidence on the application in the presence of advocates for the respondent and the appellants. The alternative accommodation was to bear a rent of Shs. 250/- per month but was dependent on the witness called by the respondent receiving a power of attorney from his, the witness's, principal authorising him to purchase the premises and let them to the appellant, for which the witness said he had already had verbal authority from his principal. Immediately following this evidence the advocate (not Mr. Sanghani) then appearing for the appellant is recorded as saying:

"The decree may be executed on receipt of the power of attorney, suggest the matter should stand over".

Thereupon the learned Chief Justice made the following order:

"Decree to be executed subject to:

1. Alternative premises being found by court to be suitable.
2. Presentation of valid power of attorney to registrar and the giving of a lease of the top floor of the premises in question at a rent of Shs. 250/- per month."

We were informed that the learned Chief Justice, together with the advocates for the respondent and the appellant and a representative of the appellant, then viewed the premises, following which the learned Chief Justice returned alone and made the following order:

"Having seen the proposed alternative accommodation I am satisfied that they are reasonably suitable, and that it would be reasonable to make an order for eviction from the suit premises. The decree will accordingly

> be executed one month from to-day provided (2) above is complied with in the meantime."

This was followed by a formal order, dated June 17, 1961, and subsequently the necessary power of attorney was obtained and a lease granted to the appellant. An application for a stay of execution pending an appeal to this court was granted

Mr. Sanghani, who appeared for the appellant, submitted first, that the order for possession was made under s. 11(1)(*b*) of the Ordinance, in which event, he argued, the alternative accommodation must be available at the time of the order and it was not so available; secondly, that if the order was made under s. 11(2)(*f*) of the Ordinance then it was made without jurisdiction as the finding of the learned Chief Justice was merely that the respondent desired to reconstruct the premises; thirdly, that in all the circumstances it was not reasonable to make the order for possession, particularly having regard to the wish of the appellant to stay in the suit premises, the suitability of the suit premises, the high rental of the offered alternative accommodation and the undue emphasis placed by the learned Chief Justice on the aspect of public interest; and fourthly, that the decree was a nullity as it was incapable of execution and that all subsequent proceedings were equally a nullity and were in any event most unsatisfactory.

Before dealing with the submissions I think it pertinent to remark that this is yet another case in which the position would have been clearer if issues had been framed in accordance with the Rules of Court.

As regards the first submission, in my view reading the judgment as a whole and having regard to the passage first quoted above it is quite clear that the order for possession was made under s. 11(2)(*f*) of the Ordinance and not under s. 11(1)(*b*). The plaint specifically referred to possession being required for the purpose of demolition and reconstruction, as did the notice to quit which gave the requisite notice of not less than three months. In the passage quoted the learned Chief Justice, having found a desire to reconstruct, then stated that the only issue left was that of reasonableness, and when he subsequently animadverted to the alternative accommodation offered he did so, in my view, in relation to the question of reasonableness, a factor which he had in any event to consider, and not as the ground in itself on which he made the order.

As regards the second submission, the point argued was that the word "required" in s. 11(2)(*f*) of the Ordinance connotes something more than a mere desire though less than compulsion and that as the learned Chief Justice had merely made a finding of a "present desire" to reconstruct the premises this was not sufficient to enable him to make the order for possession under that paragraph. The word "required" also appears in para. (*d*) and para. (*e*) of s. 11(2) of the Ordinance in the phrase "reasonably required". These paragraphs have their counterparts in the United Kingdom legislation and in *Shrimpton v. Rabbits* (1) (1924), 131 L.T. 478, Acton, J., at p. 479 said:

> "But after it has been ascertained that the desire or requirement of the landlord is a reasonable desire or requirement . . ."

This passage seems to show that, at least for the purposes of this section of the Ordinance, no great distinction is to be drawn between the words "desire" and "require". I would agree that a mere empty desire unaccompanied by facts which show a genuine intention to act on that desire would not be sufficient. For example, it would not be sufficient for the landlord merely to express a desire to reconstruct; before he could obtain an order for possession under this paragraph he must have a genuine intention to act on that desire which will thus give rise to the premises being required for that purpose. In this case

the learned Chief Justice has referred to the facts which point to genuine intention to act on the desire, and hence to the suit premises being required. Paragraph 2 of the plaint states that the respondent "requires the possession" of the suit premises and in my view it is necessarily implicit in the finding of the learned Chief Justice that the suit premises were required by the respondent within the meaning of s. 11(2)(*f*) of the Ordinance.

As regards the third submission, the question whether it was reasonable to make the order is always a difficult question. The discretion which is given by the Ordinance is to be exercised by the trial judge and

> "it must prima facie be assumed that he has properly applied his mind to all relevant considerations."

per Evershed, L.J. (as he then was), at p. 603 in *Rhodes v. Conford* (2), [1947] 2 All E.R. 601. In *Darnell v. Millwood* (3), [1951] 1 All E.R. 88, Evershed, M.R., said at p. 90:

> "It has been said many times in this court that the question what is reasonable is eminently a question of fact for the county court judge, and, unless it can be shown that he has misdirected himself by omitting some point of substance or by taking account of something which should not properly have been considered, it is not for this court to disturb the judge's findings."

See also *Chronopoulos v. Kassim* (4) (1954), 21 E.A.C.A. 177. In the present appeal it is submitted that it was unreasonable to make the order for possession having regard to all the circumstances. The learned Chief Justice in his judgment considered the condition of the suit premises, their suitability in relation to their site, nature and the rent paid, and the difficulty of obtaining alternative accommodation. He also, as was proper for him to do, considered the position from the landlord's point of view. Subject to one matter, I did not understand the case for the appellant to be that the learned Chief Justice had failed to consider any factor which he should properly have considered or to have considered any factor which he ought not to have considered. It was, however, submitted that undue emphasis had been placed on the factor of public interest in the reconstruction of the suit premises. It was conceded, having regard to *Chronopoulos v. Kassim* (4), that public interest was a factor to be considered, but it was urged that in that case the premises were dangerous, a factor which does not exist in the present case. I agree that where the premises are dangerous or very dilapidated the factor of public interest must carry greater importance than where they are not. Can it be said that in this case too great emphasis was placed on this factor? I do not think it can: the learned Chief Justice has merely said, after considering other factors, that it is "another factor to be considered" and that "the reconstruction of the said premises would be desirable". I do not consider that these words point to undue emphasis being placed on this factor. It was also submitted that the mere betterment of buildings was not of itself in the public interest and that where, as it was submitted was the position in this case, the betterment is primarily for the financial gain of the landlord, then the betterment should not be considered to be in the public interest. In support of this submission reference was made to *Bhatt v. Habib* (5), [1958] E.A. 536 (T.), but that case was concerned with the meaning of public interest as a ground in itself for an order for possession and this I do not think to be apposite to this case. I agree that the betterment of premises purely for the financial gain of the landlord may carry a very small element of public interest, but any betterment must normally be to the public good and I do not think that the learned Chief Justice did anything more than bear that factor in mind.

As regards the fourth submission, I cannot but view the procedure followed as unsatisfactory. There is first a judgment granting possession but with a

direction that it be not executed until suitable alternative accommodation is made available followed by a further order that if alternative accommodation is offered the respondent might apply to the court; then there is the formal decree in the terms set out above which does not refer to the liberty to apply contained in the further order; then there is the informal application for execution with a statement that suitable alternative accommodation is available; then there is evidence taken on the informal application followed by an order of June 17, 1961, directing the decree to be executed subject to the alternative accommodation being found by the court to be satisfactory and to a lease thereof being granted to the appellant at a rental of Shs. 250/- per month; then a visit to the premises in the presence of the advocates for the parties followed by an order, made apparently on June 17, 1961, in the absence of the parties and their advocates, to the effect that the alternative accommodation has been found to be suitable, that it would be reasonable to make an order for eviction from the suit premises and that the decree be executed at the end of one month if the lease for the alternative accommodation is granted within that time; and finally the formal order dated June 17, 1961. This type of judgment and decree seems to me likely to give rise to a position of uncertainty which may last for an indefinite period and the subsequent procedure appears very informal. A question which at once arises is: could the decree be executed a number of years hence if suitable alternative accommodation were then available?

Mr. Sanghani submitted that the decree was a nullity as it did not come within the definition of "decree" in s. 2 of the Civil Procedure Ordinance (Cap. 25 of the Laws of Aden) since it did not conclusively determine the rights of the parties with regard to all matters in dispute between them in the suit; that nothing in s. 11 of the Ordinance empowered the court to give such a judgment; and that if the decree following the judgment was a nullity all subsequent proceedings were equally a nullity and no consent of the counsel for the appellant could make it or the subsequent proceedings effective. Mr. Mansoor, who appeared for the respondent, submitted that the decree did finally determine the matters in issue but that under its terms its execution was to be suspended until the condition of suitable alternative accommodation being made available was complied with; that the court had power under s. 11 of the Ordinance, particularly under sub-s. (3) and the proviso to sub-s. (2), to impose such a condition and to suspend the execution of the decree until compliance with the condition; that as the advocate for the appellant had consented to the decree being executed subject to a condition which was subsequently performed it was not open to the appellant to object at this stage to the decree and subsequent orders; and that in any event if the decree was technically wrong it was a mere irregularity which did not affect the merits and which could be cured under r. 77 of the East African Court of Appeal Rules, 1954.

In my view the decree is an absolute order for possession suspended until suitable alternative accommodation should be made available to the appellant. This, as I have pointed out, may lead to an indefinite suspension and is not, I think, a very satisfactory type of order: see *Mills v. Allen* (6), [1953] 2 Q.B. 341 at p. 357. The question is, however, whether it is a decree and whether the Supreme Court has jurisdiction to make that type of order. The decree, in my view, did conclusively determine the rights of the parties in dispute, that is, whether or not the respondent was entitled to an order for possession of the premises; the fact that the execution of the decree was suspended does not cease to make it a conclusive determination of such rights. Did the court have jurisdiction to make that type of order? I do not think that the decree can be said to have been made under the powers conferred by the proviso to s. 11 (2) of the Ordinance as it does not appear that the respondent complied or undertook to comply with any condition before the order was made or

the judgment given. Sub-section (3) of s. 11 of the Ordinance, however, gives wide powers of suspension and in *Yates v. Morris* (7), [1951] 1 K.B. 77, it was held that an order for possession "suspended provided no further nuisance occurs" was made in exercise of jurisdiction given by a sub-section of the English legislation which is identical with sub-s. (3). I do not, therefore, consider that the decree was a nullity nor that it was made without jurisdiction. It is not, in my view, the type of order which should be made: in such a case it would be preferable to make an order for possession conditional upon alternative accommodation being made available within a reasonable time. The proceedings and orders subsequent to the decree were also characterised in each case with an element of indefiniteness, which in my view might well have affected the result of the appeal had it not been for the recorded remark of the advocate for the appellant on the application for the execution of the decree. I understand this remark to mean that the appellant was consenting to the execution of the decree subject only to the alternative accommodation offered being available to it, and this is in accord with the evidence in the suit that the appellant was prepared to accept suitable alternative accommodation. It is true that the learned Chief Justice subsequently viewed the premises with, among others, the advocate for the appellant but it is I think reasonable to assume that he did so purely to satisfy himself that it was reasonable. It may well be that this consent of the appellant to the execution of the decree, subject, of course, to the alternative premises being available, may have influenced the nature of the proceedings and the form of the orders made by the learned Chief Justice. That the appellant had, prior to the application, an opportunity of inspecting the alternative premises was clear, as it was stated that the appellant had originally rejected them. Apparently, however, the appellant had changed its mind as the cross-examination of the agent of alternative premises was directed primarily to his authority to let them and to the rental of Shs. 250/- a month not being increased. This cross-examination was then followed by the consent to execution to which I have already referred.

In my view the Supreme Court had jurisdiction to make the decree and the appellant accepted the alternative accommodation offered and consented to the execution of the decree, subject to one condition which was incorporated in the order of June 17, 1961, and which has been met. In these circumstances I do not think it is now open to the appellant to challenge the decree and order.

As regards the cross appeal, I understood that in effect it was abandoned as it would not affect the appeal either way and might only affect the position in relation to suitable alternative accommodation if the appeal succeeded.

For these reasons I would dismiss the appeal with costs and also dismiss the cross appeal with costs. The cross appeal took little hearing time and the costs on the appeal and cross appeal should be set off against each other. A stay of execution was granted pending the determination of this appeal and this stay should continue until twenty-one days after the delivery of this judgment.

Sir Alastair Forbes VP: I agree. The appeal and cross appeal are both dismissed with costs subject to a stay of execution as proposed by the learned Justice of Appeal.

Crawshaw JA: An order for possession can be made under s. 11(2)(*f*) of the Rent Restrictions Ordinance without proof of suitable alternative accommodation, but on the evidence before the court I think it would have been difficult for the learned Chief Justice to have regarded such an order as reasonable without making its effectiveness dependent on the provision of suitable alternative accommodation. The order he made would seem to me to have been within the power of the court to make (*Yates v. Morris* (7)), but I agree with the observations of Newbold, J.A., on the form it took. The

apparent acceptance by the then advocate for the appellant that the alternative accommodation was suitable, justified the court in making the final order it did on June 17, 1961. I agree that the appeal and cross appeal should be dismissed, and I agree with the proposed order as to costs and stay of execution.

Appeal dismissed.

For the appellant:
A. Daftari and *P. K. Sanghani*, Aden

For the respondent:
M. H. Mansoor, Aden

Nemchand Premchand Shah and another v The South British Insurance Company Limited

[1962] 1 EA 131 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	13 January 1962
Case Number:	96/1960
Before:	Sir Kenneth O'Connor P, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Edmonds, J.

[1] Arbitration – Insurance policy – Claim for value of goods lost by burglary – Liability repudiated on ground that burglary not proved – Arbitration clause – If difference is upon quantum is award condition precedent to litigation – Action field without reference to arbitration – Whether insurance company can invoke arbitration clause as a bar to suit.

[2] Practice – Amendment of pleading – Action for specified sum for value of goods lost by burglary – Prayer in plaint for any other relief court will grant – Application at trial for amendment to include prayer for declaratory judgment – Amendment refused – Discretion of court – Civil Procedure (*Revised*) *Rules*, 1948, *O. VII, r.* 6 (*K.*).

Editor's Summary

The appellants who were insured by the respondents claimed for an alleged loss by housebreaking or burglary. The respondents repudiated liability as they were not satisfied that the loss by burglary had occurred. An arbitration clause in the policy provided that an award was a condition precedent to any right of action or suit if any difference should arise as to the amount of any loss or damage. The appellants sued for recovery of Shs. 46,746/-. At the trial issues were framed one of which was whether

the respondents were entitled to rely on the arbitration clause on the basis that until an award had been made no right of action could be taken on the policy. That issue was argued as a preliminary point and the trial judge held that the respondents could rely on the arbitration clause and dismissed the suit. Counsel for the appellants had applied at the trial for leave to amend the plaint so as to include a prayer for a declaration that the respondents were liable to indemnify the appellants against the loss but the amendment was refused by the judge. The three main grounds of appeal were, that no difference as to the amount of the loss had arisen between the parties before the plaint was filed, and since arbitration was only a condition precedent if such a difference had arisen, it was open to the appellants to file their suit to determine the only difference which had arisen, that is, a difference on liability; that whether or not a difference as to the amount of loss had arisen, the respondents had by their conduct waived the arbitration clause and thus had left it open to the appellants to file their suit without first

going to arbitration to ascertain the quantum of loss; and that on the pleadings as they stood the judge should have given a declaratory judgment on the question of liability.

Held –

(i) the power to make a declaratory judgment is discretionary and the discretion should, when no specific relief other than the declaration is claimed, be exercised with great caution and with regard to the circumstances of the case.

(ii) in very special circumstances, the court may grant a declaratory judgment in a suit which does not specifically include a prayer for a declaration; nevertheless on the facts of this case such a course was not open to the judge nor to the appellate court.

(ii) the arbitration clause in the policy envisaged a suit being brought to determine matters, such as liability, and without prior arbitration, if the quantum was not in dispute; according a dispute relating to liability did not automatically include a dispute relating to amount.

(iv) the arbitration clause made it requisite that the dispute on amount must arise before bringing of the suit, though the fact that such a dispute had not arisen before the bringing of the suit would not preclude it arising thereafter for determination in the suit.

(v) the arbitration clause had no application when the plaint was filed, as no difference as to the amount of any loss or damage had arisen and the amount of the loss or damage was not then disputed.

(vi) the onus was on the appellants to prove that there had been a waiver of the arbitration clause and from the correspondence exchanged between the parties the appellants had proved such a waiver, whether the waiver arose by an implied contract or by reason of a representation giving rise to an estoppel by conduct.

Appeal allowed. Order that suit do proceed.

Cases referred to in judgment:

(1) *Golding v. London & Edinburgh Insurance Co. Ltd.* (1932), 43 Lloyd, L.R. 487.

(2) *Woolf v. Collis Removal Service*, [1948] 1 K.B. 11; [1947] 2 All E.R. 260.

(3) *Toronto Railway Co. v. National British and Irish Millers Insurance Co. Ltd*. (1914), 111 L.T. 555.

(4) *Jureidini v. National British and Irish Millers Insurance Co. Ltd*., [1915] A.C. 499.

(5) *Heyman v. Darwins Ltd*., [1942] A.C. 356; [1942] 1 All E.R. 337.

(6) *Scott v. Avery* (1856), 5 H.L. Cas. 811; 10 E.R. 1121.

(7) *Caledonian Insurance Co. v. Gilmour*, [1893] A.C. 85.

(8) *Spurrier v. La Cloche*, [1902] A.C. 446.

The following judgments were read by direction of the court:

Judgment

Newbold JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya sitting at Mombasa dismissing with costs a suit by the appellants (then the plaintiffs) against the respondent company (then the defendant) claiming a specified sum of money representing the value of articles lost as the result of a housebreaking, which loss, it was alleged by the appellants, was a risk covered by a policy of insurance entered into between the respondent company as insurers and the appellants as the insured. When the suit came on for trial certain issues were framed, the third of which was: “Can the defendants rely on condition 13 as to arbitration?” It was agreed to argue the case on that issue as a preliminary point of law, the facts to found the

arguments on such preliminary point being elicited from an agreed bundle of correspondence, which included the policy of insurance. At a late stage in the argument before the learned judge, counsel for the appellants applied for leave to amend the prayer of the plaint so as to include a prayer for a declaration that the respondent company was liable to indemnify the appellants against the loss. The learned judge having heard the arguments on that preliminary point decided the issue in favour of the respondent company, refused to allow the amendment and accordingly dismissed the suit with costs.

The facts of the case, so far as they are relevant to this appeal, are as follows: The appellants are merchants dealing in wristwatches, E.P.N.S. ware, imitation jewellery and the like goods and in 1956 insured their stock in trade and fixtures whilst in the premises in which they carried on business with the respondent company, which carried on the business of insurers, under a policy of insurance against loss or damage

> "by theft . . . following upon housebreaking (causing actual visible damage to the premises or part thereof) and connected therewith . . ."

The policy was, subject to a variation in the amount insured, renewed and was in force in 1958. The appellants in their plaint, which was filed on December 24, 1958, alleged that they had suffered a loss covered by the policy, and paras. 4, 5 and 6 of the plaint and the prayer therein are as follows:

> "4. During the currency of the said policy namely on or about the 19th day of October, 1958, a burglary and/or housebreaking took place at the said premises, and stock-in-trade as aforesaid the property or in custody of the plaintiffs and/or in trust or on commission or for which the plaintiffs were responsible was lost. Particulars of the said loss totalling Shs. 46,746/- exceed three folios and have already been delivered to the defendants.
>
> "5. The defendants are liable under the said policy for the whole sum of Shs. 46,746/-, which is less than the sum apportioned under the said policy in respect of the said stock-in-trade.
>
> "6. The defendants have on October 30, 1958, and since declined to accept liability under the terms of the policy or to accept that a burglary or housebreaking have occurred, and have thereby inferentially or impliedly repudiated requirements of the policy as to arbitration or otherwise.
>
> "Wherefore the plaintiffs pray for:
>
> (1) Judgment for Shs. 46,746/-;
>
> (2) Interest thereon at court rates;
>
> (3) Costs of this suit together with interest thereon at court rate from the date of judgment to payment in full;
>
> (4) Any other or alternative relief that this honourable court may deem fit to grant."

The respondent company in their defence denied liability and paras. 4, 5, 6 and 7 of the defence are as follows:

> "4. Paragraph 4 of the plaint is denied both as to the cause of and the quantum of the alleged loss.
>
> "5. Paragraph 5 of the plaint is denied; the defendant specifically denies that the plaintiff suffered any loss covered by any risk insured against under the said policy and will put the plaintiffs to strict proof thereof.
>
> "6. Without prejudice to the foregoing, the defendant will aver that the plaintiffs have not complied with Condition No. 13 of the said Policy which said condition made the ascertainment of the amount of any loss by

arbitration, independently of all other questions, a condition precedent to the bringing of any right of action or suit. The defendant will crave leave to refer to condition 13 at the trial and will allege that the value of the loss has not been ascertained by arbitration or agreed and is in dispute.

"7. With reference to para. 6 of the plaint the defendants admit they have repudiated liability under the policy but deny they have waived any condition as to arbitration or otherwise."

Clause 13 of the policy reads as follows:

"13. If any difference arises as to the amount of any loss or damage, such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment the other party shall be at liberty to appoint a sole arbitrator; and in the case of disagreement between the arbitrators the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference, and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrator, arbitrators or umpire respectively; and in the event of the death of an arbitrator or umpire another shall in each case be appointed in his stead by the party of arbitrators (as the case may be) by whom the arbitrator or umpire so dying was appointed. The costs of the reference and of the award shall be in the discretion of the arbitrator, arbitrators or umpire making the award. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

Following upon various interviews between representatives of the appellants and of the respondent company during which, apparently, details of the loss claimed had been given, the manager of the respondent company (hereinafter referred to as "the manager") on October 30, 1958, wrote a letter to the appellants the relevant portion of which is as follows:

"After considering all aspects of the incident, and after due deliberation, I regret that I am in no position but to decline to accept liability under the terms of the insurance policy you hold."

To this the appellants replied by letter of November 1, 1958, the relevant portion of which is as follows:

"Your remarks are not clear to us and we would like to know under what terms you deny liability of our claim."

On November 3, 1958, the manager replied by letter, the relevant portion of which is as follows:

"I regret to advise that the incident which allegedly occurred has not been proved by you as a loss under the policy."

The advocates for the appellants then wrote to the respondent company on November 26, 1958, as follows:

> "We have been consulted by Messrs. Rita Emporium in connection with their claim lodged with you by them arising out of burglary and theft at their premises situate on Kilindini Road, Mombasa. It appears that you do not accept any liability for the damage and loss suffered by our client, a list and full particulars whereof have already been furnished to you. We are at a loss to understand your denial of liability since it is clear that the aforesaid loss and damage is directly covered by the above policy.
>
> "Please note that unless you admit liability *within seven days* of the date hereof, our clients will have to take such further steps in the matter, as they may be advised, for enforcing their rights at your risk as to costs and consequences."

To this the manager replied on November 28, 1958, as follows:

> "I have duly received your letter, reference R/5/3419, and have given due consideration to the remarks which you have made.
>
> "Might I, at the outset, make it clear that the mere statement by an insured that loss by burglary occurred is hardly proof of such loss. The insured has, in fact, been advised by a registered letter dated November 3, that the incident which allegedly occurred has not been proved by them as a loss under the policy.
>
> "In addition, would you kindly take note, and I should also be obliged if you would inform your client, that the Criminal Investigation Department, in a letter dated November 25, have advised me that it is their considered opinion that there 'was no forcible entry' into the insured's premises. I cannot but be guided by the police in such matters and undoubtedly you will be one with me in this regard."

Thereafter the appellants on December 24, 1958, filed their plaint.

Before turning to the issues argued on the appeal, I should wish to say that I feel very indebted to both Mr. Khanna, who appeared for the appellants, and Mr. Cleasby, who appeared for the respondent company, for their clear and able arguments and for the wealth of authorities to which they referred the court. During the course of the arguments my mind veered from one side to the other and it was only after a careful consideration of the authorities, which are not always easy to reconcile, and of the facts of this case that I have been able to come to a clear conclusion.

Mr. Khanna submitted that the appeal should be allowed on the following grounds:

First, no difference as to the amount of the loss had arisen between the parties before the plaint was filed, and, as cl. 13 made arbitration a condition precedent only if such a difference had arisen, it was open to the appellants to file their suit to determine the only difference which had arisen, that is a difference on liability, without first going to arbitration to ascertain the quantum of loss.

Secondly, whether or not a difference as to the amount of the loss had arisen, the respondent company had by their conduct waived the provisions of cl. 13 and had thus left it open to the appellants to file their suit without first going to arbitration to ascertain the quantum of loss.

Thirdly, that on the pleadings as they stand it was open to the learned judge to give a declaratory judgment on the question of liability and that in any event in the circumstances he should have allowed the application for an amendment.

Before dealing with these submissions there are two matters to which I should refer. First, though the pleadings are possibly wide enough to treat this suit as an action for damages for refusal to be bound by a contract, which might be a suit not on the contract but dehors it, a distinction referred to by Greer, L.J., in *Golding v. London and Edinburgh Insurance Co. Ltd.* (1) (1932), 32 Lloyd,

L.R. 487 at p. 489, the appeal has not been argued on that basis and I deal with the appeal as a claim under the policy. In any event I am by no means certain that any such distinction exists; if it does I do not think it would make any difference to the application of an arbitration clause: see *Woolf v. Collis Removal Service* (2), [1948] 1 K.B. 11. Secondly, arbitration clauses which are conditions precedent to a suit can be said, for the purposes of this appeal, to fall into three classes: first those which relate to all differences; secondly, those which relate to differences of amount and on occasion also liability, but provide that where suit is brought the only amount recoverable is the amount as ascertained by arbitration; and thirdly, those which relate to differences of amount simpliciter. It is to be noted that the arbitration clause in this appeal falls into the third class.

Dealing first with the third ground argued, Mr. Khanna based his submission that a declaration might be granted on the pleadings as they stand on the case of *Toronto Railway Co. v. National British and Irish Millers Insurance Co. Ltd.* (3) (1914), 111 L.T. 555. Certain observations of Buckley, L.J., at p. 558 do at first sight appear to support such submission, but, in my view, those observations when carefully examined mean no more than that it is open to the court to grant a declaratory judgment in certain special circumstances if such relief is claimed in the action. It is to be noted that the learned Lord Justice in dealing with the particular judgment under appeal did not say it was a declaratory judgment but that it was in substance a judgment declaring liability and directing an inquiry as to the amount for which the liability exists. In any event, as pointed out by Mr. Cleasby, Kennedy, L.J., at p. 561 and p. 562 specifically did not rest his judgment on that ground and pointed out difficulties which would arise in an action claiming a declaration. The third member of the court, Scrutton, J. (as he then was), did not deal with this question. I do not regard this case as an authority in support of Mr. Khanna's submissions. A declaratory judgment is one which pronounces on the rights of a party without reference to the enforcement of these rights. The power to make a declaratory judgment is discretionary and the discretion should, when no specific relief other than the declaration is claimed, be exercised with great caution and with regard to the circumstances of the case. In the plaint in this case the appellants, in addition to seeking a judgment enforcing the rights claimed, asked for any other relief which the court might deem fit to grant, a prayer which is strictly unnecessary having regard to the provisions of O. VII, r. 6, of the Civil Procedure (Revised) Rules, 1948, of Kenya. While it may, in very special circumstances, be possible for a court to grant a declaratory judgment in a suit which does not specifically include a prayer for declaration, nevertheless on the facts of this case I do not think such a course would have been open to the learned judge nor is it open to this court. Apart from any other consideration, a declaratory judgment in this case would be a judgment in a suit upon the policy before arbitration: if arbitration is a condition precedent to any suit upon the policy, then it would not be possible to institute the suit, and hence to obtain the declaratory judgment, without compliance with the condition precedent; if arbitration is not a condition precedent, then there is no necessity for a declaratory judgment. There may exist very special circumstances, such as where the condition precedent must be performed within a specified time and the actions of one party make the performance by the other of the condition precedent within the specified time either impossible or improbable, in which a party may ask in a suit for a declaratory judgment before the performance of the condition precedent to the bringing of the suit; but these circumstances do not exist here and I leave that point open for determination when it arises. The reasons which I have given as precluding a declaratory judgment on the pleadings as they stand apply equally to preclude the granting of the application seeking an amendment to the prayer of the plaint.

I turn now to the first ground argued, which was that no difference on the amount of the claim had arisen. Mr. Khanna made it quite clear that his argument was not based on any question of repudiation of the contract by the respondent company; he stated that the contract was in existence and that the appellants were bound by the arbitration clause if, but, so far as this ground was concerned, only if, a difference on the question of amount had arisen and he submitted that on the facts no such difference had arisen. In support of his argument he relied strongly on the case of *Jureidini v. National British and Irish Millers Insurance Co. Ltd*. (4), [1915] A.C. 499, as explained in *Heyman v. Darwins Ltd*. (5), [1942] A.C. 356, especially in the passage at p. 365 in the opinion of the Lord Chancellor, when he said:

> "Lord Parmoor said expressly that no difference had arisen as regards matters which could come for decision under the arbitration clause and that consequently the clause had no application. It is on this second ground that I think the majority of the House should be regarded as having decided the appeal."

He pointed out that the arbitration clause was identical with that in the *Jureidini* case (4), referred to the correspondence and submitted that the respondent company had at no stage disputed the amount of the loss but merely the liability to pay; that the learned judge had put an impossible construction on the correspondence in coming to the conclusion that the respondent company were disputing the amount of the loss and that the appellants had acknowledged such dispute; that a difference on liability did not automatically include a difference on quantum; and that any difference on amount should be clearly raised. To this Mr. Cleasby replied that a difference on quantum was clearly shown in the defence and must therefore have always been in the contemplation of the parties; that in any event the correspondence showed that a difference of quantum had arisen; that a difference on liability automatically included a difference on quantum; and that once a claim had been made and rejected in toto a difference on quantum always existed until a specific agreement on quantum had been reached. As he said, could either of the parties possibly imagine that if the respondent company were liable the liability would extend to the whole of the claim without any difference as to the amount? Mr. Khanna's reply was that while a difference as to amount had arisen in the defence it had not arisen, whatever either of the parties may have contemplated, before the suit was filed and that under the arbitration clause itself the difference must have arisen before the suit was filed. He further submitted that the arbitration clause gave an option to the respondent company to invoke its provisions; that the onus was on the respondent company to take the first step to initiate the arbitration; and that if the appellants had given the respondent company a reasonable time in which to take such a step before bringing the suit and the step was not taken then it was not open to the respondent company to set up as a defence non-compliance with the clause.

As I have pointed out earlier, arbitration clauses fall into three classes. The clause in this case is identical to the clause in the *Jureidini* case (4), and in almost every case in which comments have been made on the decision in the *Jureidini* case (4), attention was drawn to the limited nature of the arbitration clause. In every other authority to which this court was referred the arbitration clause was either generally on liability or on quantum with the additional provision that only the amount as determined by arbitration could be the subject of the suit. The precise matter which the parties in their contract agreed should be referred to arbitration as a condition precedent to the bringing of a suit is, in my view, of great moment in determining whether the condition precedent applies. As Viscount Simon, L.C., said in *Heyman's* case (5), at p. 368:

> "the governing consideration in every case must be the precise terms of the language in which the arbitration clause is framed".

It is clear that, in the absence of any further agreement, the respondent company in this case could not have insisted on the question of liability being referred to arbitration under this clause nor would the arbitrator have had any jurisdiction to deal with the question of liability. In the other two classes of arbitration clause the court is asked, where suit is brought before arbitration, either to determine the question of liability, when the parties have agreed that that question should be determined by arbitration, or to determine the question of quantum, when the parties have agreed that if a suit is brought it shall be only for a quantum which must already have been determined. In the arbitration clause in this case the parties have agreed only that it shall be a condition precedent to a suit

> "that the award by such arbitrator . . . of the amount of the loss or damage if disputed shall first be obtained."

In my view this clearly envisages a suit being brought to determine matters, such as liability, without the necessity for prior arbitration if the quantum is not in dispute. This being so, it is clear that a dispute relating to liability does not automatically include a dispute relating to amount. The clause in my view also makes it requisite that the dispute on amount must arise before the bringing of the suit, though the fact that such a dispute had not arisen before the bringing of the suit would not preclude it arising thereafter for determination in the suit. I do not, however, agree with the submission that the onus is on the respondent company to initiate the arbitration; the appellants are claiming under the policy and if they are to succeed they must comply with such conditions of the policy, including the arbitration clause, as may be applicable. Nor do I agree with the submission that when a claim is rejected in toto a difference on quantum must exist until specific agreement on amount has been reached; to do so would, in effect, be to say that a dispute on liability automatically includes a dispute on amount. It would also, in my view, be contrary to the decision in the *Jureidini* case (4), as in that case the claim was rejected, no specific agreement on amount was reached, a defence was that the amount claimed was in excess of the value of the goods, the jury assessed the value of the goods at about half the amount claimed, but the plaintiff succeeded on the ground, according to *Heyman's* case (5), that no difference on amount existed. There is a great deal in Mr. Cleasby's submission that the parties could not possibly have imagined that the determination of the question of liability in favour of the appellant would necessarily mean that the appellant would receive the full amount of his claim, but this, in my view, does not dispose of the matter. As I see it, the basic issue to be resolved is not whether at some stage the amount of the claim will be questioned but whether, for the purposes of the application of the clause, a difference on amount has arisen before action brought. In the light of the facts in the *Jureidini* case (4), the observations in that case and in the comments thereon in *Heyman's* case (5), that no difference on amount had arisen must mean, in my view, that no difference on amount had arisen for the purpose of the application of the arbitration clause and not that a difference on amount had never and would never arise. If I am correct in considering that the basic issue is whether, for the purposes of the application of the arbitration clause, a difference on amount had arisen before suit brought, this, in my view, is, at least on the particular facts of this case, merely another way of saying: has the party who is claiming non-fulfilment of the condition precedent contained in the arbitration clause expressly or by his conduct waived the application of the clause so as to disentitle him to rely on its non-fulfilment? This being so, I turn now to the second ground argued by Mr. Khanna.

It is clear on the authorities that a condition precedent may be waived. AS Scrutton, J. (as he then was), said in the *Toronto Railway* case (3), at p. 563:

> "Conditions precedent may be waived by a course of conduct inconsistent with their continued validity, even though the contracting party does not intend his conduct to have that result."

Whether the respondent company has or has not waived the application of cl. 13 is a question of fact. It is not suggested in this case that the waiver was express, so the question is whether the respondent company has by its conduct impliedly waived the application of cl. 13. On the evidence before the learned judge and this court, this is a matter to be elicited from the correspondence. The learned judge, as I shall point out later, would appear to have found as a fact that there was no waiver. Mr. Khanna submitted that the learned judge was incorrect in so finding for two reasons: first, that the construction put by the learned judge on the correspondence was an impossible, or at least an unreasonable, one; secondly, that in coming to his finding of fact the learned judge had applied a wrong principle of law in that he had confused conduct giving rise to an equitable estoppel with conduct giving rise to a reasonable inference of waiver. Mr. Clesby, if I understood him correctly, submitted that the correspondence did not give rise to any reasonable inference that there had been a waiver and that the learned judge's construction of the correspondence was correct; that the onus is on the appellants to prove a waiver; that the appellants should plead specifically the facts which disclose a waiver and absolve them from compliance with a condition precedent and that they have not done so; and that before a waiver can be inferred the appellants must in some way have put themselves at a disadvantage as a result of relying on the representations of the respondent company.

I agree with Mr. Cleasby that the facts giving rise to the waiver must be specifically pleaded but I think that para. 6 of the plaint sufficiently does so. I also agree with Mr. Cleasby that the onus is on the appellants to prove that there has been a waiver and bearing that onus in mind I now turn to the correspondence in order to determine whether there has been an implied waiver. As I stated earlier, this is a question of fact the determination of which is based solely on inferences from correspondence. That being so this court is in as good a position to draw any inferences as the learned judge, though of course this court would consider the matter carefully before drawing any inference different from that drawn by the learned judge. In the first letter of October 30, the manager regretted that he was

> "in no position but to decline to accept liability under the terms of the insurance policy".

When asked under what terms he denied liability, he replied on November 3, that

> "the incident which allegedly occurred has not been proved by you as a loss under the policy".

The appellants' advocates on November 26, then wrote to the manager stating that unless he admits liability the appellants

> "will have to take such further steps in the matter as they may be advised for enforcing their rights at your risk as to costs and consequences."

This letter is in my view a clear indication that the appellants are contemplating the bringing of a suit to determine the question of liability. To this the manager replied on November 28, the salient points of which are

> ". . . the mere statement by an insured that loss by burglary occurred is hardly proof of such loss. The insured has . . . been advised . . .

> that the incident which allegedly occurred has not been proved by them as a loss under the policy. In addition . . . the Criminal Investigation Department . . . have advised us that . . . there was no forcible entry into the insured premises. I cannot but be guided by the police in such matters . . .”

On these letters the learned judge, when dealing with the submission that there was a waiver, does not appear to have come to any specific finding as to whether there had or had not been an implied waiver, and, after referring to certain dicta of Scrutton, J., in the *Toronto Railway* case (3), stated:

> “But there is no evidence before me that the plaintiffs by the conduct of the defendants have been induced to incur trouble and expense or have been subjected to delay to their injury and prejudice. It cannot be said that the defendants made any representation on the faith of which the plaintiffs changed their position.”

It might be suggested that this passage implied that there was a representation but that the appellants had not acted on it to their disadvantage; this, however, I do not think was intended as at another part of his judgment the learned judge expressed the view that there was a difference on amount. In this passage the learned judge appears to have considered that before there can be an effective waiver the party claiming a waiver must have acted on the representation to his prejudice. If this is so, with respect to the learned judge, I do not consider that such is in all cases a correct statement of the law. In my view, the question of whether or not there has been a waiver is not necessarily based on any question of equitable estoppel. Waiver may arise in two ways: either by an express or implied contract varying the original contract, in which case the party entitled to rely on a condition in the original contract consents to abandon his right in consideration, for example, of the other party taking action in accordance with such abandonment; or it may arise from the conduct of one party amounting to a representation which the other party might reasonably infer was meant to be acted upon and he does so act upon it to his prejudice, in which case it is a type of equitable estoppel. If the respondent company has impliedly consented to abandon the right to insist on arbitration as a condition precedent in consideration of a suit being brought to determine the question of liability, a question which could not be determined by arbitration, thus avoiding what may turn out to be the unnecessary expense of arbitration on amount, the fact that the appellants did bring the suit would result in a waiver by implied contract. Equally well, if the respondent company has by its conduct in correspondence taken an attitude which the appellants might reasonably infer to be a representation that for the purpose of determining the main question in issue, that is liability, a suit might be brought without first going to arbitration to determine the amount of liability, the fact that the appellants acted on such representation is an act to their prejudice if arbitration as a condition precedent is insisted upon, and as a result waiver by estoppel would arise.

Bearing these principles in mind, in my view the manager’s letter of November 28, following the letter of November 26, from the appellants’ advocates, in which there is a clear inference of a suit, and the earlier letters, would certainly give rise to the reasonable inference that the attitude adopted by the respondent company was that it was not concerned with determining the amount of the claim since it was not liable for any amount; in other words, that the respondent company was not requiring fulfilment of the condition precedent of arbitration on the amount of the loss. This, in my view, would be a wholly reasonable attitude on the part of the respondent company and one which might well be to their advantage. If they had insisted on prior arbitration

and the appellants had succeeded in proving that the amount of the loss was the amount, or nearly the amount, of their claim, presumably the respondent company would have had to pay all or most of the expenses of the arbitration. If the respondent company was subsequently successful in its stand that no liability arose under the policy then such expenses would have been needlessly thrown away. This is a factor to be borne in mind in determining what inference may reasonably be drawn from the manager's letter of November 28. Further, the letter from the appellants' advocates being such as to bring to the mind of the manager the possibility of a suit being brought, the fact that the manager did not draw attention to cl. 13 is also a factor to be borne in mind in determining the inference which might reasonably be drawn from his letter. Bearing all the circumstances in mind it seems to me that not merely is it a reasonable inference but it is in fact the probable inference to be drawn from the correspondence that the respondent company did not require fulfilment of cl. 13 before the bringing of a suit which would determine liability. This being so and the appellants having brought the suit, in my view the appellants have proved a waiver by the respondent company, whether the waiver arises by reason of an implied contract or by reason of a representation giving rise to an estoppel by conduct. Whether the respondent company could take the stand that once the issue of liability is decided against it then the issue of amount should be determined by arbitration and not by the court which determines the issue of liability does not arise in this appeal and it is thus unnecessary for me to express my view on the matter. I would not desire, however, that my view of the correct answer to the third issue before the Supreme Court should be taken as precluding that court, should it decide the issue of liability in favour of the plaintiffs, from referring the issue of amount to arbitration in accordance with the terms of the policy if either of the parties so apply and that court think fit to grant the application.

For these reasons I would allow the appeal, set aside the judgment and decree of the Supreme Court and direct that the suit proceed on the basis that the answer to the third issue before the Supreme Court is in the negative. The appellants should have the costs of the appeal but the costs in the Supreme Court should be costs in the cause.

Sir Kenneth O'Connor P: I have had the advantage of reading the judgment of Newbold, J.A. He has set out the relevant facts and extracts from the pleadings and correspondence and I do not propose to set these out again except to the extent necessary to make this judgment intelligible.

The appellants are traders. They had at all material times a policy of insurance with the respondent company which insured them inter alia against loss

> "by theft . . . following upon housebreaking (causing actual visible damage to the premises or part thereof) and connected therewith".

The policy contained an arbitration clause which will be noticed hereafter. The appellants alleged that they had suffered a loss by burglary or housebreaking on the premises on October 19, 1958, for which they put in a claim for Shs. 46,746/- for stock-in-trade which they said had been on the premises. Following interviews the manager of the respondent company wrote to the appellants on October 30, 1958, a letter which referred to the "alleged burglary" at the appellants' premises and contained the following passage:

> "After considering all aspects of the incident and after due deliberation, I regret that I am in no position but to decline to accept liability under the terms of the insurance policy you hold."

The appellants asked for elucidation.

The respondent's manager replied on November 3:

> "I regret to advise that the incident which allegedly occurred has not been proved as a loss under the policy."

The appellants put the matter in the hands of their solicitors who wrote saying that it appeared that the respondent did not accept liability for the loss, particulars of which had already been furnished, and threatening to take steps to enforce the appellants' right unless liability was admitted within seven days.

The respondent's manager replied in a letter the relevant part of which is as follows:

> "Might I, at the outset, make it clear that the mere statement by an insured that loss by burglary has occurred is hardly proof of such loss. The insured has, in fact, been advised by a registered letter dated November 3, that the incident which allegedly occurred has not been proved by them as a loss under the policy.
>
> "In addition, would you kindly take note, and I should also be obliged if you would inform your client, that the Criminal Investigation Department, in a letter dated November 25, have advised me that it is their considered opinion that there 'was no forcible entry' into the insured's premises. I cannot but be guided by the police in such matters and undoubtedly you will be one with me in this regard."

On December 24, the appellants issued a plaint in which they claimed Shs. 46,746/-, the amount of their loss and pleaded inter alia

> "The defendants have on October 30, 1958, since declined to accept that a burglary of"
>
> (? or)
>
> "housebreaking occurred, and have thereby inferentially or impliedly repudiated requirements of the liability as to arbitration or otherwise".

The respondent company filed a defence in which it denied both the cause and quantum of the alleged loss. It denied inter alia that the appellants had suffered any loss covered by any risk insured against under the policy and put the appellants to strict proof of that. Without prejudice to this, the respondent averred that the appellants had not complied with the arbitration clause (condition 13 of the policy) and alleged that the value of the loss had not been ascertained by arbitration and was in dispute.

At the trial the following issues were framed:

1. Did the plaintiff suffer loss by theft as a consequence of housebreaking causing actual visible damage to their shop?
2. Are the defendants liable for such loss under the terms of the contract and upon the pleadings?
3. Can the defendants rely on condition 13 as to arbitration?
4. If not, what is the amount of the plaintiffs' loss?

The third issue was argued as a preliminary point. No oral evidence was called, the facts being left to be gathered from the agreed correspondence.

A request by the appellants to be allowed to amend their plaint by adding a prayer for a declaration that the respondent was liable to indemnify them against the loss suffered was disallowed.

The learned judge held that the arbitration clause meant that until an award had been made, no right of action or suit could be taken on the policy. He

decided that the respondent could rely on condition No. 13 as to arbitration and dismissed the appellants' suit with costs. Against that decision the appellants appeal to this court.

In deciding whether the learned judge was right in holding that condition No. 13, the arbitration clause, was a bar to the suit it is necessary first to see exactly what condition No. 13 says, then to see whether there was a dispute and, if so, whether it was of a kind which the arbitration clause covered.

As Lord Simon, L.C., said in *Heyman v. Darwins Ltd*. (5) at p. 360:

> "The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (*a*) what is the dispute and (*b*) what disputes the language of the arbitration clause covers."

The relevant parts of condition 13 are as follows:

"Arbitration

"13. If any difference arises as to the amount of any loss or damage, such difference shall independently of all other questions be referred to the decision of an arbitrator . . . And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators, or umpire of the amount of the loss or damage if disputed shall be first obtained."

It will be observed that the language of this arbitration clause does not apply to all disputes arising out of the policy. It is not framed, as in the clause considered in *Heyman's* case (5),

> "If any dispute shall arise . . . in respect of this agreement or any of the provisions herein contained or anything arising out of the same."

Condition 13 is in far less general terms and applies only to any difference arising "as to the amount of any loss or damage". The arbitrator is not empowered to determine questions of liability. His powers extend only to determining difference as to amount. Neither is condition 13 a *Scott v. Avery* clause which, in addition to providing that the award of an arbitrator is to be a condition precedent to the bringing of an action, stipulates that an action shall only lie for such sum as the arbitrator shall award: *Scott v. Avery* (6) (1856), 5 H.L. Cas. 811; *Caledonian Insurance Co. v. Gilmour* (7), [1893] A.C. 85, 90; *Spurrier v. La Cloche* (8), [1902] A.C. 446. If an arbitration clause makes an award settling the amount (if not admitted) a condition precedent to the right to payment of a claim and the amount is not admitted, then it is immaterial whether the question of liability is left to the arbitrator or not: an action cannot be maintained until the amount has been decided by arbitration and then only for that amount: *Spurrier's* case (8). But that is not the position here. Under condition 13 the only difference which is required to be referred to arbitration is a difference as to the amount of any loss or damage and an award of an arbitrator is only made a condition precedent to a right of action if the amount of the loss or damage is disputed. Before, therefore, condition 13 can operate to bar the filing of a plaint for an amount claimed under the policy, it must be shown that a difference has arisen before action brought as to the amount and that the amount of any loss or damage is disputed.

As already stated, no oral evidence was called at the trial, the facts being left to be inferred from the correspondence which was put in by agreement. In these circumstances this court is in as good a position as was the trial court to interpret the correspondence and to determine the facts. I have no hesitation in finding that the correspondence reveals a difference or dispute about liability,

not about the amount of the loss or damage. Stripped of circumlocution and business verbiage, what the insurance company was saying was:

> "We do not believe that you had a housebreaking causing actual visual damage to the premises or any part thereof and we put you to strict proof that your loss, if any, was a loss under the policy. The police tell us that, in their considered opinion, there was no forcible entry into your premises and we propose to be guided by that, until you prove the contrary."

It is true that the amount of the alleged loss had not been admitted before action brought: neither had it been disputed. The difference which had arisen was a difference whether if there had been a loss, it was a loss covered by the policy. The difference was whether the insurers were under a liability to pay at all. If that were to be decided against them, the question of amount would arise.

I am satisfied that condition 13 had no application when the plaint was filed, as no difference as to the amount of any loss or damage had then arisen and the amount of the loss or damage was not then disputed. I do not agree with the contention of Mr. Cleasby for the respondent that a difference as to amount had ipso facto arisen because liability was disputed and the amount had not been agreed and was still in issue. In *Jureidini's* case (4), an arbitration clause (condition 17 in that contract) identical with condition 13 in the present case was considered by the House of Lords. Liability had been repudiated by the insurance company on the ground that the insured had been guilty of fraud and arson. It was held by Lord Haldane that repudiation of the claim on a ground going to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim. It was also held by Lord Dunedin, Lord Atkinson and Lord Parmoor that the difference which had arisen as to liability was not covered by condition 17. Lord Dunedin said at p. 507:

> "My lords, the very clear argument of Mr. Matthews tried to make out that if he once showed that at a certain time in Costa Rica a certain difference had arisen, then that brought into full operation and effect the condition precedent in clause 17 as applicable to all suits. My lords, I do not think that view can be maintained, because clause 17 provides for the case of a difference arising as to the amount of loss, and then says that it shall be a condition precedent to any right of action or suit on the policy that the award of such arbitrator, and so on, of the amount of loss or damage, if disputed, shall be first obtained. I think it is perfectly clear that that article necessarily refers to an existing difference, not an historical difference; and it seems to me that when the attitude was taken up by these parties, which was taken up in the letters which have been read to us which the Lord Chancellor has referred to, in England, – that they repudiated the claim altogether and said that there was no liability under the policy, – that necessarily cut out the effect of cl. 17 as creating a condition precedent against all forms of action."

Lord Parmoor said at p. 508:

> "At the same time I should like to express my opinion that no difference had arisen as regards matters which could come for decision under cl. 17, and that consequently the clause had no application."

The first ground of decision in *Jureidini's* case (4), – that favoured by Lord Haldane – was criticised in *Heyman v. Darwins Ltd.* (5), but no criticism was levelled at the second ground. Viscount Simon, L.C., said at p. 364:

> "The next case calling for special examination is *Jureidini v. National British and Irish Millers Insurance Co. Ltd*., [1915] A.C. 499. Here, again,

> the decision was not reserved, and here, again, the speeches do not all give the same ground for allowing the appeal. Viscount Haldane, L.C., who had during the argument referred to the above observation of Lord Shaw in the *Johannesburg* case, [1909] S.C. (H.L.) 53, 56, said: 'Now, my lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced.' By the person setting up the repudiation is meant the insurance company, which denied liability under the policy on the ground that the appellants had set fire to their own property, and it is not at all clear to me why, if the policy contained an arbitration clause covering all claims arising under the policy, it should not cover such a dispute. But the arbitration clause in the policy was not framed so widely. It applied 'if any difference arises as to the amount of any loss or damage,' and provided that 'it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators, or umpire of the amount of the loss or damage if disputed shall be first obtained.' Lord Dunedin pointed out that the arbitration clause only applied to differences as to amount of loss, and, therefore, not to a claim which the respondents rejected altogether, whatever the loss might be. Lord Atkinson rested his judgment on the last point alone. Lord Parker concurred without distinguishing reasons. Lord Parmoor said expressly that no difference had arisen as regards matters which could come for decision under the arbitration clause and that consequently the clause had no application. It is on this second ground that I think the majority of the House should be regarded as having decided the appeal."

Jureidini's case (4), in which (as already mentioned) the arbitration clause was identical with that under consideration in the present case, should be followed (except in so far as its authority is affected by the remarks in *Heyman's* case (5)) by this court. Moreover, I respectfully agree with it. In my opinion condition 13 in the present case is not aptly worded to cover the dispute or difference which arose between the parties prior to action in the present case and did not operate to bar the suit. Once, however, the defence had been filed, a difference as to the amount of any loss or damage had, in my opinion, arisen which might, and in my opinion, could (if an application to that effect were made after liability had been established), be referred to the decision of an arbitrator. I derive this opinion from a consideration of condition 13 and of the defence and I am fortified by the following passage in the opinion of Lord Dunedin in the *Jureidini* case (4), at p. 507:

> "Personally, I should rather like to reserve my opinion as to what would have been the effect if the respondents, instead of pleading as they did, had pled in this way: 'We will allow this question to be disposed of at law by a jury as to whether there was fraud and arson or not,' and had gone on to say, 'but in the event of that being negatived we wish this ascertainment of actual damage to be ascertained by arbitration.' I should like to reserve my opinion on whether they might have said so with effect."

That is not precisely the manner in which the respondent company pleaded in the present case; but it did in the defence clearly put the quantum as well as the cause of the alleged loss in issue and it did rely on condition 13. I do not think that the previous correspondence amounted to a waiver of the right to rely on this condition to the extent that it was applicable.

I would allow the appeal, set aside the judgment and decree of the Supreme Court dated September 14, 1960, and answer the third issue ("Can the defendants rely on condition 13 as to arbitration?") as follows:

> "Not as a bar to the suit, since no difference as to the amount of any loss or damage within the meaning of that condition had arisen prior to action brought. Condition No. 13 does not prevent questions of liability from being determined in the suit. If, however, the question of liability is determined against the defendant company. it may apply that the difference raised by the defence as to the amount of any loss or damage be referred to the decision of an arbitrator pursuant to condition No. 13."

In my opinion, the suit should proceed. If either party wishes to have the amount of any loss determined by arbitration under condition 13, it should so apply and the court, if it thinks fit, may grant the application. If neither party wishes to rely on the arbitration clause, the court should decide quantum as well as liability.

The appellant should have the costs of this appeal. The costs in the Supreme Court should be costs in the cause and be in the discretion of the judge who hears it.

There will be an order accordingly.

Crawshaw JA: The appellants who were insured with the respondents claimed under their policy a sum of money which they alleged represented the loss they had suffered through a housebreaking. The respondents denied liability in toto on the ground that the claim was not covered by the policy as no "actual visible damages to the premises" had been caused, a state of affairs which under the terms of the policy was necessary before a claim following upon a housebreaking could arise. The appellants filed suit for the amount claimed. The respondents in their written statement of defence, in addition to denying total liability disputed the quantum of loss and also pleaded that the appellants had not complied with the provisions of cl. 13 of the policy. The learned judge in dismissing the suit with costs as disclosing no cause of action held that a difference as to quantum had arisen prior to the filing of the suit and that arbitration under cl. 13 was therefore a condition precedent to the filing of a suit on any issue between the parties under the policy.

The relevant part of cl. 13 reads as follows:

> "If any difference arises as to the amount of any loss or damage, such difference shall independently of all other questions be referred to the decision of an arbitrator . . . And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

Mr. Cleasby for the respondents maintained, with extensive reference to authorities, that the respondents' total repudiation was only of the claim under the policy and not of the policy itself and that therefore the arbitration clause did not go out with the repudiation. Mr. Khanna for the appellants made it clear that he accepted this, and such would appear to be correct.

Mr. Khanna based his appeal on three main grounds:

(*a*) that for the purposes of cl. 13 no difference had in fact arisen as to quantum.

(*b*) that if it is held that a difference had arisen, then the condition precedent as to arbitration had, by the conduct of the appellants, been waived by them.

(*c*) that notwithstanding cl. 13, the court could have treated the action as a declaratory suit and have come to a finding on whether the claim came within the policy, irrespective of the amount of the loss.

For reasons which will appear, I do not think it is necessary to consider the third ground. As to the first ground, I find myself, with respect, in disagreement with the learned judge; the amount of the claim was certainly never specifically questioned. From their letter to the appellants of October 30, 1958, there can be no doubt that the respondents were declining to accept any liability at all "under the terms of the insurance policy". The appellants' reply inquired under what terms of the policy liability was denied and the respondents' manager in his letter of November 3, said:

> "I regret to advise that the incident which allegedly occurred has not been proved by you as a loss under the policy".

The learned judge said of this letter,

> "The incident of course covers not only the alleged housebreaking but also the amount of goods alleged to have been stolen".

I read that letter however as going no further than to say that the alleged house-breaking and loss by theft was not regarded by the respondents as a risk covered by their policy. On November 26, the appellants wrote to the respondents saying,

> "It appears that you do not accept any liability for the damage and loss suffered by our client, a list of full particulars whereof have already been furnished to you".

The learned judge referred to this letter and said,

> "A reasonable interpretation of these words is that the plaintiffs acknowledge that the defendants were denying liability for any of the loss claimed by the plaintiffs, and that surely must preclude them now from saying that there is no difference between the parties on the quantum of loss".

Here again, with respect, I differ from the learned judge; it seems to me that what the appellants have in mind is the denial by the respondents of total liability under the "terms of the policy" and not a complaint as to quantum of loss, about which the respondents had made no comment – not unnaturally perhaps in view of what amounted to a denial that the risk came within the terms of the policy. The learned judge then referred to a letter from the respondents to the appellants of November 28, and said,

> "In their second paragraph they say that 'the mere statement by an insured that a loss by burglary has occurred is hardly proof of such loss'. The defendants are saying, in other words, that the plaintiffs must prove the amount of their loss, their mere statements to which being insufficient."

The paragraph continues, however,

> "The insured has, in fact, been advised by a registered letter dated November 3, that the incident which allegedly occurred has not been proved by them as a loss under the policy."

This I think makes it clear (and is consistent with the earlier letters already referred to) that the part of the paragraph quoted by the learned judge refers to a "loss" within the risks insured against, and not the amount of the loss. The rather vague grounds for denial of liability in the respondents' earlier letters is perhaps explained by their awaiting the result of police investigations, for in the third paragraph of their letter of November 28, they say that by a letter of November 25, the Criminal Investigation Department had expressed the view that there had been no forcible entry into the appellants' premises;

if this was correct it would of course mean that there had been no "housebreaking causing actual visible damage to the premises . . ." within the terms of the policy.

In my view, up to the time of the filing of the suit no difference as to the amount of any loss had arisen within the meaning of cl. 13, it first being raised by the respondents in their written statement of defence. At the same time, I would not say that the respondents had by their conduct or otherwise waived the condition as to arbitration, nor that the appellants were justified in concluding that they had done so. The controversial matter in the correspondence between the parties had been whether the loss was a risk within the policy, and when it became apparent that no agreement would be reached as to this the appellants, a few weeks later on December 24, 1958, filed their suit without first ascertaining from the respondents whether the quantum of loss was also in dispute.

What then is the position? No difference as to quantum having arisen before action, the condition precedent did not operate and the appellants were entitled to institute the suit. With the filing of the written statement of defence, however, the quantum came into issue. In the *Jureidini* case (4), the insurance policy contained a clause similar to cl. 13 in the instant case. The plaintiffs wrote to the defendants claiming the amount of their alleged loss and the defendants rejected the claim in toto without raising the question of quantum. The plaintiffs thereupon filed a suit, and in their defence the defendants, as well as denying total liability, alleged that the claim was in excess of the value of the goods, thus putting in dispute the question of quantum. There is therefore much in common between that and the instant case. It was held in the *Jureidini* case (4), that the defendants were precluded from pleading the arbitration clause as a bar to the action. The ground on which the House of Lords based their decision was considered in *Heyman v. Darwins Ltd*. (5), and Viscount Simon observed that the majority of the House should be regarded as having decided the appeal on the ground that no difference had arisen as regards matters which could come for decision under the arbitration clause and that consequently the clause had no application. The relevant date for consideration, whether a dispute as to quantum had arisen was therefore taken as the date of the filing of the suit, and it was then too late for the defendants in challenging the quantum to plead the arbitration clause as a bar to the suit. I would say, however, that as I see it, before it can be said no difference has arisen as to the amount of any loss, some reasonable opportunity must have been available to the insurance company to challenge the amount claimed; if this was not so the assured might avoid the express intention of the parties as shown in the arbitration clause by filing a suit prematurely. In the instant case I think the respondents did have such opportunity, although following the correspondence and before their filing of the suit the appellants did not (as one would have expected them to do) ascertain from the respondents whether, if liability was proved, they agreed the amount.

It is my view that the court is entitled to hear the issue of liability. It was admittedly not specifically pleaded in the plaint, but liability was specifically denied by the respondents in their written statement, and the appellants put to strict proof of it, and it was framed as an issue by the court. If liability is established, the court on the strength of the *Jureidini* case (4), may also determine the question of quantum, but not in my opinion if the respondents should apply to take the matter to arbitration in manner provided by cl. 13, for in their defence they disputed the quantum and relied on cl. 13; a right to refer the matter to arbitration in such circumstances would appear to have been contemplated by Lord Dunedin in the *Jureidini* case (4).

I would allow the appeal with costs; order that the judgment and decree

of the Supreme Court be set aside, and that the costs in the Supreme Court should be costs in the cause.

Appeal allowed. Order that suit do proceed.

For the appellants:
D. N. & R. N. Khanna, Nairobi
D. N. Khanna and *K. C. Thakkar*

For the respondents:
Atkinson, Cleasby & Co., Mombasa
R. P. Cleasby

Haj Ibrahim Mohamed Saeed v Al-Haj Othman Kaid Sallam
[1962] 1 EA 149 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	13 February 1962
Case Number:	43/1961
Before:	Sir Alastair Forbes Ag P, Crawshaw Ag VP and Newbold JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden – Light, Additional J.

[1] Rent restriction – Claim for possession – Monthly tenancy – Business premises – Change of user – Abandonment – Tender of arrears of rent refused before action begun – Additional rent due at date of commencement of proceedings – Whether court has jurisdiction to make order for possession – Whether change of user amounts to abandonment – Rent Restriction Ordinance (*Cap.* 136), *s.* 11 (*A.*) – *Transfer of Property Ordinance* (*Cap.* 154) (*A.*) – *Rent and Mortgage Restrictions* (*Amendment*) *Act*, 1933, *Sch. I.*

Editor's Summary

The respondent landlord had instituted proceedings to recover possession of certain premises formerly used as a coffee shop, of which the appellant was a monthly tenant, on the grounds that the premises had been kept closed for seven months, that the appellant was in arrears with his rent for the period April to October, 1960, and that the respondent required the premises for his own use. Notice to quit dated November 21, 1960, was served on the appellant expiring at the end of December, 1960. On November 26, 1960, the appellant tendered all arrears of rent which the respondent refused. There was no tender before action of rent due for November and December, 1960, nor were the arrears of rent paid into court. In his defence the appellant alleged, inter alia, that he had occupied the premises for over twelve years, which was longer than the respondent had owned the premises, that though he was not using them as a

coffee shop, he was using them to store property used for the coffee shop and that he required them for this purpose; that he had tendered rent and was prepared to pay the rent which had been refused. The trial judge held that not only had the appellant ceased to occupy the premises for the purpose for which they were leased to him, but that they had been unoccupied and locked up, that the respondent was justified in refusing the arrears of rent after issuing a notice to quit, that the respondent needed the premises and his claim for possession appeared reasonable. The judge accordingly granted a decree for possession postponed for one month. On appeal it was contended, inter alia, for the appellant that the notice to quit was not effective to terminate the tenancy, that under s. 11(2)(*a*) of the Rent Restriction Ordinance, tender of the rent at any time before suit was sufficient, that the respondent as a purchaser of the premises after the commencement of the Ordinance could not take advantage of s. 11(2)(*d*) of the Rent Restriction Ordinance and that change

of user as such was not a ground for granting possession of the premises unless the change brought the case within the terms of s. 11(2)(*b*) ibid. and there was no suggestion of that here.

Held –

(i) there was material upon which the Supreme Court could find that a monthly tenancy existed and, therefore, the notice to quit was valid.

(ii) though there was a change of user in that the premises were used for storage purposes, this was not a case of abandonment, as a mere change of user of business premises did not necessarily amount to abandonment.

(iii) there was no evidence to show that such a change of user constituted a breach of the terms of the contractual tenancy, and it certainly was not a change of user which brought the matter within s. 11(2)(*b*) of the Ordinance.

(iv) if a landlord seeks to rely upon para. (*d*) of s. 11(2) of the Ordinance to recover possession, the onus is upon him to show that the paragraph applies and, inter alia, he must show that his acquisition of the premises was not by purchase after the date of commencement of the Ordinance; this was not done in the instant case and therefore, the respondent could not rely on s. 11(2)(*d*).

(v) accepting that tender of the rent, even though overdue, before action brought, meant that the rent had been "paid", there was two months' rent due which had neither been paid nor tendered at the date the action was brought; there was, therefore, at the crucial date, rent lawfully due which had not been paid and this was sufficient to give the court jurisdiction under s. 11(2)(*a*) of the Ordinance, although the respondent did not rely on these two months' rent in his plaint.

(vi) when considering whether it was reasonable to make an order for possession, the trial judge was influenced by certain misconceptions; in the circumstances an order restoring possession to the appellant upon conditions was appropriate and would be made.

Appeal allowed in part. Order that possession of premises be restored to the appellant on conditions therein stated.

Cases referred to in judgment:

(1) *Bird v. Hildage*, [1948] 1 K.B. 91; [1947] 2 All E.R. 7.

(2) *Dellenty v. Pellow*, [1951] 2 All E.R. 716.

(3) *Mills v. Allen*, [1953] 2 All E.R. 534.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: This is an appeal from a judgment and decree of the Supreme Court of Aden dated April 20, 1961, whereby the appellant/defendant was ordered to deliver up to the respondent/plaintiff possession of certain premises which were leased by the appellant from the respondent.

The premises in question (hereinafter referred to as "the premises") are the ground floor of No.

150/29, Section D, Street No. 5, Crater, which are owned by the respondent. In his plaint the respondent pleaded, inter alia, as follows:

> "1. Plaintiff is the owner of No. 150/29 ground floor, Section D, Street No. 5, Crater. Defendant was the monthly tenant of the plaintiff in respect of the said premises according to the British calendar and pays rent of Shs. 30/- per month.
>
> "2. Defendant has not used the said premises for over seven months and has kept the same locked up. Besides, he is irregular in the payment of the monthly rent and is frequently in arrears. The rent from April to

October, 1960, is still due and payable. In or about November, 1960, however, defendant remitted the said arrears by postal money order, but plaintiff refused to accept the same.

"3. Plaintiff requires the said premises for his own use and occupation. Plaintiff therefore seeks to recover from the defendant vacant possession of the said premises by ejecting the defendant from therein.

"4. The tenancy was duly terminated by plaintiff's advocate's notice to defendant dated 21.11.60 which expired at the end of the monthly tenancy, December, 1960."

In his written statement of defence the appellant alleged, inter alia, that he had been occupying the premises for over twelve years, and had been in occupation of them before the respondent became the owner; that though he had ceased to use them as a coffee shop due to slackness of trade, he was using them for the storage of his property which had been used for the coffee shop, and that he required them for this purpose; that he had tendered rent to the respondent which had been refused; and that he was prepared to pay the rent which had been refused; and he asked the court to dismiss the suit and order the respondent to receive the rent due to him.

It may be noted here that the written statement of defence was prepared by the appellant personally, and that he appeared in person at the hearing of the suit.

At the hearing the respondent gave evidence to the effect that he was the owner of the premises of which the appellant was a monthly tenant at a rent of Shs. 30/- per month; that notice to quit dated November 21, 1960, had been served on the appellant; that the premises had been let for occupation as a coffee shop; that the premises had been locked up for some nine months, but he was not aware whether or not the appellant had any articles stored on the premises; that on November 26, that is, after service of the notice to quit, the appellant had tendered a money order for all arrears of rent, but that he (the respondent) had refused to accept it; and that he required the premises for his own use and would suffer greater hardship if the premises were not granted to him. No reason for this latter assertion was advanced. Two witnesses were called by the respondent, who confirmed that the premises had apparently been kept locked up for the past six or seven months.

The appellant in his evidence indicated – I will refer to this evidence in more detail later – that he had leased the premises to use as a coffee shop from some time in 1949 before the respondent had acquired the premises. He agreed the premises had been closed as a coffee shop for some six or seven months, but said he was storing articles in them; and he claimed the respondent had allowed him to be in arrears with his rent on occasion.

The learned additional judge who heard the case said in his judgment:

"It is undisputed that the plaintiff leased the suit premises to the defendant for use as a coffee shop at a monthly rent of Shs. 30/- some time in the year 1949, but that for the last seven months the defendant has ceased to conduct this business. It is also undisputed that the defendant has been irregular in the payment of rent and was in arrears. In his statement of defence the defendant says that he several times offered the rent to the plaintiff and the plaintiff refused to accept it, but he now testifies that the reason for the arrears is because the plaintiff agreed from time to time to allow these arrears to accumulate. On this point alone the defendant appears to lack sincerity.

"It is also undisputed that the defendant was given a valid notice to quit the premises at the time that the defendant was in arrears of rent and the premises has ceased to be used as a coffee shop, but whereas in his

written statement the defendant says that he ceased business because of the slackness of trade he now testifies that it was because of ill health. In his written statement defendant says that after ceasing business on the suit premises he has merely used the premises for the storage of articles of this business, but giving evidence he attempts to show that he needs the suit premises for the additional purpose of the daily storage of his weight and scales in connection with his butchery business. This last minute defence was quite obviously attempted by the defendant to rebut the allegation of the plaintiff and his witnesses that the suit premises have been continuously locked up by the defendant and unused for the past seven months or more.

"The defendant complains that in November, 1960, he did send all arrears of rent by post but the plaintiff refused to accept, and the plaintiff agrees, but it is quite clear that the arrears were sent after the notice to quit. The defendant refers to a former suit between the parties (290/59), but the judgment in that case does not show that the present claim is without merit. On the other hand it does show that the defendant, even in 1959, was twelve months in arrears of rent.

"Having carefully considered all the circumstances I prefer the evidence of the plaintiff, and I find that not only has the defendant ceased to occupy the suit premises for the purpose for which they were leased to him, but that for the past seven months at least the premises have been unoccupied and locked up by the defendant. I also find that the plaintiff did not encourage irregularity in payment of rent, and that he was quite justified in refusing to accept the arrears of rent after issuing notice to quit.

"I cannot see how, in the circumstances, the defendant can claim the protection of the Rent Restriction Ordinance as a 'Protected Tenant'. In any event there is evidence unrebutted that the plaintiff needs the premises for his own use and occupation, and his claim for possession does not in any way appear unreasonable or anything but genuine."

The learned judge accordingly granted a decree for possession, which, however, he postponed for one month to give the appellant an opportunity of obtaining alternative accommodation for the storage of his goods. This appears to indicate that the learned judge, in saying that for the past seven months the premises had been "unoccupied and locked up" by the appellant, meant that they were not occupied as a coffee shop. He appears to accept that they were occupied at least for the storage of some of the appellant's property.

It is to be noted that the learned judge did not frame issues in the case, neither did he refer to the relevant provisions of the Rent Restriction Ordinance (Cap. 136 of the 1955 edition of the Laws of Aden, hereinafter referred to as "the Ordinance"). The need to frame issues has been repeatedly stressed by this court. Here, the failure to do so, or to refer to the terms of the Ordinance, appears to some extent to have misled the learned judge in his consideration of the case.

The grounds advanced for obtaining possession of the premises were lawful termination of the tenancy by a valid notice to quit, and (*a*) non-payment of rent; (*b*) requirement of the premises by the landlord for his own use and occupation; and (*c*) change of user and non-occupation of the premises by the tenant. The provisions of the Ordinance relevant to these grounds – it is not disputed that the Ordinance does apply to the premises – are contained in s. 11 and are as follows:

"11(1) No order or judgment for the recovery of possession of any premises to which this Ordinance applies or for the ejectment of any

tenant therefrom shall be made or given unless the court considers it reasonable to make such order or give such judgment, and either –

(*a*) the court has power so to do under the provisions of sub-s. (2) of this section; or

(*b*) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect.

"(2) The court shall for the purposes of sub-s. (1) of this section have power to make or give an order or judgment for the recovery of possession of any premises to which this Ordinance applies or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if –

(*a*) any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy (whether under the contract of tenancy or under any Ordinance) so far as the obligation is consistent with the provisions of this or any other Ordinance, has been broken or not performed;

(*b*) the tenant has used or allowed to be used such premises for any immoral, or illegal purpose or has committed waste or has been guilty of conduct which is a nuisance or annoyance to adjoining or neighbouring occupiers;

.

(*d*) the premises are reasonably required by the landlord (not being a landlord who has become a landlord by purchasing the premises or any interest therein after the date on which this Ordinance comes into effect) for occupation by himself, or any son or daughter of his over eighteen years of age, or his father or mother: Provided that an order or judgment shall not be made or given on any ground specified in this paragraph if the court is satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it:

."

A great many grounds of appeal are set out in the memorandum of appeal, but Mr. Chanan Singh, who appeared for the appellant on the appeal, did not seek to argue the majority of them. His main arguments were:

(*a*) that the notice to quit was not effective to terminate the tenancy;

(*b*) that under s. 11(2)(*a*) of the Ordinance, tender of the rent at any time before suit is sufficient;

(*c*) that the respondent as a purchaser of the premises after the commencement of the Ordinance could not take advantage of s. 11(2)(*d*) of the Ordinance; and

(*d*) that change of user as such is not a ground for granting possession of the premises unless the change brings the case within the terms of s. 11(2)(*b*) of the Ordinance, and there is no suggestion of that here.

As to the notice to quit, Mr. Chanan Singh argued, as is indeed the case, that the notice must expire at the end of the period of tenancy, and that the landlord must show that it does. He contended that in the instant case the respondent had failed to lead evidence to show the date of commencement of the tenancy and so failed to establish that the notice to quit was effective

on the correct date. I do not think that this contention is sound. It was pleaded by the respondent that the appellant was a monthly tenant of the premises "according to the British calendar", and that the tenancy was duly determined by the notice "which expired at the end of the monthly tenancy, December, 1960". Attached to the plaint was a copy of the notice to quit, the last paragraph of which read:

> "This is therefore to give you notice and require you to quit vacate and deliver vacant possession of the said premises in your occupation to my client at the expiry of the next month of your tenancy, i.e. January 1, 1961, failing which the ejectment proceedings will be instituted against you by my client at your risk as to all costs."

The correctness of this statement in the notice to quit was apparently accepted by the appellant in his letter in reply, in which he said, inter alia: "It is true that I am the monthly tenant of your client . . ."; and in the written statement of defence the assertions were not denied. Nor was there any suggestion in the appellant's evidence that the assertions were incorrect. It appears to me that in these circumstances the court was entitled to find from the pleadings, and the notice to quit and reply thereto, which were put in evidence by the respondent as part of his case, taken with the respondent's statement in evidence that the appellant was the monthly tenant of the premises, that there was indeed a monthly tenancy running from the first to the last day of each calendar month. Accordingly I think this ground of appeal must fail.

It is convenient to deal next with the grounds based on para. (*b*) and para. (*d*) of sub-s. (2) of section 11 of the Ordinance. I think the contentions advanced by Mr. Chanan Singh on both these paragraphs are sound. The learned judge appears to have relied to some extent on the change of user or non-user of the premises as a ground for granting possession. As I have already pointed out, he seems to have accepted that the premises were being used for storage, so, though there was clearly a change of user, this was not a case of abandonment of the premises. No evidence was led to show that such a change of user constituted a breach of the terms of the contractual tenancy; and it certainly was not a change of user which brought the matter within s. 11(2)(*b*) of the Ordinance. Some reference was made by Mr. Iyer for the respondent to the English cases on abandonment, which are referred to in Halsbury's Laws of England (3rd Edn.), Vol. 23 at p. 807. The English legislation, however, relates to premises used as a dwelling, while the local legislation covers also business premises. A mere change of user of business premises does not necessarily amount to abandonment.

As regards recovery of the premises for the use of the landlord, this does not appear to have been relied on by the learned judge for his decision. Mr. Chanan Singh argued that in any case s. 11(2)(*d*) could not apply since the appellant had been the tenant before the respondent acquired the premises. I think it is to be inferred from the appellant's evidence that he was a tenant of the premises before the respondent acquired them, and that the learned judge was wrong in saying that it was undisputed that "the plaintiff leased the suit premises to the defendant" if, by that, he meant that the original lease was granted by the respondent himself. The appellant's evidence on the point was:

> "I have a tenancy of the suit premises for some time. The suit premises were let to me by the plaintiff for use by me as a coffee shop. Since 1949 I have been using the premises as a coffee shop, and before plaintiff became landlord no one complained of me."

I interpret this as meaning that the respondent only became landlord some time after the appellant had first rented the premises. Para. (*d*) of sub-s. (2) of s. 11, however, refers to acquisition by the landlord by purchase, and there

is no evidence here as to the method by which the respondent acquired the premises. But I do not think this helps the respondent. It appears to me that if a landlord seeks to rely upon that paragraph to recover possession, the onus is on him to show that the paragraph does apply to him and that, inter alia, he must show that his acquisition of the premises was not by purchase after the date of commencement of the Ordinance. This was not done in this case, and I think the respondent cannot rely on s. 11(2)(*d*) of the Ordinance.

I come now to the question of non-payment of rent. This appears to have been the principal ground relied on by the learned judge, who stated that the respondent was quite justified in refusing the tender of arrears after the service of the notice to quit. Mr. Iyer also stated that this was the principal ground on which he relied to support the judgment.

Mr. Chanan Singh relied on the decision in *Bird v. Hildage* (1), [1948] 1 K.B. 91, in which it was held that the material time by reference to which the court has to decide whether rent "is lawfully due and has not been paid" is the date of the landlord's institution of proceedings for possession. The provision of the English Rent Restriction Acts corresponding to s. 11(2)(*a*) of the Ordinance which was considered in *Bird v. Hildage* (1) (i.e. in Sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933) is identical with s. 11(2)(*a*). The proceedings in *Bird v. Hildage* (1), had been commenced on May 21, 1946. Cohen, L.J., delivering the judgment of the English Court of Appeal, said:

> "Section 3 and Sch. I lay down the circumstances in which the court may make an order or give a judgment for recovery of possession, and we think that, in reaching a conclusion whether any rent is lawfully due and has not been paid, the court must look at the date of institution of the proceedings by which the landlord is seeking to recover possession.
>
>
>
> "Before the court can have jurisdiction the landlord must prove two things, namely (1) that some rent was lawfully due from the tenant at the date of the institution of the proceedings, and (2) that the rent was unpaid.
>
> "The question, therefore, arises in the present case, was any rent lawfully due from the tenant on May 21, 1946, to the landlord? In our view, rent is not lawfully due unless it can be recovered by process at law. A landlord may recover rent lawfully due in two ways, that is, either by distress or by judgment in an action. In this case, it is admitted that a valid tender of the rent due on March 25, 1946, amounting to £16 5s. 0d. was made on May 16, 1946. As a result of that tender, the landlord could not thereafter distrain for his rent: *Johnson v. Upham* (1859), 2 E. & E. 250, and see Hill and Redman, Law of Landlord and Tenant (10th Edn.), p. 323. Equally, in view of that tender and the payment into court which the tenant was entitled to make and did make as the result of that tender, the landlord could not obtain judgment for his rent, and, in fact, did not do so: see *Johnson v. Clay* (1817), 7 Taunt. 486 and *James v. Lord Vane* (1860), 29 L.J. (Q.B.) 169, 171, per Cockburn, C.J.
>
> "The result is, in our view, that, where tender of rent is made, even after the due date, where time is not made the essence of the contract, such a tender prevents rent from being lawfully due from the tenant to the landlord within the meaning of the schedule. It would be a very curious construction of the schedule if the result were that, although a landlord could not succeed in action to recover judgment for his rent, he could, nevertheless, require the court to exercise its jurisdiction on the ground that rent was lawfully due to him and unpaid. Although tender can never amount to payment, where time is not made the essence of the contract either expressly or impliedly, it can always be made after the due date, and the creditor refuses

> at his peril. If the creditor does refuse it and subsequently brings proceedings to recover the debt, and a payment into court is made, he cannot recover judgment. Judgment will be given against him for the costs of the proceedings, as a plea of tender is a defence to a claim that the defendant is indebted to him. Where the debtor has a defence in law to a claim for money, whether it be rent or otherwise, it seems to us impossible to say that the money claimed is lawfully due from the debtor to the creditor or the tenant to the landlord."

On the wording of s. 11(2)(*a*) of the Ordinance, I respectfully agree that the critical date that has to be considered is the date of commencement of the proceedings for recovery of possession. But in the instant case the facts are not the same as the facts in *Bird v. Hildage* (1). In *Bird v. Hildage* (1) the rent was payable quarterly; a quarter's rent was overdue; tender of the rent overdue was made before action brought; and when the action was commenced the amount due was paid into court. At that stage another quarter had not yet elapsed, so no further sum was due by way of rent over and above what had been tendered. In the instant case the rent was payable monthly; several months' rent was overdue at the date of notice to quit; there was a tender of the amount overdue at that date, but before action was brought two further months' rent was due which, it is to be inferred from the defence, was not paid or tendered; and there was no payment into court of any of the rent due. So far as payment into court is concerned, this in itself would not deprive the court of jurisdiction, though it might affect the question, the question of reasonableness (*Dellenty v. Pellow* (2), [1951] 2 All E.R. 716). However, accepting that tender of the rent, even though overdue, before action brought means that the rent has been "paid", so as to deprive the court of jurisdiction under s. 11(2)(*a*) of the Ordinance, yet here, at the date the action was brought, there was two months' rent, i.e. rent for November and December, due which had neither been paid nor tendered. It is true that there is little or no evidence on the question of this rent; but, as I have said, it is to be inferred from the defence that it was neither paid nor tendered. We were in fact informed that such was the position, and this was not disputed. There was therefore, at the crucial date, rent lawfully due from the tenant which had not been paid, and I think this is sufficient to give the court jurisdiction under the section, although the respondent did not rely on these two months' rent in his plaint. For this reason I think this ground of appeal must fail, although I think, with respect, that the learned judge was wrong in saying that the respondent

> "was quite justified in refusing to accept the arrears of rent after issuing notice to quit."

It remains, however, to consider the question of reasonableness in making the order for possession. The learned judge has not referred expressly to the question of reasonableness in his judgment, but it is, I thin, implicit in the judgment that he did consider it reasonable to make the order. It would seem, however, that he was influenced by certain misconceptions, e.g. that the respondent's rights crystallized at the date of the notice to quit rather than at the date of the commencement of proceedings, thus discounting the effect of the tender of the arrears of rent; that the change of user of the premises entitled the respondent to an order for possession; and that the respondent's statement that he required the premises for his own use and occupation also entitled him to an order for possession. I have already given reasons for my view that neither the change of user nor the desire of the respondent to have the premises for his own occupation, entitled him to an order for possession. The mere statement by the respondent that he desires the premises for his own use and occupation does not, in my opinion, carry the question of reasonableness any further.

I think, however, that the nature of the change of user is a matter which can be taken into account. As regards the arrears of rent, it is true that, because there was no tender of the rent due in respect of November and December, the case technically falls within the jurisdiction of the court. Nevertheless, it was natural for the appellant, who did not at that time have the benefit of professional legal advice, to assume that, because the rent tendered in respect of the earlier months had been refused, it would be useless to tender the rent for November and December. The omission to pay the arrears of rent into court was probably also due to the appellant's failure to employ an advocate in the court below. The ordinary powers of the court to grant relief against forfeiture of a lease for non-payment of rent, which are contained in s. 111 of the Transfer of Property Ordinance (Cap. 154) may be noted. In Halsbury's Laws of England (3rd Edn.), Vol. 23 at p. 818 it is stated, in relation to the Rent Restriction Acts, that

> "the normal order, where there are still arrears at the date of the hearing, is an order for possession suspended as long as the current rent is paid and a further sum paid off the arrears".

Power to make such an order is contained in sub-s. (3) of s. 11 of the Ordinance. It is to be borne in mind that such an order is not always the most satisfactory form of order to make (*Mills v. Allen* (3), [1953] 2 All E.R. 534), and in all the circumstances of this case I think the order set out below would be appropriate here.

I have already mentioned that the original order for possession, which was made on April 20, 1961, was suspended for one month. Application was subsequently made for stay of execution. The application was dismissed on July 14, 1961, subject to an undertaking by the respondent not to let or part with possession of the premises until the appeal had been determined. It would seem, therefore, that the respondent has been in possession of the premises for some months, though the record does not disclose the precise period. In the circumstances, the arrears of rent to be paid by the appellant under the proposed order must be related to the period he has actually been in occupation of the premises, and possession of the premises will require to be restored to the appellant.

I would accordingly order as follows:

(1) On the expiration of twenty-one days from the date of this judgment the decree of the Supreme Court shall stand confirmed unless, within such period:

(*a*) the appellant either –

(i) pays to the respondent such sum as may be agreed by the parties to be the arrears of rent due in respect of the period during which the appellant has been in possession of the premises up to the date of this judgment; or

(ii) pays into court such sum as the registrar of the Supreme Court may consider sufficient to cover such arrears, in which event either party shall be at liberty to apply to a judge of the Supreme Court to determine the amount of such arrears as shall be due; subject to any order as to the costs of the application, the amount so found to be due shall be paid out of court to the respondent and the balance, if any, paid to the appellant; and

(*b*) the appellant files in the Supreme Court an undertaking to pay the future rent of the premises as and when it becomes due.

(2) If, within such period of twenty-one days payment is made as aforesaid

and the undertaking is so filed, the appellant shall thereupon be restored to possession of the premises and the decree of the Supreme Court shall be set aside except as to the order for costs.

(3) The respondent shall be at liberty to apply to the Supreme Court for an order for possession in the event of any breach by the defendant of his undertaking to pay the future rent of the premises as and when it becomes due.

In view of the somewhat complicated nature of the order which is necessary owing to the circumstances, I would order further that either party be at liberty to apply to a judge of the Supreme Court in the event of any difficulty arising in the carrying out of the terms of this order.

As regards costs, the appellant has been partially successful on the appeal, and I would therefore order that the respondent pay half the appellant's costs of the appeal. As regards the costs in the Supreme Court, the appellant has been shown to be in default and the order made has been an exercise of the discretion of the court in his favour. In the circumstances I would not interfere with the order for costs made by the Supreme Court.

Crawshaw JA: I agree the order except in so far as it relates to costs in the court below. The respondent's grounds for applying for possession were (*a*) that he required the premises for his own use and occupation, and (*b*) that the premises were not being used by the respondent, and (*c*) that the appellant was in arrears of rent up to the end of October, 1960. On none of these grounds has he succeeded. I would order that each party pay his own costs in the court below.

Newbold JA: I agree with the judgment and conclusion of the learned Acting President and with the order proposed by him.

Appeal allowed in part. Order that possession of premises be restored to the appellant on conditions therein stated.

For the appellant:
Chanan Singh and *A. Rahman*, Aden

For the respondent:
S. N. Iyer, Aden

Charles Douglas Cullen v Parsram and Hansraj
[1962] 1 EA 159 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 March 1962
Case Number:	52/1960
Before:	Sir Ronald Sinclair P, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Kenya – Miles, J

[1] Tort – Detinue – Claim for return of trees felled or their value – Demand by owner for return of trees – Original taking not lawful – Whether a good defence is that goods no longer in defendant's possession at time of demand – Limitation Ordinance (*Cap*. 11), *s*. 5 (*K*.).

Editor's Summary

In 1954 the respondents, who were saw millers, entered on the appellant's farm and felled and removed seventy-six trees. The boundary of the appellant's farm had not been precisely ascertained and the respondents believed they were felling trees under the authority of the Forest Department and in forest reserve. In December, 1954, the appellant discovered that thirty-four trees had been felled and he accepted Shs. 1,000/- from the respondents in respect of these, believing that the respondents had only felled and removed these trees. In February, 1955, the appellant discovered that a further forty-two trees had been felled and removed by the respondents. After some correspondence the appellant was paid Shs. 871/81 in respect of twenty-four of the forty-two trees; but not being satisfied with the amount received he wrote to the respondents on March 19, 1958, threatening action for damages in respect of trespass and conversion unless a sum of about Shs. 13,000/- was paid. By letter to the respondents dated May 2, 1958, the appellant for the first time demanded the return of the trees themselves and as the demand was not met filed a suit in detinue. The main point at the trial was whether the appellant was entitled to the return of the trees or their value; the trial judge found as a fact that at the time of the demand the respondents had ceased to be in possession of the trees "for a period of some 3 years" and held as a matter of law that in these circumstances the appellant could not succeed in an action of detinue. The appellant thereupon appealed and challenged the findings of fact and law.

Held – (CRAWSHAW, J.A., dissenting) –

(i) an action in detinue is primarily to recover possession of the specific article and was based on a wrongful with holding of it.

(ii) where the original possession of the defendant was lawful, whether by reason of bailment, quasi-contract or statutory right, and there is a continuing duty on the part of the defendant to retain the article and then to deliver it up to the person entitled to demand it, it is no defence for the defendant to say that he no longer has possession of the article, unless he proves that possession was lost without any default on his part.

(iii) where the original possession by the defendant is unlawful and the defendant has either destroyed the article or disposed of it, lack of possession at the time of the demand is a good defence in an action in detinue, as the wrong consists not of withholding the article, but of a previous conversion.

(iv) the trial judge was correct in holding that the appellant could not recover in an action in detinue.

Appeal dismissed.

Case referred to in judgment:

(1) *Rosenthal v. Alderton & Sons Ltd*., [1946] 1 K.B. 374; [1946] 1 All E.R. 583.

(2) *Clayton v. Le Roy*, [1911] 2 K.B. 1031.

(3) *Alexander v. Southey*, 106 E.R. 1183.

(4) *Williams v. Gesse*, 132 E.R. 637.

(5) *Verrall v. Robinson*, 150 E.R. 213.

(6) *Jones v. Dowle*, 152 E.R. 9.

(7) *Coldman v. Hill*, [1919] 1 K.B. 443.

(8) *Reeve v. Palmer*, 141 E.R. 33.

(9) *Goodman v. Boycott*, 121 E.R. 974.

(10) *Wilkinson v. Verity* (1871), L.R. 6 C.P. 206.

(11) *Crossfield v. Such*, 155 E.R. 1587.

(12) *Beaman v. A.R.T.S. Ltd*., [1948] 2 All E.R. 89.

(13) *Betts v. Receiver for the Metropolitan District*, [1932] 2 K.B. 595.

(14) *Bristol and West of England Bank v. Midland Railway Co*., [1891] 2 Q.B. 653.

(15) *Oakley v. Lyster*, [1931] 1 K.B. 148.

(16) *United States of America v. Dollfus Mieg et Compagnie S.A*., [1952] A.C. 582; [1952] 1 All E.R. 572.

The following judgments were read:

Judgment

Newbold JA: This was an appeal against a judgment and decree of the Supreme Court of Kenya given at Nakuru on March 17, 1960, in a suit in which the appellant (then the plaintiff) sued the respondents (then the defendants) in detinue claiming the return of trees felled and removed by the respondents or their value. In the Supreme Court judgment was given in favour of the respondents, dismissing the suit with costs.

The facts, so far as they are relevant to this appeal, are as follows. The appellant was the owner of a farm and in 1954 the respondents, who were saw millers, entered on the appellant's farm and felled and removed seventy-six trees. At that time the boundary of the appellant's farm had not been precisely ascertained and the respondents believed that they were felling trees under the authority of the Forest Department and in forest reserve. In December, 1954, the appellant discovered that thirty-four trees had been felled and he accepted Shs. 1,000/- from the respondents in respect of the felling and removal of those trees, believing at that time that the respondents had felled and removed only those trees. In February, 1955, the appellant discovered that a further forty-two trees had been felled and removed by the respondents. Correspondence extending over a long period then took place between the appellant and

the Forest Department and eventually, in June, 1957, the appellant was paid Shs. 871/81 in respect of twenty-four of the forty-two trees. The appellant was not satisfied with the amounts he had received and demanded payment of a considerably increased sum both in respect of the thirty-four trees and the forty-two trees, and in a letter to the respondents dated March 19, 1958, a threat of action for damages in respect of trespass and conversion was made unless a sum of about £650 was paid. In a letter to the respondents dated May 2, 1958, the appellant for the first time demanded the return of the trees themselves. This demand was not met, and on May 16, 1958, the appellant filed his plaint in detinue. Before the Supreme Court five issues were framed. The first issue was whether the suit was time barred under s. 5 of the Limitation Ordinance (Cap. 11 of the Laws of Kenya). The learned judge decided this issue on a preliminary objection and having regard solely to the form of the plaint. His decision was that the claim was not time barred but in his judgment the learned

judge stated that had his decision been given after he had heard the evidence it might well have been that the evidence would point to a different conclusion. At the hearing of the appeal counsel for the respondents asked for leave to argue the question of limitation. We reserved our decision on this application and stated that should it become necessary to consider the matter of limitation we would relist the appeal. The second and fifth issues are immaterial for the purposes of this appeal. The third issue was whether the appellant was entitled to the return of the trees or their value. The learned judge held that the appellant was not so entitled and the main point of this appeal was whether the learned judge was correct in so holding. The fourth issue was whether the appellant was precluded from claiming the recovery of the trees by reason of having accepted two payments of monetary compensation. The learned judge held that the appellant was precluded from making any claim in respect of the forty-two trees but not in respect of the thirty-four trees. From this decision, in so far as it relates to the forty-two trees, the appellant appeals, but consideration of this part of the appeal only becomes necessary if the appellant succeeds on the main point; and its consideration would also be subject to any decision on the application for leave to argue the limitation point.

I turn now to the main point of this appeal, which is whether the learned judge was correct in holding that the appellant was not entitled to the return of the trees or their value. As I have stated, the plaint is framed in detinue, claiming the return of the trees or their value, and is based on a demand by the appellant for their return and a refusal by the respondents. The demand is contained in the letter of May 2, 1958, of which the learned judge said

> "this was plainly a specious attempt to resuscitate or create a right of action which would not be barred by the Limitation Ordinance (Cap. 11)."

Up to the date of that letter the claim of the appellant had been for damages in respect of trespass and conversion, but it appears that the appellant some time after March 19, 1958, appreciated that any claim in trespass or conversion would be time barred, hence the demand in May for the return of the trees and the plaint being framed in detinue. The learned judge found as a fact that at the time of the demand the respondents had ceased to be in possession of the trees "for a period of some three years", and held as a matter of law that in these circumstances the appellant was not entitled to succeed in an action of detinue. The appellant challenges both the finding of fact and the decision in law that in the circumstances of this case lack of possession at the time of the demand is a good defence. As far as the finding of fact is concerned the learned judge stated as follows:

> "According to the evidence of the defendants, which upon this point stands uncontradicted, the trees, immediately they had been removed, were put through the mill and disposed of in the ordinary course of their business".

There was evidence before the learned judge to that effect and, indeed, that such was the position appears to have been accepted without question up to the filing of the appeal. Before us counsel for the appellant did not seriously dispute this finding of fact, indeed he subsequently accepted that the trees were not in the possession of the respondents at the time of the demand, and I can see no reason whatsoever to interfere with this finding of fact.

Turning now to the question of law, the essential point in this appeal is whether in an action of detinue it is a good defence of the defendant to say that at the time of the demand he was not in possession of the article demanded. The learned judge referred to a passage at p. 421 of Clerk and Lindsell on Torts (10th Edn.) and held that it was; it is submitted for the appellant that the learned judge was wrong in so doing.

In order to determine this point it is necessary to trace in outline the history of the actions of detinue and of trover, or, as it is now called, of conversion, and to ascertain the main purpose of the action of detinue. Both actions are of very ancient origin, though the action of detinue is of earlier origin than that of trover. The action of detinue took two forms: the one, detinue sur bailment, was basically an action founded on contract in which the possession of the article by the defendant was originally lawful and the complaint was that the defendant had failed to deliver it up on demand; the other, detinue sur trover, was basically an action founded on tort in which the possession of the article by the defendant was not necessarily originally lawful but the plaintiff waived any tort, made an untraversable allegation of finding, and complained that the defendant had failed to deliver it up on demand. In both forms the action of detinue sought the return of the specific article itself. The action of trover was an action in tort in which the wrong complained of was the conversion of the article and damages were sought for that wrong. The old procedural distinction between these, the two actions of detinue and of trover, have been abolished for over a hundred years, but the two separate forms of action have continued under the names detinue and conversion, and the difference in the remedies sought still remains. In detinue what is sought is the return of the article, which in proper cases the court will order, or its value. Since it is the return of the article itself which is sought, where the judgment is not for the return of the article itself but for its value, the value which the court awards is the value of the article at the date of judgment: see *Rosenthal v. Alderton & Sons Ltd*. (1), [1946] 1 K.B. 374. In trover what is sought is simply damages for the wrongful act. In detinue no wrong is assumed to exist until the refusal to deliver up on demand made by the person entitled to make the demand, hence the demand and refusal is an essential prerequisite to the action: *Clayton v. Le Roy* (2), [1911] 2 K.B. 1031. In trover the wrong exists from the moment of the conversion and though there may well be a demand and refusal, the refusal is not of itself a conversion but merely evidence of a previous conversion: *Alexander v. Southey* (3), 106 E.R. 1183. As a refusal is merely evidence of a conversion it follows that if the refusal is on the ground of lack of possession at the time of the demand and there is no other evidence of any conversion the defence of lack of possession at the time of the demand is a good defence: *Williams v. Gesse* (4), 132 E.R. 637; *Verrall v. Robinson* (5), 150 E.R. 213.

In detinue, however, the position is not quite so simply answered. In detinue sur bailment, refusal to deliver up on the ground of lack of possession at the time of the demand has been held in a number of cases not to be a good defence: *Jones v. Dowle* (6), 152 E.R. 9; *Coldman v. Hill* (7), [1919] 1 K.B. 443. The reason is obvious: as the original possession by the defendant was lawful and as he remained under a continuing duty to deliver up the article to the person entitled to demand it, the refusal to deliver up is itself the wrong and not merely evidence of some previous wrong and such wrong refusal cannot be excused on the ground of an earlier wrongful parting with the possession of the article. As was said in *Reeve v. Palmer* (8), 141 E.R. 33, a bailee cannot set up a wrongful act as a defence to a demand and thus by a wrongful act better his position. See also the judgment of Blackburn, J. (as he then was) in *Goodman v. Boycott* (9), 121 E.R. 974 at p. 977. Is the same position true where it is a case of detinue sur trover, that is where the action of detinue is founded on what is described in *Wilkinson v. Verity* (10) (1871), L.R. 6 C.P. 206 as a bare taking? I have examined a large number of authorities extending over a very long period but I have been unable to find one precisely in point. In certain text books, as for example Clerk and Lindsell on Torts there are statements which suggest that lack of possession at the time of the demand is a good defence where the original possession did not arise out of bailment. There are also dicta in a number of cases that lack of possession at the time of the

demand is a good defence if the possession was lost through no fault of the defendant. In *Crossfield v. Such* (11), 155 E.R. 1587, the defendant, thinking he was entitled to do so, delivered to a third person certain assets of the deceased. The administratrix after demand brought an action of detinue against the defendant, to which the successful defence of lack of possession was set up. Pollock, C.B., said at p. 1589:

> "At the trail two questions arose. One was whether the defendant . . . was liable in detinue for the other half which Goddard had obtained. We are of opinion that he was not, for he did not detain the goods as against the administratrix, for at the time he had them in his possession there was no legal representative with authority either to demand or receive them. Therefore in whatever other form of action he might be liable, he cannot be sued in detinue by the administratrix for detaining goods which, as against her, he really never did detain".

In *Beaman v. A.R.T.S. Ltd*. (12), [1948] 2 All E.R. 89, Denning, J. (as he then was) said at p. 92:

> "The cause of action in wrongful detention is based on a wrongful withholding of the plaintiff's goods. It depends on the defendant being in possession of the plaintiff's goods."

In so far as this statement relates to a claim in detinue based on bailment, it appears, with respect, to be contrary to the cases which lay down the principle that a wrongful parting with the goods by a bailee is no defence; and in the report of the case on appeal, [1949] 1 All E.R. 465, Somervell, L.J., at p. 471 said of these and other comments of Denning, J.: "Some of the statements made might, I think, be found to need qualification". Nevertheless, the dicta of Denning, J. emphasizes the essence of the claim in detinue, that is, a wrongful withholding as opposed to a wrongful conversion. This distinction is brought out also in *Wilkinson v. Verity* (10), where at p. 210 Willes, J., said:

> "Upon like reasoning, it seems to follow . . . that, when the action of detinue is founded upon a wrongful conversion of the property only, as it needs must where there is a bare taking and withholding of the property of another, without any circumstances to show a trust for the owner or to found an option to sue either for the wrong or for the breach of the original terms, the statute would run from the time at which the property was first wrongly dealt with."

See also *Betts v. Receiver for the Metropolitan District* (13), [1932] 2 K.B. 595. On the other hand there are dicta in *Bristol and West of England Bank v. Midland Railway Co.* (14), [1891] 2 Q.B. 653 which suggest that lack of possession is not a defence in either trover or detinue. At p. 661 Lindley, L.J., said:

> "And the question arises whether it lies in the mouth of the defendants to say: 'We have not got them,' when they have wrongly parted with them. My answer is 'No'."

But those dicta should be related to the facts of the case, which were that the defendants originally had lawful possession of the goods and were under a duty to deliver them only to the person rightly entitled to delivery.

As the action of detinue is primarily to recover possession of the specific article and is based on a wrongful withholding of it, I consider that where there is no continuing duty to deliver on demand it must be a good defence for the defendant to say:

> "I have not got the article, indeed it no longer exists, and therefore I

> cannot deliver it to you. My wrong was in converting it to my use and not in withholding it from you."

In my opinion, where the original possession of the defendant was lawful, whether by reason of bailment, quasi contract or statutory right, and there is a continuing duty on his part to retain the article and then to deliver it up to the person entitled to demand it, it is no defence for the defendant to say that he no longer has possession of the article, unless he proves that possession was lost without any default on his part. Where, however, the original possession by the defendant was unlawful and the defendant has either destroyed the article or disposed of it, then lack of possession at the time of the demand is a good defence in an action of detinue, as the wrong consists not of withholding the article, but of a previous conversion. The plaintiff may, of course, have other means of recovering damages for the wrong done to him, but he cannot seek to recover the article itself from the defendant as the defendant could not comply with the demand nor is he under any continuing duty to do so.

On the facts of this case I consider that the learned judge was correct in holding that the appellant could not recover in an action of detinue and I would dismiss the appeal with costs. This being so it is unnecessary to come to any decision on the application for leave to argue the limitation point, but I do not wish to be understood as necessarily agreeing with the decision of the learned judge on this point.

Sir Ronald Sinclair P: I have had the advantage of reading the judgment of Newbold, J.A. I agree with his reasoning and conclusions and have nothing to add. The appeal is dismissed with costs.

Crawshaw JA: This was historically an action in detinue sur trover. An action for detinue or trover lies for severed timber (33 Halsbury's Laws of England (2nd Edn.) p. 52). What the appellant asked for was the return of his timber or its value. An act of conversion does not rob the real owner of his property in the goods if they are still in existence, and if he has not other wise disqualified himself from seeking their return (e.g. by receiving payment of compensation) he is entitled to sue in detinue for their restitution, or in the alternative their value. The measure of damages in trover is generally the value of the goods converted (Halsbury's Laws of England, p. 69).

After earlier seeking settlement of the dispute in damages, the appellant, through his lawyers, on May 2, 1958, wrote to the respondents' lawyer claiming the return of the trees or alternatively payment of a specified sum of money as being the alleged value thereof. The respondents' lawyers replied on May 8, saying,

> "Our clients specifically and totally deny having removed cedar or podo or any tree at all by themselves or their servants, or agents at any time, from your client's property, and put your client to strict proof thereof."

Thereupon the appellant filed his suit. In their defence the respondents, inter alia, qualified the total denial in their letter of May 8, to the extent of denying having removed forty-two of the trees, alleging that compensation had been paid to and accepted by the appellant in respect of the remaining thirty-four trees. In the alternative the respondents said that Shs. 871/81 had been paid to the appellant

> "as payment towards damage suffered by the plaintiff in respect of further trees agreed at twenty-four in numbers",

and that the appellant agreed to accept this sum "in full and final settlement".

The plaint shows clearly that the original wrongful acts complained of were

conversion by the wrongful cutting down and removal of the trees, but instead of framing his action in damages for conversion the appellant framed it in detinue. He was fully entitled to do this, if, so far as he knew, the trees might still be in the possession of the respondents, in spite of earlier demands for compensation, and even if his motive was (mistakenly or otherwise) that by so doing he thought he would avoid being barred by limitation. The learned judge found that the seventy-six trees claimed had been cut down and removed by the respondents, and although this may have been due to a mistaken but honest belief that they had a right to do so, it is not now I think contested that it was wrongful; mistaken belief is no defence (Halsbury, p. 52).

The appellant therefore (subject to the findings of the learned judge on the issues as a whole) had a right to the return of his property if still available, and on the evidence he was not to know, or not to know for sure, whether the respondents still had possession of it or not. He got no assistance in this from the respondents, and the latter's letter of May 8, justified the appellant, in my opinion, in filing his suit in detinue. Whether the respondents still possessed the timber or not was a matter peculiarly within their knowledge. The appellant was also entitled to claim in the alternative the value of the timber and any special damages suffered. He did not claim special damages, but only the return of his property or its value. He certainly delayed a long time in filing his suit, but this is explained, at least in part, by his pursuing his claim against a wrong party and his apparent failure to appreciate his legal position.

The respondents were unable to return the property, for they had sawn it up and sold it. This only became apparent when they gave their evidence. The respondents were therefore in no position to exercise an option, had they otherwise been allowed to do so, and the only remedy left to the appellant was his alternative claim for the value of the property. This is precisely the remedy which would have been available to him in an action for conversion. Had the action been brought in conversion the issues would, as I see it, have been exactly the same as those framed in the instant suit, except that which related (rather astonishingly in view of the subsequent admissions of the respondents) to whether the appellant was entitled to the return of the trees. The number of trees cut and their value were two of the issues on which considerable evidence was led. That there was conversion was not I think seriously disputed, and Mr. Gautama who appeared for the respondents admitted at the trial that a certain number of trees had been cut down. Had the learned judge (subject as aforesaid to his finding on the issues as a whole) ordered the respondents to pay to the appellant the value of the property, the respondents could not, I think, in the circumstances, afterwards be heard to say that they had been in any way embarrassed in their defence.

In Pollock on Torts (15th Edn.) at p. 12 it is said:

> "We are now independent of forms of action. Trespass and trover have become historical landmarks, and the question whether detinue is, or was, an action founded on contract or on tort (if the foregoing statement of the history be correct, it was really neither) survives only to raise difficulties in applying certain provisions of the County Court Act as to the scale of costs in the Superior Court. It would seem, therefore, that a rational exposition of the law of torts is free to get rid of the extraneous matter brought in, as we have shown, by the practical exigency of conditions that no longer exist."

In Atkin's Encyclopaedia of Court Forms and Precedents, Vol. 15, p. 303, it is said:

> "As will be seen the law as to the proper form of action is in many ways highly technical, but the importance of such technicality has largely disappeared

> since the introduction of the modern form of pleading, for today the court can give the remedy which the facts justify even if the plaintiff may have called his action by a wrong name. Indeed there is now no need to state the particular form of action either in the writ or in the statement of claim, and consequently no division of the precedents in this title has been made to accord with the three actions of trespass, conversion and detinue with which the title deals."

Cited in support of the above is the case of *Oakley v. Lyster* (15), [1931] 1 K.B. 148, where at p. 151 Scrutton, L.J., said:

> "Four or five hundred years ago if a person wanted justice from the King's Court he had to obtain a particular form of writ, and, if he chose the wrong one, his claim was not maintainable whatever the facts might be. Before the Common Law Procedure Act and the Judicature Act much the same thing happened. The plaintiff had to express his claim in a way that was legally accurate, and if he did not, a demurrer put an end to the action. Great injustice was thereby done. Now, the courts find out the facts, and, having done so, endeavour to give the right legal judgment on those facts. So in this case I begin by ascertaining the facts in order to see whether the form in which the plaintiff is claiming is substantially right, or, if not substantially right, whether any injustice is done by giving him the real remedy which the facts justify."

At p. 154 GREER, L.J., said:

> "The remedy he has chosen in this case to put on his pleading is a claim for damages for conversion, although I do not think he can be confined to his pleadings, because he has stated the facts and the court can give the remedy which the facts justify even if he may have called it by a wrong name.
>
>
>
> "He thereby converted the hard core to his own use and is liable to the plaintiff for its value, whether the claim is sustainable in trover or by an action on the case."

Admittedly an action in detinue was not there under consideration, but I think the principles are applicable to the instant case. Conversely to the instant case (but not a corollary thereto), where a person sues not for the return of the property but for its value in damages, it is in the discretion of the court whether and on what terms the action will be allowed to proceed, if the defendant offers to restore the property (Salmond on Torts (11TH Edn.), p. 357, and *United States of America v. Dollfus Mieg et Compagnie S.A.* (16), [1952] A.C. 582 at p. 619). The facts were all before the court, whether the action was technically in detinue or conversion, and in the circumstances the only remedy was common to each. In my opinion no injustice would have been done had the learned judge (subject, as I say, to his finding on the issues as a whole), ordered payment of the value. Unfortunately my view differs from that of my brother judges and it is not therefore necessary to consider what order on this appeal would follow my conclusions.

Appeal dismissed.

For the appellant:
B. R. Patterson-Todd, Nakuru

For the respondents:
Satish Gautama, Nairobi
S. C. Gautama and *A. P. Shah*

Henry De Souza Figueiredo v George Blacquere Talbot and Another
[1962] 1 EA 167 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	20 January 1962
Case Number:	49/1961
Before:	Sir Alastair Forbes VP, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Uganda – Sheridan, J.

[1] Land registration – Caveat – Leasehold property – Document purporting to be sublease granted by one of two executors entitled to life interest in property – Duplicate certificate of title deposited with tenant – Caveat entered by tenant claiming interest as equitable mortgagee for repairs carried out by him – Validity of caveat – Registration of Titles Ordinance (*Cap.* 123), *s.* 2, *s.* 69, *s.* 138, *s.* 143 *and s.* 149 (*U.*) – *Succession Ordinance, s.* 274 (*U.*).

Editor's Summary

The respondents as executors of a will were registered proprietors of a leasehold house and land in Kampala. Under the will the second respondent was entitled to a life interest in the property. By a document entitled a sublease which was never registered the second respondent purported to sublet the property to the appellant for ten years from July 1, 1953, with an option to renew for a like term. It was also agreed that the appellant could make any alteration to the premises, and have a first option to purchase the property. The appellant entered into possession and spent some Shs. 58,000/- upon repairs. There was no evidence that the respondents had agreed that moneys so expended should be a charge on the property, but the second respondent deposited with the appellant the duplicate certificate of title to the property, according to her evidence, for safe custody, while the appellant maintained it was as security for Shs. 58,000/-. In 1955, the appellant registered a caveat claiming that by virtue of an agreement dated May 23, 1953, he was interested as equitable mortgagee in the interest of the second respondent in the property. In February, 1961, a notice was issued from the Registry of Titles to the appellant's advocates stating that the registered proprietors of the property had applied for registration of a transfer by them to purchasers and that unless the appellant took action under s. 149 of the Registration of Titles Ordinance the caveat would lapse after thirty days. The appellant applied to the court for continuation of the caveat but the judge dismissed the application holding that the deposit of the certificate was not for the purpose of creating an equitable mortgage and that the caveat as noted on the register was wrong. On appeal

Held –

(i) the caveat referred to the sublease which did not purport to create any interest in the appellant as equitable mortgagee and could not stand.

(ii) even if the caveat could be interpreted as referable to the deposit of the certificate of title, such deposit even if intended by the second respondent to create a security could not do so as, under s. 138 of the Registration of Titles Ordinance, the first respondent would have had to join the second respondent in depositing the certificate and there was no evidence that he had done so.

(iii) the general provisions of s. 274 of the Succession Ordinance must be read subject to the specific provisions of s. 143 of the Registration of Titles Ordinance and in relation to registered land all executors must concur in transactions affecting the land.

Appeal dismissed.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: This is an appeal from an order of the High Court of Uganda made on May 18, 1961, on an application under s. 149 of the Registration of Titles Ordinance (Cap. 123 of the 1951 Edition of the Laws of Uganda) (hereinafter referred to as "the Ordinance") for continuation of a caveat entered in the Leasehold Register, Vol. 120, folio 23, in relation to property known as 45 Nakasero Road, Kampala.

The property in question (hereinafter referred to as "the property") is a leasehold estate for ninety-nine years from August 1, 1931, and the present proprietors, registered on July 7, 1953, appear on the register as:

> "George Blacquere Talbot and Betty Gwenyth Talbot, of P.O. Box 1073, Kampala, Executors of the will of Frederick George Talbot, who died on the fourth day of March, 1952, probate of the will having been duly granted by H.M. High Court at Kampala on August 1, 1952."

Under the will of Frederick George Talbot, Betty Gwenyth Talbot (hereinafter referred to as "Mrs. Talbot") is entitled to a life interest in the property, and, subject thereto, the executors hold the property in trust for one Christopher Talbot Hollick absolutely.

By a document entitled a "sublease" dated May 23, 1953, Mrs. Talbot purported to sublet the property to the present appellant for a term of ten years from July 1, 1953. The sublease provided, inter alia, that:

(i) the sublessee might make any alterations in the demised premises;

(ii) the sublessee should have an option to continue the sublease for a further period of ten years; and

(iii) the sublessee should have a first option to purchase the property.

The remaining provisions in the sublease were usual ones. It is to be noted that the sublease did not make any provision for reimbursement to the sublessee of expenses which might be incurred in the making of any alterations to the demised premises. The sublease has never been registered and, as remarked by the learned judge of the High Court, it may have been realised that it was incapable of being registered.

In pursuance of the sublease the appellant entered into possession of the property, and between August, 1953, and the end of that year carried out extensive alterations and renovations costing somewhere in the region of Shs. 58,000/-. There is a conflict of evidence as to whether these alterations and renovations were carried out at the request of Mrs. Talbot and her co-executor, Mr. G. B. Talbot. Whatever the truth as to this, there is no suggestion in the correspondence between Mrs. Talbot, Mr. Talbot, and the appellant, exhibited to the affidavit filed by the appellant in support of his application, that Mrs. Talbot and Mr. Talbot were agreed as executors that the moneys expended by the appellant on the alterations and renovations should be a charge on the property. The appellant, however, alleged that some time in 1953, Mrs. Talbot deposited with him the duplicate certificate of title of the property as security for the money he was going to spend. Mrs. Talbot contested this, saying that she had handed the duplicate certificate of title and other papers to the appellant at his suggestion for safe custody.

In January, 1955, the appellant presented a caveat to the then Registrar of Titles (since deceased) which was accepted for registration. There is a conflict of evidence as to whether or not Mrs. Talbot was present when the caveat was presented. The caveat, as registered under the heading "Incumberances",

reads as follows:

"Entered January 13, 1955. Inst. 126331

"Henry De Souza Figueiredo, P.O. Box 13, Kampala by virtue of an agreement dated 23.5.53 claims an interest as equitable mortgagee in the interest of the said Betty Gwenyth Talbot in the said land.

"Address for service c/o P. J. Wilkinson,

Advocate, P.O. Box 146, Kampala.

(Sgd.) J. A. Cavanaugh,

Registrar of Titles."

There matters apparently rested till January, 1961, when the Registrar of Titles wrote to the appellant suggesting that the memorial of the caveat was incorrect in stating that the appellant's interest was "as equitable mortgagee" and that the error should be corrected to show that he claimed as sublessee. On February 4, 1961, a notice issued from the Registry of Titles addressed to the appellant's advocates, stating that the registered proprietors of the property had applied for registration of a transfer by them to Francis Joseph Macken and Charles Leslie Holcom, and reminding them that under s. 149 of the Ordinance the caveat would lapse at the expiration of thirty days unless they took action in accordance with the provisions of the section. Section 149 of the Ordinance reads as follows:

"149. Upon the receipt of such caveat the registrar shall notify the same to the person against whose application to be registered as proprietor or (as the case may be) to the proprietor against whose title to deal with the estate or interest such caveat has been lodged; and such applicant or proprietor or any person claiming under any transfer or other instrument signed by the proprietor may, if he thinks fit, summon the caveator to attend before the High Court to show cause why such caveat should not be removed; and such court may, upon proof that such caveator has been summoned, make such order in the premises either ex parte or otherwise, and as to costs as to it seems fit. Except in the case of a caveat lodged by or on behalf of a beneficiary claiming under any will or settlement or by the registrar, every caveat lodged against a proprietor shall be deemed to have lapsed upon the expiration of thirty days after notice given to the caveator that such proprietor has applied for the registration of a transfer or other dealing. A caveat shall not be renewed by or on behalf of the same person in respect of the same estate or interest; but if, before the expiration of the said period of thirty days or such further period as is specified in any order made under this section, the caveator or his agent appears before the High Court and gives such undertaking or security, or lodges such sum in court as such court considers sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed, then and in such case the High Court may direct the registrar to delay registering any dealing with the land, lease or mortgage for a further period to be specified in such order, or may make such other order, and in either case such order as to costs as is just."

In pursuance of the notice the appellant filed application under s. 149 for continuation of the caveat. Affidavits were filed by the appellant and Mrs. Talbot, and both gave evidence at the hearing of the application, as well as a Mr. Norman McAllister, called by the appellant.

The learned judge preferred the evidence of Mrs. Talbot to that of the appellant, but he decided the matter on the ground that the caveat in its present form was clearly wrong. He said, after referring to Mrs. Talbot's version of the reason why she handed the duplicate certificate of title to the appellant:

> "It follows that the applicant had no right to use the certificate of title to create an equitable mortgage, in accordance with s. 138 of the Ordinance by depositing it on her behalf with the Registrar of Titles. I am not sure that he even did that. There is no note or memorandum of deposit and the caveat in its present form is confined to the agreement of May 23, 1953. Mr. Phadke concedes that its only relevance can be that under it the applicant had an option to purchase the premises which is an interest in land under an unregistered instrument in respect of which a caveat might be lodged under s. 148 of the Ordinance. He submits that despite s. 143 the opening words 'Notwithstanding anything in this Ordinance contained' in s. 138 rendered it competent for one executor to create an equitable mortgage and he refers to s. 274 of the Succession Ordinance (Cap. 34) which deals with the powers of several executors being exercised by one. I doubt if that extends to the creation of a lease but all this is rather academic because it is quite clear that a wrong entry was made as is pointed out by the present Registrar of Titles in his letter, Annexure F. I do not know what the correct entry should have been if the deposit of the certificate of title to secure the Shs. 50,000/- was to be relied on as an equitable mortgage. I agree that there could have been a collateral agreement to the sublease to secure the reimbursement of Shs. 50,000/- but I am unable to spell one out from the evidence and the correspondence."

The learned judge accordingly dismissed the application with costs; ordered the appellant to return the duplicate certificate of title to the advocates for the executors; and ordered that the caveat of January 13, 1955, be removed so that the application for transfer of the property might be given effect to. The appellant appeals against the whole of this order.

On the appeal Mr. Wilkinson for the appellant contended that in addition to the lease granted to the appellant, it had been agreed that the sum spent in altering the property should be secured to him by an equitable mortgage over the life interest of Mrs. Talbot; that for this purpose the duplicate certificate of title was deposited with the appellant; that the learned judge was under a misapprehension in thinking that deposit of the certificate of title with the registrar was necessary to create an equitable mortgage under s. 138 of the Ordinance; that the learned judge should have held that the duplicate certificate of title was deposited with the appellant with intent to create a security thereon; and that even if the learned judge concluded that the caveat had been intended to refer to the sublease, he should have ordered amendment of the caveat and left it on the title to protect the appellant's sublease.

It is true, of course, that the learned judge erred in thinking, as he apparently did, that under s. 138 of the Ordinance deposit of the duplicate certificate of title with the registrar was necessary to create an equitable mortgage. The "deposit" referred to in s. 138 is deposit by the registered proprietor with the equitable mortgagee. But that does not affect the learned judge's finding that Mrs. Talbot did not deposit the duplicate certificate of title with the appellant with intent to create a security thereon. This is a finding of fact based very largely on credibility, and I doubt whether an appellate court could interfere with it. However, I do not think it necessary to go into this aspect of the matter as I think there are other reasons why the appeal must fail, at least as far as continuation of the caveat is concerned.

In the first place, as the learned judge said, the caveat as noted on the register is clearly wrong. It refers to the sublease – there is no other "agreement dated 23.5.53" involved in the case – and the sublease does not purport to create any interest in the appellant as equitable mortgagee. Clearly the caveat in its present form cannot stand. As to the suggestion that it should be amended to refer to the appellant's interest as sublessee, this was never put to the learned

judge; the original caveat lodged was not in evidence, so that it was impossible to say whether or not the note in the register agreed with it; and the appellant's whole contention was that the caveat should be allowed to remain on the basis of the existence of an equitable mortgage. I see no reason why the learned judge, assuming he had the power to make such an order, should have contemplated amending the caveat to maintain the appellant's interest as sublessee and not as equitable mortgagee.

Secondly, even if the caveat could be interpreted as referable to the deposit of the duplicate certificate of title, I am clearly of opinion that such deposit, even if intended by Mrs. Talbot to create a security, could not in fact operate to do so. Section 138 of the Ordinance reads as follows:

> "138. Notwithstanding anything in this Ordinance contained, an equitable mortgage of land may be made by deposit by the registered proprietor of his certificate of title with intent to create a security thereon whether accompanied or not by a note or memorandum of deposit subject to the provisions hereinafter contained. Every equitable mortgage as aforesaid shall be deemed to create an interest in land. Every equitable mortgagee shall cause a caveat to be entered as provided for by s. 148."

Where more persons than one are registered as proprietors, "the registered proprietor" must mean all such persons; and the definition of "proprietor" in s. 2 of the Ordinance supports this view. The section does not indicate that one of several registered proprietors may make a deposit of the certificate of title. Here "the registered proprietor" of the property is Mrs. Talbot and Mr. G. B. Talbot. There is no evidence whatever that Mr. G. B. Talbot joined with Mrs. Talbot in depositing the duplicate certificate of title with the appellant with intent to create a security thereon. In my opinion, unless both executors joined in such deposit, the deposit would be ineffective to create an equitable mortgage. Reference was made to s. 274 of the Succession Ordinance (Cap. 34), which reads (omitting the illustrations):

> "274. When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration."

That general provision must, however, be read subject to the specific provisions of the Ordinance, which is also the later enactment. Section 143 of the Ordinance provides, inter alia:

> "If in any case probate or administration is granted to more persons than one, all of them for the time being shall join and concur in every instrument, surrender or discharge relating to the land, lease or mortgage."

While this does not specifically refer to the creation of an equitable mortgage by deposit of title deeds, it is the obvious intention of the legislature that, in relation to registered land, all executors must concur in transactions affecting the land. In these circumstances I think the term "the registered proprietor" in s. 138 of the Ordinance is to be construed as I have indicated, which is the ordinary meaning of the words, and is not to be read as subject to s. 274 of the Succession Ordinance.

For these reasons I think the appeal against dismissal of the application for continuation of the caveat, and the order for the removal of the caveat from the register, must be dismissed.

There was, however, also an order that the appellant return the duplicate certificate of title to Messrs. Hunter & Greig. On an application under s. 149 of the Ordinance the court is authorised to:

> "direct the registrar to delay registering any dealing with the land, lease or mortgage for a further period to be specified in such order, or may make such other order, and in either case such order as to costs as is just".

I think "such other order" in this provision can only mean an order in relation to the caveat or registration of a new dealing, which are the matters before the court on such an application. The words do not, in my view, enable the court to make an order in relation to any other matter which may arise incidentally in the course of the hearing of an application under the section. Our attention was not drawn to any other provision which would authorise the making of the order for the "return" of the duplicate certificate of title to Messrs. Hunter & Greig, and accordingly I do not think it was competent for the court to make the order on this application. The procedure for obtaining delivery of a certificate from a person who wrongfully retains it appears in s. 69 of the Ordinance. I would therefore vary the order of the High Court dated May 18, 1961, by the deletion of para. (ii) thereof.

This variation of the order does not affect the substance of the appeal, and I would order that the respondent have the costs of the appeal.

Crawshaw JA: I agree and have nothing to add.

Newbold JA: I also agree.

Appeal dismissed.

For the appellant:
Parekhji & Co., Kampala
P. J. Wilkinson, Q.C. and *Y. V. Phadke*

For the respondents:
Hunter & Greig, Kampala
A. I. James

Saif Bin Sultan Hussain Al Qu'aiti and Others v H H Sultan Sir Saleh Bin Ghaleb and others

[1962] 1 EA 173 (PC)

Division:	Privy Council
Date of judgment:	2 February 1962
Case Number:	40/1958
Before:	Lord Keith of Avonholm, Lord Morris of Borth-y-Gest and Lord Hodson
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 17 of 1956 on appeal from H.M. Supreme Court of Aden – Knox Mawer, J.

[1] Arbitration – Award under Sharia law – Application of equitable principles.

[2] Trust – Creation of trust – Family dispute – Submission to – Arbitration – Award – Sum paid into bank for credit and in names of specified persons – Sum accepted by bank on terms stated – Whether payer by depositing sum divests himself of all interest therein – Whether trust created of ascertained property for defined purpose – Sultan of Shihr and Mukalla's Fund Ordinance, 1945, *s.* 5, *s.* 6 (*A.*).

Editor's Summary

By his will Sultan Omer Al Qu'aiti, who died in 1865, created a wakf of one-third of his property for the benefit of the provinces in Hadhramaut over which he had ruled and the remaining two-thirds was, after allowing for widow's portion and provision for two other sons, inherited under Sharia law by his sons Abdullah, Awadh and Saleh. He provided that the wakf property, which included certain jaghirs and mukhtars granted to him for military services rendered by him to the Nizam of Hyderabad, should be managed by these sons. In 1866, the jaghirs and mukhtars were re-granted to Awadh and Saleh, who lived in Hyderabad, but Abdullah who lived as before in Arabia administering the family property and exercising the power of government there was not mentioned in the re-grant. In 1873 the three sons agreed that they owned the properties in Arabia in common in equal third shares (hereinafter called the partnership property) and in 1878 Abdullah, probably without the knowledge of his sons, Hussain and Munasser, sold by deed to Awadh for 186,000 Maria Theresa dollars his share in the partnership property excluding his share in the original Hadhramaut property. Of this sum 46,000 dollars were paid at the time and 140,000 dollars remained unpaid when Abdullah died in 1888. In 1896, relying on the deed of sale Awadh claimed the Qu'aiti Sultanate, deprived his nephews Hussain and Munasser of power and installed his own son Ghalib in their place, but giving money allowances to Hussain and Munasser. In 1900, the dispute between Awadh and his two nephews, who had never accepted the deed of sale as genuine, was referred to the arbitration of a mansab who gave his award in May, 1903. Meanwhile, Hussain and Munasser rebelled against their uncle and were removed from the Sultanate by the political resident of Aden and were never allowed back. The mansab decided that Awadh should pay 260,000 dollars to the heirs of Abdullah, of which five-eighths or 162,500 dollars was divisible as to one-eighth to Abdullah's widow and two-eighths each to Hussain and Munasser. This sum was paid into the National Bank of India at Aden on August 1, 1903, by Awadh. This fund had much grown by accretions of interest and through investment when in 1942, the heirs of Hussain and Munasser made an unconditional demand for payment. During their lives Hussain and Munasser had not only declined to accept the award of the mansab or the fund at the bank but they had tried by proceedings in Hyderabad to establish a claim to the jaghirs and mukhtars held by their grandfather, Omer I. After many years their claim was rejected but they were as a matter of grace granted certain allowances. After receipt

of the claim to the fund by the heirs of Hussain and Munasser, the Sultan of Shihr and Mukalla's Fund Ordinance, 1945, was passed by which the Supreme Court of Aden was empowered to determine all claims to the fund whereupon, at the instance of the Financial Secretary of the Colony of Aden, an interpleader suit was begun in which the heirs of Hussain and Munasser were plaintiffs and the heirs of Awadh were defendants. In the Supreme Court the heirs of Hussain and Munasser were awarded the entire fund including all accumulations subject to a deduction in respect of the allowance made of grace to Hussain and Munasser during their lives and to recoup the costs of Awadh and his heirs in resisting the proceedings in Hyderabad. On a first appeal (reported in [1957] E.A. 55 (C.A.)), the decision of the Supreme Court was varied on the ground that the heirs of Hussain and Munasser were entitled only to the original fund as from 1942, when they first claimed it unconditionally, and accretions thereafter. The accretions from 1903 to 1942 were held to be due to the heirs of Awadh. The heirs of Hussain alone brought this further appeal from that decision. The heirs of Awadh cross-appealed for payment of the entire fund on the ground that they also had in 1942 claimed the fund on the footing that they accepted the repudiation by Hussain and Munasser of the mansab's award.

Held –

(i) in making the payment to the bank in 1903 Awadh divested himself of all interest in the fund which was thereafter held unconditionally for Hussain and Munasser and their heirs.

(ii) notwithstanding the delay in making their claim, the appellants were entitled not only to the original fund but also the accretions.

(iii) since the submission to arbitration was binding upon Hussain and Munasser, who had never withdrawn their submission before the mansab gave his award, no question of repudiation by Hussain and Munasser arose and the cross-appeal must fail.

(iv) since by s. 5 (1) of the Ordinance notice had to be given to each and every person who might in the opinion of the judge have a claim to any part of the fund or any interest in the disposition thereof, the Supreme Court was right in considering the respondents' claim to deduction from the fund; moreover since Hussain and Munasser did during their lives obtain the equivalent of part of the fund from another source, their heirs could not on just and equitable grounds claim the whole fund without making a refund.

(v) the only principle of law derived from the Sharia applicable to the issues was that the decision must be just and reasonable in all the circumstances and in accordance with natural justice, equity and morality; English authorities could therefore be of assistance but only of persuasive authority.

Appeal allowed. Cross-appeal dismissed. Order of the Supreme Court of Aden restored with variations.

Case referred to in judgment:

(1) *Rhys v. Dare Valley Railway Co*. (1874), 19 L.R. Eq. 93.

Judgment

Lord Hodson: These are an appeal and cross-appeal from the Court of Appeal for Eastern Africa dated April 6, 1957, allowing in part an appeal [and a cross-appeal] from the judgment of the Supreme Court of

Aden dated September 6, 1955.

The action is an interpleader suit instituted by the Financial Secretary of the Colony of Aden in pursuance of the provisions of the Sultan of Shihr and Mukalla's Fund Ordinance, 1945.

By the Ordinance the Supreme Court was empowered (by s. 6) “to hear and determine all claims to the fund” subject to the right of any claimant to appeal, and directed (by s. 5) to order notice in writing to be given to those who in the opinion of the judge of the Supreme Court may

> “have a claim to any part of the fund, or any interest in the disposition thereof”.

The fund came into existence by the payment on August 1, 1903, of a sum of 2,14,500 rupees to the National Bank of India in Aden by Sultan Awadh bin Omer to whom their lordships will refer as Awadh.

The claimants to the fund are, on the one hand, the heirs of Awadh, who were made defendants in the interpleader proceedings and are the respondents to this appeal, and, on the other hand, the heirs of Sultan Hussain bin Abdullah and of Sultan Munasser bin Abdulla to whom their lordships will refer as Hussain and Munasser. The heirs of Hussain and Munasser were plaintiffs in the interpleader proceedings and the heirs of Hussain only are the appellants in this appeal.

Each side claims the whole of the fund with all accretions.

The history of the fund may be summarised as follows:

Awadh, Hussain and Munasser were descendants of Omer I who in the nineteenth century was head of the Qu’aiti family and ruled over part of the Hadhramaut in Arabia. He also rendered military service to the Nizam of Hyderabad and became an Hyderabad noble. For his service he was granted by the Nizam certain Crown grants of land in Hyderabad known as “jaghirs” and “mukhtars”. Omer I died in 1865. He left a son Abdullah, who was the father of Hussain and Munasser, and a son Awadh. By his will he created a “wakf” of one-third of his property for the benefit of the provinces in Hadhramaut over which he had ruled, the property to be managed by Abdullah, Awadh and another son Saleh. This property comprising the wakf expressly included the mukhtars and jaghirs. The remaining two-thirds of Omer’s property was, after allowing for widow’s portion and provision for two other sons, inherited under Sharia law by Abdullah, Awadh and Saleh.

In 1866, the jaghirs and mukhtars which their father had enjoyed were re-granted to Awadh and Saleh. These two continued to live, as they had before, in Hyderabad. Abdullah was not mentioned in the re-grant. He continued as he had before, to live in Arabia administering the family property and exercising the power of government there.

In 1873, Abdullah, Awadh and Saleh entered into an agreement providing for ownership in common in equal third shares of their properties in Arabia and Hyderabad, referred to as the partnership property.

Meanwhile the possessions of the family in Arabia were enlarged by conquest and came to be known as the Qu’aiti Sultanate.

In 1878, probably without the knowledge of Hussain and Munasser, Abdullah sold by deed to Awadh for the sum of 186,000 Maria Theresa dollars his share in the partnership property excluding his share in the original possessions in the Hadhramaut. At the time of the sale 46,000 dollars was paid leaving 140,000 dollars still unpaid when Abdullah died in 1888. Saleh died in 1880, and his heirs, having received their share of the partnership property in 1886, disappear from the scene.

In 1896, Awadh relying upon the deed of sale claimed the Qu’aiti Sultanate, deprived Hussain and Munasser of power and installed his son Ghalib in their place giving money allowances to Hussain and Munasser.

Hussain and Munasser when they got to know of the deed of sale did not accept it as genuine and did

not abandon their claims to both the sovereignty and the property.

In 1900, the dispute between Awadh and his nephews Hussain and Munasser was referred to the arbitration of a “mansab”. The submission to arbitration was joined in by Hussain and Munasser who never withdrew their submission before the mansab gave his award in May, 1903. They had, however, rebelled against their uncle Awadh and were removed in July, 1902, from the Sultanate by the political resident of Aden who took them back with him to Aden in a warship. They were never allowed to return to the Sultanate and by an Act of State, Awadh was thereafter in undisputed possession of the lands and government of the Sultanate.

The claims to the fund which came into existence following upon the award of the mansab fall to be decided on this appeal.

By his award the mansab held that Abdullah had sold to Awadh his own share of the partnership property except for the excluded share of the Hadhramaut properties. He decided that Awadh should pay to the heirs of Abdullah three sums: first 140,000 dollars being the balance of the purchase price under the deed of sale; secondly 70,000 dollars as compensation for their share of the Hadhramaut properties; and thirdly 50,000 dollars as “a matter of sympathy and mercy”. This total sum of 260,000 dollars was to be divided among the heirs of Abdullah in the following shares: three-eighths (97,500 dollars) were due to Abdullah’s daughters: of the remaining five-eighths (162,500 dollars), one-eighth was due to Abdullah’s widow, two-eighths to Hussain and two-eighths to Munasser. These 162,500 dollars were the equivalent of Rs. 2,14,500. This sum was paid into the National Bank of India at Aden on August 1, 1903, by Awadh and is the origin of the fund the claims to which are in issue.

The fund has been added to over the years by accretions of interest and as the result of investment; on August 15, 1955, the market value of the securities representing the fund amounted to Rs. 9,87,808.12.0. Since that date there have no doubt been further accretions and the argument has been directed not only to the original fund but to the accretions which naturally far exceed the value of the original fund.

In the Aden court the heirs of Hussain and Munasser were awarded the entire fund including all accumulations subject to a deduction of Rs. 1,82,000 in name of damages to the heirs of Awadh. The Court of Appeal for Eastern Africa varied the Aden judgment holding that the heirs of Hussain and Munasser and through them the appellants were entitled to the fund only as from April 7,1942, when the appellants first made an unconditional demand for payment with the consequence that they were only entitled to accretions as from that date and that the accretions attributable to the period 1903 to 1942, were due to the heirs of Awadh, the respondents. The Court of Appeal for Eastern Africa made the same deduction as was made by the Supreme Court of Aden, not as damages, but in respect, as they held, of unjust enrichment.

Hussain’s heirs alone are prosecuting this appeal but any success they achieve will of course enure to the benefit of the heirs of Munasser also.

It is necessary to show how the deduction came to be made in favour of the respondents, for the appellants contend that the Aden court acted without jurisdiction in making it having regard to the nature of the proceedings and the terms of the Ordinance of 1945, and further that the deduction was made in respect of Crown grants of jaghirs and mukhtars which were not subject to the mansab’s award.

The deduction was made because Hussain and Munasser had claimed from the Nizam of Hyderabad by succession through their father Abdullah to be entitled to a share in the Crown grants, jaghirs and mukhtars which had been held by their grandfather, Omer I. The proceedings in Hyderabad dragged on for many years and various advisers to the Nizam submitted opinions thereon. The final result was that

Hussain and Munasser failed to establish any claim

as of right but were granted allowances as a matter of grace taking into account the fact that their pecuniary circumstances were daily becoming more difficult. These allowances were charged on the jaghirs and mukhtars held by the heirs of Awadh who had died in 1910 during the course of the Hyderabad proceedings. In making their claim and receiving these allowances in face of the award the trial judge held that they were in breach of contract and the Court of Appeal for Eastern Africa held that they had flouted the award and had unjustly enriched themselves at the expense of Awadh and his heirs so that a deduction should be made from any sum awarded. This was quantified by agreement at Rs.1,52,771.6.

Moreover, Awadh and his heirs had been put to expense in resisting the claim of Hussain and Munasser in Hyderabad and the expenses were quantified, again by agreement, at Rs.30,000.

The deduction therefore totalled Rs. 1,82,771.6. It will be necessary to refer to this hereafter.

The rival claims must be considered subject to any relevant statutory provision in light of the relevant law as to which there was no dispute.

There had been a submission to the arbitration of a mansab, a Moslem holy man, and the agreement was made and the award concluded within the Sultanate of Shihr and Mukalla. Sharia law is the law of the Sultanate. By art.9 and art.10 of a Sultanate Decree (No.5 of 1940) it is provided:

> "The law of Islam is and is hereby confirmed to be the fundamental law of our Dominion by the application of which decree our courts shall be guided by and have regard to the general principles of the law of Islam and to any tribal laws, customs or usages not repugnant to Islam justice, equity and morality."

The learned trial judge had the advantage of being assisted by counsel on each side who had held office in the Sultanate as judges and were agreed that the only principle of law which can be derived from the Sharia in deciding the issues arising in this case is that the decision arrived at must be just and reasonable in all the circumstances and in accordance with natural justice, equity and morality.

English authorities therefore will be of assistance in so far as they deal with situations which have a resemblance to that under consideration but are of no more than persuasive authority. Likewise any references to the law relating to the formation and discharge of contract and to the law relating to trusts must be read in the light of the overriding consideration that the Sharia law is to be applied.

The original sum was paid into the bank by Awadh accompanied by a letter dated August 1, 1903, of which the material parts are:

> "As per the Resident's instructions I beg to send you per bearer Rs.2,14,500/-. . . The amount being the shares of my nephews Munasser bin Abdulla and Hussein bin Abdulla and Husein's mother, as per the Munsab's decision and agreed to by the Government of India. Kindly receive the same and deposit in their name. The said sum may not be disposed of without the order of the Political Resident, Aden."

On the same day the bank manager acknowledged the receipt of the money as follows:

> "Received from H.H. The Sultan of Mukalla, the sum of Rs. 2,14,500/-. . . for credit of the Political Resident, Aden on account of Munasser bin Abdulla and Hussain bin Abdulla."

The account was opened and on August 8, 1903, the political resident informed

Hussain and Munasser of the deposit of the money in the bank saying that it was the share which the mansab had fixed for them and for the mother of Hussain and asking when and how they would like to receive the same.

Using the language of trust there was a trust created of ascertained property with a defined purpose for named beneficiaries and the trust was accepted by the political resident when he appropriated the fund to the beneficiaries by his letter of August 8, 1903. It was therefore appropriately described as "the Sultan of Shihr and Mukalla's Nephews Trust".

In these circumstances their lordships are of opinion in agreement with the trial judge that in making the payment as he did Awadh divested himself of all interest in the fund and thereafter it was held unconditionally for Hussain and Munasser and their heirs.

It is true that Hussain and Munasser would never accept either the award or the money and maintained the same attitude all their lives.

At an interview with the political resident on May 26, 1903, they declined even to receive a copy of the award for consideration and thereafter resolutely refused to accept the money. It was not until April 7, 1942, after their death that their heirs through their attorney made claim to the fund by letter to the Aden Government. Notwithstanding the delay of the appellants in putting forward the claim their lordships are in agreement with the learned trial judge in arriving at the conclusion that the appellants are entitled not only to the original sum of money deposited but also to the accretions which have resulted from the investment of the fund on their behalf.

Various contentions were put forward to the contrary; that which was accepted by the Court of Appeal for Eastern Africa was that the political resident held the money on behalf of Awadh with irrevocable authority to pay to the heirs of Abdullah but only on condition that they should accept the award and receive the money in full discharge of Awadh's obligations under it. It followed therefore in the judgment of the Court that until 1942 when the heirs of Abdullah indicated they were willing to accept the money due under the award the fund and its accretions belonged to Awadh or his heirs. No such condition was expressed nor in the opinion of their lordships is there any necessity to imply such a condition. This contention is not only inconsistent with the contemporary documents but is in any event insufficient to deprive the heirs of Hussain and Munasser of their claim to the accretions. Once they accepted the award they became entitled to the fund including all accretions for the fund represented the balance of the purchase price paid for Abdullah's properties. Awadh and his heirs have enjoyed the rents and profits of the properties from 1903 onwards and it is manifestly unjust that they should have the benefit of nearly forty years' interest on the purchase price.

To use the language of Vice-Chancellor Bacon in *Rhys v. Dare Valley Railway Company* (1) (1874), 19 L.R.Eq.93 at p.95, referring to the general rule that a purchaser taking possession of property and retaining the purchase money must pay interest to the vendor – this is "common sense, honesty and justice". It is no answer to this claim that afterwards Awadh's title was confirmed by the British Government and thenceforth the possession of Awadh and his heirs was derived from an Act of State not from the deed of sale.

Other contentions were put forward by the respondents; for example it was argued that the money was offered as a gift or tendered so that it was returnable if not accepted and no interest should be attached to it until acceptance. It was further suggested that if there was in truth a trust in favour of Hussain and Munasser the trust failed and there was a resulting trust in favour of Awadh. All these contentions fall, in

the opinion of their lordships, to be rejected for the reasons that have been given against accepting the grounds of the Court of Appeal.

Lastly by cross-appeal the respondents based a claim for a payment to them of the whole fund on the fact that they had by letter dated January 24, 1924, demanded payment thereof, thus, as they say, accepting the repudiation of the award by Hussain and Munasser. This argument was not strongly pressed and must fail for the submission to arbitration was binding upon both parties and no question of repudiation of contract arises by reason of the failure of Hussain and Munasser to accept the benefits due them under the award during their lifetime.

Returning to the deduction, it was submitted by the appellants that this being an interpleader action brought pursuant to the Ordinance of 1945, there was no jurisdiction to entertain any claim except a claim to the fund itself so that any demand to be reimbursed in respect of the Hyderabad claims brought by Hussain and Munasser must be the subject of a separate action. The learned trial judge was impressed with this difficulty but came to the conclusion that in the interests of justice and finality it was clearly desirable that he should deal if he could with all outstanding matters. Their lordships do not dissent from this view. By s.5(1) of the Ordinance notice was directed to be given to each and every person who may in the opinion of the judge have a claim to any part of the fund or any interest in the disposition thereof. The respondents have such an interest having regard to the fact that Hussain and Munasser did, if the jaghirs and mukhtars were subjects of the award of the mansab, obtain from another source the equivalent of part of the fund. It is on the above hypothesis unjust that they should claim the whole fund and so receive part of the same thing twice over and the objection to the jurisdiction of the Aden court is not on this footing sustainable.

Their lordships do not regard this as raising any question of breach of contract or unjust enrichment which might found a separate right of action. It involves merely recognition, on just and equitable grounds, of a plea that the appellants cannot claim the whole fund without refunding what they have taken out of property which the fund in part represents.

The question remains whether the jaghirs and mukhtars were ever the subject matter of the mansab's award. These are Crown grants and not strictly assignable property but nevertheless there was, as the learned judge said, some evidence that in practice these grants were bought and sold. Moreover, Omer I, by his will did purport to dispose of them. It appears therefore that the grants of jaghirs and mukhtars can fairly be described as property if the award by its terms purported to deal with them. These grants are not referred to by name in the award but both courts have held and their lordships agree that the language of the award covering as it did "property in the direction of Hyderabad" is wide enough to cover grants of both kinds.

The deduction ought therefore to be made as a matter of justice both in respect of the allowances received by Abdullah's heirs and of the expenses incurred in resisting the claim. As has been noted Hussain's heirs alone are appellants in this appeal and so far as their success has been of benefit to the other plaintiffs it is only just that these should share part of the costs to which the appellants have been put in prosecuting the appeal in so far as these are not recoverable from the other side.

Their lordships will therefore humbly advise Her Majesty to allow the appeal and dismiss the cross-appeal; to set aside the order of the Court of Appeal for Eastern Africa (except para. (vi) thereof, which provides for the costs of the Financial Secretary, Aden and of the Government of Mukalla); to restore the order of the Supreme Court of Aden with the variation that the words "representing the damages" contained therein be deleted and with the further variation that the sums to be paid to the respective parties out of the fund under the said order (including the defendants) be paid to them with accretion of interest at the rate that shall have accrued on the fund from the

date of the said order until payment; and subject further to a direction that before the balance is payable to the plaintiffs No. 1 to No. 20, there shall be payment out of such balance three-quarters of the costs incurred by the appellants in the consolidated appeal (on a solicitor and client basis) less the costs recovered from the appearing respondents in the consolidated appeal.

There shall be paid by the appearing respondents to the appellants in the appeal three-quarters of their costs of the consolidated appeal as between party and party and three-quarters of their costs of the appeal and cross-appeal in the Court of Appeal for Eastern Africa as between party and party.

Appeal allowed. Cross-appeal dismissed. Order of the Supreme Court of Aden restored with variations.

For the appellants and cross-respondents:
Hatchett, Jones & Co., London
D. Kemp (of the English Bar)

For the respondents and cross appellants:
T. L. Wilson & Co., London
Sir Frank Soskice, Q.C., R. Millner (both of the English Bar), *Akbar Ali Khan* and *A. K. Kazi*

The Official Receiver v United Stores Limited and others
[1962] 1 EA 180 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	6 February 1962
Case Number:	50/1961
Before:	Sir Alastair Forbes VP, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	Appeal from H.M. High Court of Uganda – Lewis, J.

[1] Bankruptcy – Stay of proceedings – Attachment – Attachment order made in civil suit – Attachment of moneys due to bankrupt – Objection to attachment – Application by trustee in bankruptcy cause for stay of all proceedings against debtor – Court hearing objection unaware of any order for stay made in bankruptcy cause – Whether court hearing objection has jurisdiction when order for stay made in bankruptcy cause – Bankruptcy Ordinance (*Cap.* 29), *s.* 11, *s.* 42, *s.* 44 *and s.* 164 (*U.*) *– Bankruptcy Act*, 1914, *s.* 9 *and s.* 105 (*U.K.*) *– Bankruptcy Rules*, *r.* 6.

[2] Contract – Consideration – Written authority by one party to another to pay moneys due to him to third party – Consideration moving from third party – Subsequent revocation of authority – Whether such revocation effective – Indian Contract Act, 1872, *s.* 2 *and s.* 25.

Editor's Summary

A builder, who was subsequently made bankrupt (hereinafter called "the bankrupt") signed a contract in April, 1960, to build a ginnery for the third respondent for Shs. 680,984/-. The bankrupt instead of carrying out the contract sub-contracted the work in May, 1960, to the second respondent for Shs.655,984/- the difference being a profit to the bankrupt. By August,1960, the second respondent had done about one-third of the work and having received no payment wrote to the bankrupt that if payment was not made by September 1, work would be stopped. He also complained to the third respondent that although the bankrupt had received payments, he had not paid the second respondent. The third respondent then wrote on September 1 to the bankrupt who replied authorising payment in future direct to the second respondent and by the end of September the bankrupt had paid the second respondent for part work. Relying on the authority to pay given to the third respondent, the

second respondent continued work until the bankruptcy occurred in November, 1960. On November 2, 1960, the first respondent sued the bankrupt for goods sold and delivered but the latter had by then left for India and could not be served. The first respondent then applied to the court for attachment of moneys alleged to be due to the bankrupt by the third respondent under the April contract and on November 3 an order was made that "all debts owing or accruing due" from the third respondent to the bankrupt be attached. On November 17, before any benefit under the attachment had been obtained by the first respondent, the second respondent filed an objection to the attachment. On November 19 the appellant informed the registrar of the court that an interim receiving order had been made against the bankrupt on November 19, asked that "all proceedings against the debtor should be stayed" and stated that he understood that garnishee proceedings were pending against the bankrupt. The Official Receiver's application was made in Bankruptcy Cause No. 37 of 1960 and an order was duly made. On November 22 the appellant again informed the registrar of the interim receiving order, referred to the instant case and stated that objection proceedings therein had been set down for hearing on December 2 and requested the court to stay these proceedings. No order was apparently made on this request and the judge who heard the objection appeared to have no knowledge of any order in the bankruptcy cause staying all proceedings. The judge held that the third respondent had accepted the objector, the second respondent, as contractor, found that the moneys due under the contract had become payable to the second respondent and annulled the order of attachment. On appeal it was submitted that the objection should not have been heard and that in any event the authority from the bankrupt to the third respondent to pay the second respondent passed no legal right to the latter.

Held –

(i) the court before which proceedings are pending retains its jurisdiction and, while under the Bankruptcy Act, 1914, the bankruptcy court may transfer to itself proceedings pending in other divisions, no such order was made in the instant case, nor was there any similar power of transfer under the Bankruptcy Ordinance of Uganda.

(ii) proceedings against a bankrupt are not automatically stayed by an adjudication and they continue until a stay is ordered; the judge was not aware of any such order and in the absence of knowledge of such order the judge had jurisdiction.

(iii) the letter of September 1, 1960, to the bankrupt amounted to a proposal under s. 2(*a*) of the Indian Contract Act, 1872, which the bankrupt replied accepting; and for the purposes of s. 2(*d*) ibid. the objector came within the description "any other person", the consideration being that the objector would continue construction of the ginnery.

(iv) the bankrupt had released the third respondent from its obligation to pay him in consideration of payment to the objector direct; there was the further consideration that on the bankrupt authorising payment to the objector direct, the objector would continue work under the sub-contract; the subsequent purported cancellation of the authority by the bankrupt was, therefore, of no effect and left the third respondent liable to pay the objector as moneys became due under the contract.

Appeal dismissed.

Cases referred to in judgment:

(1) *Realisations Industrielles et Commerciales S.A. v. Loescher & Partners*, [1957] 3 All E.R.241.

(2) *Jetha Petrol Station Ltd*. *v*. *Jamal Premji Lalani Ltd*., [1958] E.A.455 (C.A.).

The following judgments were read by direction of the court:

Judgment

Crawshaw JA: This is an appeal by the Official Receiver as trustee of the property of Karam Chand Notra, trading as Notra Sons & Co., against a judgment and order of the High Court, Uganda, sitting at Kampala (herein after referred to as the "trial court") allowing an objection against an attachment order; the appellant also appeals against the order of the trial court as to costs. The second and third respondents cross-appealed on the question of costs. At the commencement of the hearing of the appeal we heard an application by the appellant, supported by an affidavit of the Official Receiver, for liberty to produce further documentary evidence; for reasons which we gave at the time, the application was refused and we ordered that the costs thereof be paid out of the property of the debtor.

On November 2, 1960, United Stores Ltd., the first respondent (hereinafter referred to as the "plaintiffs"), filed a suit against Karam Chand Notra (hereinafter referred to as the "bankrupt") for goods sold and delivered. Service was not effected on the bankrupt as he had left for India and his whereabouts were not known. Application was made by the plaintiffs to attach certain moneys alleged to be due to the bankrupt by Lango Co-operative Union Ltd., the third respondent (hereinafter referred to as the "Union"), and on November 3 an order was made,

> "that all debts owing or accruing due from the Lango Co-operative Union Ltd. to the above-named defendant be attached".

On November 17, and before any benefit under the attachment had been obtained by the plaintiffs, Lango Builders, the second respondent (hereinafter referred to as the "objectors"), filed an objection to the attachment supported by affidavit. On November 19, the Official Receiver wrote to the registrar of the High Court, Kampala, informing him that an interim receiving order had been made against the bankrupt on November 19 and asking that, "all proceedings against the debtor should be stayed", and that he understood certain garnishee proceedings were pending against the bankrupt. This application was in Bankruptcy Cause No. 37 of 1960 and we were informed by Mr. Mehta, who appeared for the appellant, that an order in the terms asked for was made but I do not think we were informed on what date. On November 22 the Official Receiver wrote again to the registrar of the High Court informing him of the interim receiving order and specifically mentioning the instant case (No.999 of 1960) and stating that objection proceedings therein had been set down for hearing on December 2, 1960, and requested the court to stay these proceedings. I cannot find that any order was made on this request, but it would seem that it was filed in Civil Case No. 999 and not in Bankruptcy Cause No. 37, for the learned judge in the trial court referred to it, whereas he appeared to have no knowledge of any order in the Bankruptcy Cause staying all proceedings. Both applications are provided for in s. 11(1) of the Bankruptcy Ordinance (Cap.29) (hereinafter referred to as the "Ordinance") which reads:

> "11(1) The court may, at any time after the presentation of a bankruptcy petition, stay any action, execution or other legal process against the property or person of the debtor, and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just."

It will be seen that the first part of the sub-section relates to applications to the Bankruptcy Court for a stay, and the latter part of the sub-section relates to applications for a stay to the court in which the proceedings are pending. A copy of the letter of November 22 was sent to the respective advocates for the Union, the plaintiffs and the objectors. A letter was addressed by the advocates for the Union to the court on November 25 asking if the court proposed to stay the proceedings, but there is nothing on record to show if they received a reply. On May 5, 1961, the objection was heard, Mr. Shah, who had previously appeared for the plaintiff, appearing for the Official Receiver, the plaintiff apparently being unrepresented. Chanda Singh, as sole proprietor of the objectors, gave evidence, but no witness was called by any of the other parties, the only other evidence consisting of letters and other documents. The affidavit in support of the objection was made not by Chanda Singh but by his manager, who was not called; when Mr. Shah said he would like to cross-examine the latter, Mr. Wilkinson for the objectors is recorded as saying he was "not relying on the affidavit at all; only on the evidence".

The earlier grounds of appeal are not on the merits of the objection and may be summarised as follows:

(*a*) that the learned judge should not have heard the objection as "it was within the jurisdiction of the Bankruptcy Court", and it was that court which the objectors should have moved.

(*b*) that the Bankruptcy Court had ordered that, 'all actions, executions or other legal processes against the property or person of the debtor. . . had been stayed."

There is no substance in (*a*). The court before which proceedings are pending retains its jurisdiction. Under s. 105 (4) of the English Bankruptcy Act, 1914, the Bankruptcy Court may transfer to itself actions pending in other divisions, but no such order was made in the instant case, nor can I find any similar power of transfer in the Uganda Ordinance.

As to (*b*), it seems quite astonishing that the trial court was not informed by the Official Receiver of any order of the Bankruptcy Court staying all legal proceedings, and no explanation for not so doing has been given; it is clear from the judgment of the learned judge that he was unaware of one. I do not think Mr. Mehta for the Official Receiver went so far as to argue before us that the objection proceedings were invalid because of any such order; in the absence of knowledge thereof by the trial court I do not think it can be said that the trial court had no jurisdiction. The learned judge in his judgment referred to the request of November 22 for a stay, and said that proceedings would not be stayed unless the court was properly moved under s. 11 (1) of the Ordinance, and he added,

> "So far as these proceedings are concerned, Civil Case No. 999 of 1960 has not been stayed".

The learned judge was perhaps of the opinion that the application should have been made by motion supported by an affidavit under the provisions of r. 26 of the English Bankruptcy Rules as applied to Uganda by s. 164 of the Ordinance. Be that as it may, and I am not saying whether the application should have been made by motion, the learned judge did not order a stay and the case proceeded. In *Realisations Industrielles et Commerciales S.A. v. Loescher & Partners* (1), [1957] 3 All E.R. 241, Lynskey, J., held that proceedings against a defendant were not automatically stayed as a result of an adjudication, because a discretion was vested in the court under s.9 (1) of the Bankruptcy Act, 1914(which is similar to s. 11 (1) of the Ordinance), and that the proceedings continued until an order was made staying them. In the absence of knowledge

of the order in the Bankruptcy Cause this, with respect, is the position in the trial court as I also see it. I would not say that on a proper exercise of discretion in the instant case (had the learned judge accepted the application) the proceedings should not have been allowed to continue if the plaintiffs so desired. They could at best have derived no more benefit from them than any other ordinary creditor; from the Official Receiver's point of view, the creditors would have benefited had the objection been unsuccessful; the objectors themselves required a determination of the court (as no doubt did the Official Receiver) as to who was entitled to the attached moneys, and the Union desired to know where their legal liability lay. It seems to me that had objection proceedings been stayed, fresh proceedings would have had to be instituted to have the matter settled, to which all except the plaintiffs would have been parties and in which the Official Receiver or the objectors would have been the plaintiff.

The moneys attached were sums due or becoming due by the Union for the construction of a ginnery. By a contract dated April 14, 1960 (hereinafter referred to as the "head contract") the bankrupt agreed with the Union to construct the ginnery on the terms therein set out. It is not in dispute that the bankrupt did not carry out any part of the contract, and that by a sub-contract dated May 1, 1960, between him and the objectors the latter carried out such work as was done. The bankrupt was to be paid by the Union under the head contract Shs. 680,984/74 and under the sub-contract the objectors were to be paid by the bankrupt Shs. 655,984/74; the difference of Shs.25,000/- being the profit retained by the bankrupt.

Chanda Singh said in evidence that by the end of August the objectors had completed about one-third of the work and had not received any payment. On August 10 he wrote to the bankrupt saying that about 60 per cent. of the work had been completed and that if payment was not received work on the ginnery would be stopped on September 1. Chanda Singh said that at the end of August he complained to the Union that although payments had been made by the Union to the bankrupt, the latter had passed none of it on to the objectors, and that he threatened to stop work on September 1; he said,

> "I told them that I was willing to continue work provided they paid us direct. They agreed to pay us direct and said they had no objection to pay us direct if we got a letter of authority from Notra Sons."

On September 1 the Union wrote to the bankrupt informing him of the objectors' complaint and of the threatened "strike" and said, "we could pay them straight from here if you instruct us". On September 2 the bankrupt replied to the Union as follows:

> "We thank you for your letter d/1st instant along with your cheque for Shs. 21,420/-.
>
> "With regard to what you write about Messrs. Lango Builders, who are receiving along with this letter their cheque for payment due to them, we shall have no objection to your paying them direct for amount due to us for the work done at the ginnery.
>
> "Please treat this letter as our authority to pay them direct. This will save us form unnecessary expense of exchange we otherwise incur in this connection simply for negotiating your cheques."

Chanda Singh went on to say in his evidence:

> "At the end of September the head contractor paid me in respect of work done in the past. In reliance of this agreement with Co-operative Union and Notra Sons I carried on work after September 1. I carried on until Notra Sons went bankrupt. After that a direct contract was made between

> me and the owners for the completion of the work. I am now claiming payment for work done by me after September 1.
>
>
>
> "Money is now due for work done from September 1 until new contract."

It seems that on September 17 the objectors received Shs. 23,040/-, it is not clear from whom.

On October 11 the bankrupt wrote to the Union, the first paragraph of which letter reads,

> "We refer you to our letter dated September 2 requesting to make payment on our behalf to Messrs. Lango Builders direct which authority is hereby revoked."

The letter went on to request payment of the moneys shown in the architect's certificate No. 4. On November 12 Messrs. Wilkinson & Hunt on behalf of the objectors sent a telegram to the Union in the following terms:

> "You must note hereby that our client Lango Builders of Lira are the only persons entitled to money due and accrued stop. You are well aware that they are building your ginnery and besides you were instructed by Notra Sons & Company to effect payment due from time to time direct to the said Lango Builders stop. Please confirm per return that you will effect payments already due and owing and that will become due from time to time to our said clients Lango Builders stop Messrs. Gasston & Barbour are also well conversant with our clients' claim."

On November 14 Messrs. Wilkinson & Hunt wrote to Messrs. Gasston & Barbour, consulting engineers, who apparently signed the payment certificates as the work proceeded, saying that "through an oversight" the Union had drawn a cheque in favour of the bankrupt for a sum of Shs.61,700/- being the net amount due under certificate No. 4 and that when the Union's attention had been drawn to this the Union had stopped payment. Messrs. Hunter & Greig, who were then acting for the Union, wrote to Messrs. Wilkinson & Hunt on November 15 saying that the Union

> "are only anxious to pay over any money due in respect of the works being carried out at Lira to the proper party. It appears from your telegram addressed to our clients that you have not been shown a copy of the letter of Notra Sons & Company, addressed to our clients and dated October 11 last, and we are, therefore, enclosing a copy of this herewith."

The letter referred to the attachment order of November 3 and suggested that the objectors should bring their claim to the notice of the court. On November 17 the objection proceedings were instituted.

The learned judge in his judgment said:

> "The agreed correspondence and the facts show that the employers accepted the objectors as the contractors who were to carry out the contract of April 14. In fact the defendant never even commenced to build the ginnery. There was a novation of the contract. They must then be taken to have waived their rights as to assigning or subletting under condition 13 of the contract. On these facts Mr. Wilkinson contends, first, that there was an assignment of the contract of April 14 with the consent of the employers, and consequently the objectors have established an interest within O.19, r. 56, alternatively, the defendant by his letter to the employer of September 2, transferred a fund in their hands to the objectors which the employers impliedly promised to pay; that this became a legal right

> in the objectors, founded on the promise; and the money under the contract became a fund received or to be received for and payable to the objectors. *Shamia v. Joory*, [1958] 1 Q.B.
>
> "In my opinion, the view of the objectors must prevail and the property mentioned in the order of attachment must be released."

Mr. Wilkinson in his opening address to the trial court clearly did not regard the transaction between the bankrupt and the objectors as an assignment of the head contract nor does he now. Before us, both Mr. Wilkinson and Mr. Mehta agreed that it was not a novation. They appeared always to have regarded it as a sub-contract as described in that document, and which it would seem to have been, accompanied later by an authority to the Union to pay direct to the objectors, which authority the bankrupt later purported to cancel.

The main ground of appeal on the merits of the objection is contained in para. 7 of the memorandum of appeal which reads:

> "7. The learned trial judge erred in holding that the letter of September 2, 1960, of the defendants passed a legal right to the objector."

Mr. Mehta referred to the letter of September 2 in which the bankrupt authorised the Union to pay the objectors direct, and submitted that it related only to moneys then due and not to payments which would from time to time become due. I do not put this limited construction on the letter. The letter says that the objectors, "are receiving along with this letter their cheque for payment due to them"; the letter was endorsed, "Copy to: Messrs. Gasston & Barbour, . . . Messrs. Lango Builders, . . .". If the moneys "due" to the objectors were then being paid by the bankrupt, the authority given to the Union could only refer to future payments. The bankrupt appeared to welcome payments being made direct to the objectors, for in the final paragraph of his letter he said the procedure,

> "will save us from unnecessary expense of exchange we otherwise incur in this connection simply for negotiating your cheques."

Mr. Mehta argued further that there was nothing to show that the Union had agreed to make future payments to the objectors. I think the letter of the Union to the bankrupt of September 1 was in sufficiently wide terms to indicate that they were willing to make such payments if authorised to do so, and that the letter was written with a view to obtaining the assent of the bankrupt. Admittedly they later sent a cheque for Shs. 61,700/- to the bankrupt, but apparently realised their mistake and stopped payment.

There is the unrebutted evidence of Chanda Singh that when he complained to the Union at the end of August that the bankrupt had not paid him, and threatened to discontinue work, the Union

> "agreed to pay us direct and said they had no objection to pay us direct if we got a letter of authority from Notra Sons".

He said:

> "In reliance of this agreement with Co-operative Union and Notra Sons I carried on work after September 1. I carried on work until Notra Sons went bankrupt. After that a direct contract was made between me and the owners for the completion of the work. I am now claiming payment for work done by me after September 1."

Mr. Wilkinson submits that the agreement was completed on receipt by the Union of the letter of authority.

Section 2(*a*) of the Indian Contract Act, 1872 (hereinafter referred to as

the "Act") as applied to Uganda and appearing in the laws of Uganda as Cap. 207, reads:

> "2.(*a*) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:"

As I read the letter of the Union of September 1 to the bankrupt, it amounts to a proposal that as the objectors had threatened to cease work because they were not receiving payment from the bankrupt, the bankrupt should authorise them to pay the objectors direct from the moneys which otherwise would be payable to the bankrupt under the head contract.

Section 2(*b*) and (*c*) of the Act reads:

> "(*b*) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise:
>
> "(*c*) The person making the proposal is called the 'promisor', and the person accepting the proposal is called the 'promise':"

The proposal was accepted by the bankrupt by his letter of September 2, a copy of which was sent to the objectors by the bankrupt.

Section 2(*d*) and (*e*) of the Act reads:

> "(*d*) When at the desire of the promisor, the promise or any other person has done or abstained form doing, or does or abstains from doing, something, such act or abstinence or promise is called a consideration for the promise:
>
> "(*e*) Every promise and every set of promises, forming a consideration for each other, is an agreement:"

Subject to certain exceptions which do not apply here, s. 25 of the Act provides that an agreement without consideration is void. It seems to me that for the purposes of s. 2(*d*) the objectors come within the description "any other person", the consideration being that they would continue the construction of the ginnery. Chanda Singh said,

> "I told them [the Union] that I was willing to continue work provided they paid us direct".

We were referred to *Jetha Petrol Station Ltd. v. Jamal Premji Lalani Ltd*. (2), [1958] E.A. 455 (C.A.). In that case the respondents were to receive a sum of money on behalf of a certain H. S. Sond. Sond gave an irrevocable authority to the respondents to pay from that sum to the appellants Shs. 10,000/-which he owed them. Later Sond purported to revoke this authority. There was no oral evidence and the trial judge held that the documents disclosed no contract and dismissed the action. On appeal it was held that the letter from the respondents to the appellants binding themselves to pay the Shs. 10,000/- to the appellants should they receive that sum on behalf of Sond and be authorised by Sond to make the payment, was a proposal within the meaning of s. 2(*a*) of the Act, and that the letter of authority which ensued was an acceptance. Gould, J.A., who delivered the main judgment in which the other members of the court concurred, observed on the question of consideration that the money was to be received by the respondents on behalf of Sond and would in the normal course be payable to him and then went on to say:

> "When, therefore, Harnam Singh Sond signed and caused to be given to the respondents an authority to pay the appellants Shs. 10,000/-, he impliedly agreed to release the respondents from their liability to pay that

> amount to him. This agreement to release, which would certainly be 'at the desire of the promisor' appears to me to provide good and valuable consideration for the respondents' promise to the appellants . . ."

The learned judge went on to say:

> "If there was consideration for the conditional promise to pay, I do not think that cancellation by Harnam Singh Sond of the authority to pay effected after acceptance and performance of the consideration by the appellants (though before payment) relieves the respondents from liability under their contract with the appellants."

It seems to me that that is the position in the instant case. The bankrupt released the Union from their contractual obligations to pay him, in consideration of their paying the objectors direct. There was, as I have said, the further consideration that on the bankrupt giving authority to the Union to pay the objectors direct, the objectors would continue work under the sub-contract. I would accordingly hold that this was a promise by the Union to pay to the objectors moneys owing by the Union to the bankrupt in accordance with the authority from the bankrupt to that effect; that there was consideration for such promise; that the bankrupt had impliedly released the Union from their liability to pay the same moneys to the bankrupt; and that the purported cancellation of the authority by the bankrupt on October 11 was of no effect and left the Union liable to make payments to the objectors of moneys as they became due under the contract. I understand that there is a balance of Shs. 5,000/- due under the head contract in excess of the total moneys payable under the sub-contract, to which the Official Receiver will be entitled.

A further ground of appeal (paras. 4 and 5 of the memorandum) relates to the production of evidence by the objectors, but this ground has not been argued by Mr. Mehta and I think there is no merit in it.

For these reasons I would dismiss the appeal so far as it relates to the discharge of the garnishee order of November 3, 1960.

The remaining question is costs. The order of the learned trial judge was in the following terms:

> "The objectors are of course entitled to their taxed costs and these must be paid by the Official Receiver and not be a charge in the defendant's bankruptcy. I make this order because: (1) the Official Receiver had, for the reason stated, no locus standi and (2) even if he had, he should not have allowed counsel for the plaintiff to represent him in a matter diametrically opposed to the interests of the creditors of the defendant. The proper course was for the Official Receiver to have preferred a claim under O.36, r. 8."

Mr. Mehta submitted that the Official Receiver had locus standi and Mr. Wilkinson said he did not contend otherwise. It seems to me that the Official Receiver stepped into the shoes of the bankrupt and was properly a party to the proceedings. With respect to the learned judge, I do not agree that the interests of the plaintiffs were necessarily opposed to the interests of the general body of creditors, for if the objection to the attachment had been unsuccessful the moneys which fell due by the Union would have been payable to the Official Receiver, for the plaintiffs would not have been entitled to the benefit of their attachment because of the provisions of s. 44 (1) of the Ordinance, which reads as follows:

> "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in

> bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor or of the commission of any available act of bankruptcy by the debtor."

Section 44 (2) provides that "an attachment of a debt is completed by receipt of the debt".

Mr. Mehta submitted that if the objectors were successful in this appeal the costs up to the commencement of the bankruptcy proceedings should be paid by the plaintiffs and thereafter by the Official Receiver. Mr. Wilkinson on the objectors' cross-appeal submitted that the order of the learned judge was correct even if for wrong reasons, but that if that order was not upheld then the plaintiffs should be ordered to pay the costs up to the date of the bankruptcy proceedings and the costs thereafter should be paid by the Official Receiver. Mr. James on the Union's cross-appeal supported Mr. Wilkinson's submission but expressed the view that the order of the learned judge went too far in directing that the costs payable by the Official Receiver should not come out of the bankrupt's estate.

Mr. Shah in answer to the cross-appeals submitted that the objectors should pay the costs as they had allowed the public to believe the bankrupt to be a creditor of the Union; Mr. Shah relied on the reputed ownership clause, s. 42(*c*) of the Ordinance. The section is not, however, applicable as, for the reasons which I have given, the Union were liable to pay the objectors and such moneys were not therefore "in the possession, order or disposition of the bankrupt". Mr. Shah also argued that the Union should have paid the money into court and retired from the proceedings. Mr. Shah did not object when Mr. Sparrow, who was then acting for the Union, asked at the trial court for costs, and I am not prepared to say that the learned judge was wrong in awarding the Union their costs.

It is not clear to me that the institution of bankruptcy proceedings has any relevance in relation to the costs, but the only complaint by the Official Receiver against the order of the learned judge is that it made the Official Receiver liable for the costs before the bankruptcy proceedings and prohibited payment out of the bankrupt's estate. In those circumstances I do not think this court is at liberty to order costs to be paid by the plaintiffs after the making of the interim receiving order even should we think it would otherwise have been a proper order to have made. I do, however, think that the plaintiffs should be made to pay the costs up to then. They instituted the attachment proceedings and were a party to them throughout and were unsuccessful. I would vary the order of the learned judge by ordering that the plaintiffs pay the costs of the other parties up to the date of the interim receiving order and that thereafter the Official Receiver pay the costs in the trial court of the objectors and the Union, and also the costs of the objectors and the Union in this appeal. The learned judge made no order as to the plaintiffs' costs and nor would I, here or in the court below. I would make no order as to the costs of the cross-appeals. I would set aside the order that the costs payable by the Official Receiver should "not be a charge in the defendant's bankruptcy". It will thus be open to the Official Receiver to apply for reimbursement out of the bankrupt's estate of any costs payable by the Official Receiver in these proceedings.

Sir Alastair Forbes VP: I agree. There will be an order in the terms proposed by the learned Justice of Appeal.

Newbold JA: I also agree.

Appeal dismissed.

For the appellant:
Patel & Mehta, Kampala
A. G. Mehta

For the first respondent:
J. S. Shah, Kampala

For the second respondent:
Wilkinson & Hunt, Kampala
P. J. Wilkinson, Q. C., and *R. E. Hunt*

For the third respondent:
Hunter & Greig, Kampala
A. I. James

Overseas Touring Company (Road Services) Limited v African Produce Agency (1949) Limited and another

[1962] 1 EA 190 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	20 January 1962
Case Number:	101/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Lyon, J.

[1] Practice – No case – Suit against two defendants – Submission of no case for one defendant to answer – Conceded that no prima facie case on evidence against one defendant – Judge's refusal to dismiss this defendant from action – Whether defendant should be dismissed – Civil Procedure Rules, O. 1, *r.* 7, 14 (*U.*) *– Rules of the Supreme Court, O. XVI, r.* 1 *– County Court Rules, O.* 3, *r.* 5.

Editor's Summary

The first defendant agreed to transport for the plaintiff 400 tins of kerosene from Kisumu to Kampala. The tins were duly loaded on the first defendant's lorry but owing to an accident between the first defendant's lorry and a bus belonging to the second defendant 368 tins were damaged and lost and only

the remaining 32 tins were delivered. The plaintiff sued the first defendant alleging negligence and he joined the second defendant by a third party notice. Subsequently by direction of the court the second defendant was added as a party and the plaintiff, having been allowed to sue both defendants under O. 1, r. 7, filed an amended plaint. The first defendant admitted the contract, blamed the accident on the second defendant's driver and denied negligence and liability. The second defendant also admitted the accident but denied negligence. At the trial the plaintiff proved the contract of carriage, the short delivery, the quantum of damage and that this had occurred, according to the first defendant, in the accident. The plaintiff then closed his case whereupon counsel for the second defendant submitted that there was no evidence on which he could be held negligent and applied for his client to be dismissed from the suit. The judge agreed that there was then no prima facie case against the second defendant but refused to order the second defendant's dismissal from the suit. Ultimately the second defendant was held to be negligent and liable to the plaintiff in damages. On appeal

Held –

(i) the case of the first defendant was that the collision was due solely to the negligence of the driver of the second defendant's bus; there was thus a question to be decided between the defendants which could not be resolved if the second defendant were dismissed from the action.

(ii) if that question were not resolved in the proceedings before the court, another action would have to be brought to resolve it; this was the mischief which O. 1, r. 7, was designed to avoid, which the words "may be determined as between all the parties" in r. 7 confirmed.

Appeal dismissed.

Cases referred to in judgment:

(1) *Lipman v. Fox and L.G.O. Co*. (1911), 46 L.Jo. 746.

(2) *Yuill v. Yuill*, [1945] P. 15; [1945] 1 All E.R. 183.

(3) *Hummerstone v. Leary*, [1921] 2 K.B. 664.

(4) *Overseas Tankship* (*U.K.*) *Ltd. v. Morts Dock and Engineering Co. Ltd*., [1961] 2 W.L.R. 126; [1961] 1 All E.R. 404.

The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a judgment and decree of the High Court of Uganda in Kampala dated September 10, 1960, whereby the claim by the first respondent (the plaintiff in the High Court) against the second respondent (the first defendant in the High Court) and the appellant (second defendant in the High Court) for damages for breach of a contract of carriage and negligence was decreed against the appellant and dismissed against the second respondent.

The matter arose in this way. It will be convenient to refer to the parties as the plaintiff and the first defendant and the second defendant respectively.

In December, 1957, the plaintiff agreed with the first defendant who was engaged in the transport business as a private carrier, for the transport by him of 400 tins of kerosene oil from Kisumu to Kampala.

Only 32 tins were delivered, the remainder (so it was alleged) being damaged or lost as a result of a collision between the lorry of the first defendant and a bus belonging to the second defendant. Originally the plaintiff sued the first defendant who brought in the second defendant by a third party notice. Subsequently, by direction of the High Court, this procedure was changed, the second defendant was added as a party and the plaintiff was permitted to sue both defendants. An amended plaint was filed. It is to be noted that O. 1, r. 14 of the Uganda Civil Procedure Rules, which deals with third party notices, applies only (as did the old rule in England) to cases where the defendant claims to be entitled to contribution or indemnity over against a third party. The Uganda rule has not been extended as has O. XVI, r. 1, in England. This may have been why third party procedure was considered inapplicable in this case.

The plaintiff in its amended plaint dated June 5, 1959, averred that 400 tins of kerosene oil were safely loaded on the first defendant's lorry, but said that the first defendant did not carry them carefully and failed to deliver 368 tins out of the 400. The plaintiff averred further that, on December 24, 1957, the lorry on which 400 tins had been safely loaded was being driven by the first defendant's driver when it collided with a motor-bus owned by the second defendant which was coming from the opposite direction: as a result of the collision the lorry was badly damaged and 368 out of the 400 tins of kerosene oil were damaged, broken and lost. In consequence the first defendant failed to deliver the 368 tins to the plaintiff. The plaintiff alleged that the collision was due to the negligence of the driver of the lorry or of the bus or

of both, and being unable to say which of the defendants (the owner of the lorry or the owner of the bus) was to blame, he sued both under O. 1, r. 7 of the Uganda Civil Procedure Rules jointly and severally or in the alternative. The plaintiff claimed Shs. 4,416/- being the value of 368 tins of kerosene oil at Shs. 12/- a tin.

The first defendant in his defence admitted the contract of carriage and that the 400 tins of kerosene oil had been loaded on to a lorry owned by him. He

averred that, on December 24, 1957, the lorry came into collision with a bus owned by the second defendant which, by the negligence of its driver, was driven head-on into the first defendant's lorry causing it damage beyond repair and causing the death of its driver and of another man who was in the cab of the lorry. The first defendant admitted that out of the 400 tins, only 32 were delivered to the plaintiff at Kampala and that 368 tins were lost, but he denied that this was due to any negligence on his part. He averred that some of the tins were broken open in the accident and said that the remainder were stolen by persons unknown after the accident without any fault or neglect of the first defendant.

In its defence the second defendant admitted that its motor-bus came into collision with the lorry, but denied the rest of the plaintiff's allegation and in particular denied that the driver of the bus was negligent.

The question whether the first defendant was a common carrier or a private carrier was tried as a preliminary point. The learned judge held that he was a private carrier. It was at this stage that the second defendant was added and ceased to be a third party.

Under the original proceedings, when there was only one defendant, the judge had ruled that the defendant should begin. When another defendant had been added, he rescinded that ruling and ruled that the plaintiff should begin.

Mr. Sangani, managing director of the plaintiff company, gave evidence. He testified that the first defendant Malkit Singh had entered into a contract with his company to carry carefully 400 tins of kerosene from Kisumu to Kampala. He said that his company had paid for these tins which were "not delivered to me because the lorry met with an accident". 32 tins were delivered to him. He said that after receiving a message from the police

> "We went with another lorry to the place of the accident to collect the tins."

He never received the balance. He said that the value of one tin was Shs. 12/-. Mr. Sangani further testified that the first defendant had told him that he would arrange for payment of his (Sangani's) money and that the undelivered goods would be accounted for; and he said that his company was claiming "Shs. 4,416/- being the price of 368 tins." The witness continued:

> "Malkit Singh said the tins burst on account of the accident. There was an accident with a bus and the tins burst. Yes, the tins had been damaged, he was unable to deliver the balance of the tins."

The witness was unable to say how the accident happened or who was to be blamed for the accident. In cross-examination this witness said that he thought that there was an accident because he was told; and he said that Malkit Singh had not been on the lorry.

At the close of this witness's evidence, which concluded the plaintiff's case, counsel for the second defendant (appellant) submitted that the evidence as to why the witness had not received the balance of the tins was inadmissible against the second defendant.

Counsel for the second defendant asked that his client should be dismissed from the suit on the ground (1) that there was no evidence on which he could be held to be negligent; and (2) that there was no proof of damage having been suffered. He was warned by the judge that if he continued with this submission, he would not be permitted to call evidence. He did, however, persist, saying that he did wish to call evidence, but that if he were forced to elect, he would elect to call no witnesses. Counsel for the first defendant said inter alia that he would tender evidence showing definitely that the driver of the lorry had not been negligent and that he was prepared to prove that the negligence was that of someone else.

The learned judge agreed with counsel for the second defendant that there was no prima facie case of negligence against him, but said that the matter did not end there as there was a claim in the alternative. On the authority of *Lipman v. Fox and L.G.O. Co.* (1) (1911), 46 L.Jo. 746, cited in the Annual Practice, 1961 at p. 333, he refused to dismiss the second defendant from the suit.

The suit then proceeded and evidence was heard. The learned judge found that there had been a contract between the plaintiff and the first defendant, that the first defendant would transport 400 tins of kerosene oil from Kisumu to Kampala, that 400 tins of kerosene were loaded on the first defendant's, lorry and that only 32 were delivered; that there was no contest as to the value of the tins and the quantum of damage suffered and that the figure was Shs. 4,416/-; that the first defendant's lorry came into collision with a bus belonging to the second defendants, that the bus was on its wrong side, that there was ample room on the road to pass; that the lorry was travelling slowly uphill and the bus fast downhill, that the driver of the bus had driven too fast on the wrong side of the road and had been negligent. The learned judge said that he had rarely heard clearer evidence of gross negligence. He found that there was no negligence on the part of the first defendant's servants or agents and that all the damage flowed directly from the negligence of the second defendant's servants or agents. Accordingly, he gave judgment for the plaintiff against the second defendant and dismissed the plaintiff's claim against the first defendant.

On appeal, Mr. Wilkinson, for the appellant, argued that the learned judge had been wrong in refusing to allow him to call evidence if he continued with his submission of no case at the close of the plaintiff's evidence and his submission failed. I think, however, that the learned judge was justified in taking that course: *Yuill v. Yuill* (2), [1945] P. 15, p. 18.

Mr. Wilkinson's main contention was that contained in grounds 1 and 2 of the memorandum of appeal, which read as follows:

> "1. Having found at the close of the plaintiff's case that the plaintiff's evidence did not afford a prima facie case of negligence against the second defendant and that there was no case for the second defendant to answer the learned trial judge erred in not dismissing the second defendant from the suit at that stage.
>
> "2. The learned trial judge erred in not holding that the plaintiff had failed to prove the damages claimed against the second defendant at the close of the plaintiff's case and erred in not therefore dismissing the second defendant from the suit or alternatively dismissing the plaintiff's claim against the second defendant at that stage of the suit."

It may be useful to recapitulate briefly what was before the trial judge at this stage.

The position was that the plaintiff had pleaded a contract by the first defendant to carry 400 tins of oil, and failure to deliver 368 of those tins. The plaintiff had also pleaded a collision between the vehicle of the first defendant and the vehicle of the second defendant as a result of which 368 tins were damaged, broken and lost, and that his (the first defendant's) failure to deliver 368 tins was in consequence of that collision; and he had alleged that the collision was due to the negligence of one or other or both of the drivers of the vehicles of the first and second defendants respectively.

The first defendant had admitted the contract of carriage, the loading of 400 tins on his lorry, delivery of only 32, and the collision causing the breaking open and loss of the tins. He had denied negligence on his part and had alleged negligence by the driver of the bus, the servant of the second defendant.

The second defendant had admitted the collision, but denied the other allegations and denied negligence.

The plaintiff's witness had proved the contract of carriage, the short delivery, the quantum of damage and an admission by the first defendant that the damage had happened in the accident and a promise by him to pay for it.

At that stage was the second defendant entitled to be dismissed from the suit because, until the first defendant's evidence had been heard, there was no evidence of negligence against him? In my opinion he was not.

Rule 7 of O. 1 of the Uganda Civil Procedure Rules reads:

> "7. Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."

I stress the words "may be determined as between all parties". The first defendant would be liable for failing to deliver, if the failure was due to his negligence. He proposed to negative negligence on his part by calling evidence that he was not negligent and that the collision was caused solely by the negligence of the driver of the bus. Obviously, there was a question there between the first and second defendants which could not be properly resolved if the second defendant were dismissed from the action. If it were not resolved in the present suit, another suit would have to be brought to resolve it. That is the mischief which O. 1, r. 7 is designed to avoid.

In *Hummerstone v. Leary* (3), [1921] 2 K.B. 664, the facts were as follows: – The plaintiffs, who were injured in a collision between a motor-lorry, in which they were passenger, and a motor-car, brought an action in the county court claiming damages, making the owners of both vehicles defendants under O. 3, r. 5, of the County Court Rules (which corresponds to O. 1, r. 7 of the Uganda Rules). The plaintiffs' evidence appeared to make it probable that the driver of the car rather then the driver of the lorry was to blame, but they could do no more than state what they observed just before the collision occurred. Their evidence did not affirmatively or conclusively show that the driver of the lorry was not to blame. At the close of the plaintiffs' case counsel for the owner of the lorry submitted that there was no evidence against him, and the county court judge took this view and dismissed that defendant from the action. The case then proceeded against the other defendant, whose witnesses threw all the blame on the driver of the lorry, and the county court judge found that the driver of the car was not negligent and accordingly entered judgment for the second defendant. It was held that as a state of facts was proved by the plaintiffs from which the reasonable inference to be drawn was that prima facie one if not both of the defendants was negligent, the county court judge should not have dismissed the first defendant, the owner of the lorry, from the action at the close of the plaintiffs' case, but should have heard the case against both defendants before coming to a decision; and therefore that there must be a new trial.

Bray, J., said at pp. 666-668:

> "This case raises a question of considerable importance. It is somewhat remarkable, considering that it so frequently arises, that it is almost devoid of authority. (His lordship stated the facts and continued:) In our opinion the learned judge took an entirely wrong course in allowing Leary to be dismissed from the action. Instead of trying the case as one entire case, which it was, and hearing all the evidence before arriving at a conclusion, he divided it into what we may call compartments and tried each separately, the result of which was that it was never really tried at all.

> He treated it as a claim against Leary alone and a claim against Foster alone, overlooking the fact that the plaintiffs, as they were entitled to do under the Rules, were alleging that either Leary or Foster or both were responsible for the accident. When once a state of facts was proved, as it was, from which the reasonable inference to be drawn was that prima facie one if not both drivers had been negligent, the plaintiffs were entitled to call on the defendants for an answer, and the proper time at which to decide whether on the evidence one defendant or the other defendant or both the defendants were liable was at the close of the whole case. That the plaintiffs did prove such a state of facts is clear. The collision took place in broad daylight, there was no other traffic in the road, and there was nothing to indicate inevitable accident. If the learned judge was right, then if all that the plaintiffs could have proved was the collision itself, which under such circumstances as these would raise a presumption of carelessness on the part of one or both drivers, each defendant would be entitled to judgment because the plaintiffs would have failed to prove which driver was to blame. The learned judge did not give effect to O. 3, r. 5, of the County Court Rules, which is substantially a reproduction of R.S.C. O. XVI, r. 7. Order 3, r. 5, which enables a plaintiff to join several defendants when he is in doubt which is liable, provides that 'where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties.' The language of that rule contemplates that the case shall be tried out between all the parties, and, apart from the special language of the rule, it is in our opinion clear that when the difficulty of procedure is got over and a plaintiff can present his case against two defendants in the alternative he is just as much entitled to have the case tried out where he has made a prima facie case in support of his cause of action as a plaintiff is who proceeds against one defendant alone.
>
> "It must not be supposed from our judgment that if a plaintiff fails to make a prima facie case at all he is entitled to call on two defendants under such circumstances as these to give evidence and ask for judgment if no such evidence is given. He must of course prove facts from which in the absence of an explanation liability could properly be inferred."

Mr. Wilkinson distinguished *Hummerstone's* case (3), on the ground that in that case there was some evidence of the circumstances in which the collision occurred from which negligence on the part of one or both drivers was a reasonable prima facie inference. He contended that there was, at the close of the plaintiff's case in the present suit, no evidence of negligence and no evidence that the plaintiff had suffered damage. I think that there was clear evidence that the plaintiff had suffered damage and of its amount. The question of negligence is more difficult. I think that at that stage there was, on the pleadings and on the evidence called for the plaintiff, a sufficient prima facie case of damage due to an accident – a collision between two vehicles under the management respectively of the servants of the first and second respondents, an accident which does not ordinarily happen if those who have the management of vehicles use proper care: moreover there was a pleading by the first defendant of gross negligence on the part of the second defendant's servant, which he was entitled to have litigated in order to show that he himself had not been negligent and was not liable on his contract of carriage. In my view, if the judge had dismissed the first defendant from the suit at that stage, he would have done what the county court judge did in *Hummerstone's* case (3); he would have divided what should, under the rule, have been one case into compartments

and tried each separately with the result that the case would never really have been tried at all.

In the Annual Practice, 1961 at p. 333, the following passage occurs:

> "Where at the conclusion of plaintiff's case there is no evidence against one of the defendants joined under this Rule, that defendant should not be dismissed from the action, as the evidence called for the other defendant may fix him with liability (*Lipman v. Fox and L.G.O. Co*., 46 Law Journal (Dec. 2, 1911), at p. 746), and if it does so, would involve a new trial being ordered against the dismissed defendant (*Hummerstone v. Leary*, [1921] 2 K.B. 664)."

The report of *Lipman's* case (1), in the Law Journal is not available here, but, the case is mentioned in *Hummerstone's* case (3), as a decision of Lord Alverstone, C.J., I think that *Lipman's* case (1) supports the conclusion of the learned trial judge and that he took the right course.

I would dismiss the appeal with costs.

Sir Alastair Forbes VP: I agree with the reasoning and conclusions of the learned President, but would add a word regarding an argument advanced by Mr. Wilkinson that the damage suffered i.e. the loss of the 368 tins of kerosene, was not shown to have followed as a direct result of the negligence of the appellant.

Mr. Wilkinson argued that the only evidence on the point was that of the turn-boy; that from his evidence it did not appear that 368 tins could have been holed; that it was pleaded they were stolen, but there was no evidence as to this – merely the statement of the first respondent that his lorry only recovered 32 tins; that the turn-boy was taken away by the police and police remained in charge, but no evidence was called to show what the police did in regard to the tins; and that even if the tins were stolen, that was not a normal consequence of the negligence which caused the accident.

The learned judge said:

> "There has been some suggestion by both the plaintiff and the second defendant that some of these tins of kerosene were stolen. There is no clear evidence of that; but, even if it were so, I cannot see that the first defendants were at fault, because their turn-boy was taken to the police station by the police, and three Kenya police officers were left on the site; and the other two servants or agents, or part owners of the lorry, were already dead, and therefore on that part of the case there was no negligence on the part of the first defendant's servants or agents.
>
> "I am quite satisfied on the whole case that all damage flowed directly from the negligence of the second defendant's servant."

I think, on the evidence, the learned judge was fully justified in finding that there had been a loss of the 368 tins and that the loss flowed directly from the negligence of the appellant's servant which caused the accident. In *Overseas Tankship* (*U.K.*) *Ltd. v. Morts Dock and Engineering Co. Ltd*. (4), [1961] 2 W.L.R. 126, however, the Privy Council has laid it down that the essential factor in determining liability for the consequences of a tortious act of negligence is whether the damage is of such a kind as a reasonable man should have foreseen; and, further, that a man should not escape liability however "indirect" the damage, if he foresaw or could reasonably have foreseen the intervening events which led to its being done. Applying that test in the instant case, it appears to me that, in the conditions prevailing in East Africa, it is to be foreseen that a traffic accident may result in a vehicle involved being left

unattended through no fault of the owner, and that in such case loss of the contents of the vehicle through pilferage is not merely foreseeable but highly probable. There is no doubt here that the loss occurred, and I do not think it incumbent on the respondent to show the precise manner in which it happened, a very difficult matter in the circumstances of the case. The loss, however, was in my view a probable consequence of the negligence of the appellants' servant and I think the appellants are liable for it.

Crawshaw JA: I have had the advantage of reading the judgments of the learned President and Vice-President and I agree with them.

Appeal dismissed.

For the first appellant:
Wilkinson & Hunt, Kampala
P. J. Wilkinson, Q. C. and *R. E. Hunt*

For the first respondent:
Patel & Mehta, Kampala
A. G. Mehta

For the second respondent:
Baerlein & James, Kampala
A. I. James

B D Bilimoria & another v T D Bilimoria
[1962] 1 EA 198 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	3 April 1962
Case Number:	4/1962
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP, and Sir Trevor Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Keatinge, J.

[1] Appeal – Right of appeal – Submission to arbitration – Award filed in court – Application to set aside award – Award set aside with no order as to costs – Whether decision setting aside award is a decree or an order – Whether leave to appeal from decision necessary – Arbitration Rules, r. 2, *r.* 7 *and r.* 16 (*U.*) *– Civil Procedure Ordinance* (*Cap.* 6), *s.* 2, *s.* 68, *s.* 77 *and s.* 85 (*U.*) *– Civil Procedure Rules,*

O. 40, *r.* 1(2) *and O.* 43 (*U.*) – *Civil Procedure Ordinance* (*Cap.* 5), (*K.*) – *Arbitration Ordinance* (*Cap.* 15), (*T.*).

Editor's Summary

An award made by an arbitrator pursuant to a submission agreed between the three partners of a firm was duly filed in the High Court under s. 9 (2) of the Arbitration Ordinance. The appellants then applied to have the award set aside and the respondent filed cross objections but objected to the motion. The judge, however, set aside the award on the ground of error on the face thereof but stated that there should be no order as to costs. On appeal by the appellants against that portion of the order stating that there should be no order as to costs a preliminary objection was taken on behalf of the respondent that the substantive order was interlocutory and not an order in the form of a decree and accordingly no appeal lay against any part of it without the leave of the court, which had not been obtained.

Held –

(i) the proceedings had not been commenced in any manner prescribed by the Rules Committee set up under the Civil Procedure Ordinance but under powers conferred by the Arbitration Ordinance and, therefore, the proceedings were not a suit as defined by the Civil Procedure Ordinance, and, accordingly, could not result in a decree but only in an order.

(ii) by virtue of s. 77 (1) of the Civil Procedure Ordinance there is no appeal as of right against an order setting aside an arbitration award.

(iii) as leave to appeal had not been obtained the court had no jurisdiction to entertain the appeal which must be struck out as incompetent.

Appeal struck out as incompetent.

Cases referred to in judgment:

(1) *Mansion House Ltd. v. Wilkinson* (1954), 21 E.A.C.A. 98.

(2) *Mityana Ginners Ltd. v. Public Health Officer, Kampala*, [1958] E.A. 339 (C.A.)

(3) *Patel v. Patel*, [1960] E.A. 154 (C.A.).

(4) *Rene Dol v. The Official Receiver of Uganda* (1954), 21 E.A.C.A. 116.

The following judgments were read by direction of the court:

Judgment

Gould JA: This is an appeal from part of an order made on November 10, 1961, by Keatinge, J., in the High Court of Uganda at Jinja. The order set aside an award made by arbitrators and the appeal was directed not to the setting aside of the award but only to the portion of the order stating that there should be "no order as to costs". When the matter came before this court counsel for the respondent took the preliminary objection that no leave to appeal had been given. I will now deal with that objection.

The relevant facts are brief. The arbitration in question took place pursuant to an agreement between the three partners in a firm called B. D. Bilimoria Brothers to refer their differences to arbitration. The arbitrators made an award on October 6, 1960, and, under s. 9 (2) of the Arbitration Ordinance (Cap. 21 of the Laws of Uganda, 1951) filed it in the High Court on December 8, 1960; pursuant to r. 2 of the Arbitration Rules made under that Ordinance the award was allotted the serial number Miscellaneous Cause No. 14 of 1960, and the subsequent proceedings in the High Court were brought in that cause. The appellants (two of the partners) filed a notice of motion dated April 18, 1961, asking that the award be set aside upon several grounds; the third partner, the respondent to this appeal, filed cross objections and, by his advocate, opposed the motion, but the learned judge made an order setting aside the award on the ground of error in law appearing on the face of it.

In arguing his preliminary objection the advocate for the respondent did not suggest that the order as to costs, which is the subject matter of the appeal, should be regarded as being in any way in a different position from the substantive order setting aside the award. His submission was that the substantive order was interlocutory and not an order in the form of a decree from which an appeal would lie as of right, and that it was not an order in respect of which provision had been made in law for an appeal without the leave of the court.

The matter in issue involves consideration of the relevant Uganda legislation in the light of certain decisions of this court, and in order first to ascertain whether what I have referred to as an "Order" is in law a decree or an order, it is necessary to look at the definition of "decree" in s. 2 of the Civil Procedure Ordinance (Cap. 6). It reads:

> " 'decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint or writ and the determination of any question within s. 35 or s. 95, but shall not include –
>
> (*a*) any adjudication from which an appeal lies as an appeal from an order; or
>
> (*b*) any order of dismissal for default."

By s. 68 of the same Ordinance it is provided that, unless otherwise expressly provided, an appeal shall lie to this court from the decrees or any part of the decrees of the High Court. The advocate for the respondent argued that the order in the present case (I shall continue so to refer to it) was not a decree, as it was interlocutory and not a conclusive determination of the rights of the parties. I do not need to express an opinion upon that submission as, on the authority of certain decisions of this court,

I am satisfied that for other reasons the order in question is not a decree. The matter turns upon the use of the words "in the suit" in the definition above quoted. In s. 2 "suit" is defined as meaning "all civil proceedings commenced in any manner prescribed". In turn, by the same section "prescribed" means "prescribed by rules": and "rules" means

> "rules and forms made by the Rules Committee to regulate the procedure of courts;".

In the course of an exhaustive study of the corresponding definitions and sections in the Kenya Civil Procedure Ordinance (Cap. 5 of the Laws of Kenya) which are, so far as they affect the present question, in terms identical with those of the Uganda legislation, Briggs, J.A. (as he then was), said in *Mansion House Ltd. v. Wilkinson* (1) (1954), 21 E.A.C.A. 98 at 101-2 –

> "Accordingly a 'suit' is any civil proceeding commenced in any manner prescribed by rules and forms made by the Rules Committee to regulate the procedure of courts under s. 81 of the Ordinance."
>
>
>
> "It is necessary to go to the Civil Procedure Rules in order to discover whether the motion to the Supreme Court was 'commenced in any manner prescribed by rules and forms made by the Rules Committee' as set out above. Counsel has referred us to O. IV, r. 1 (suits begun by plaint), O. XXXIII (suits of interpleader under s. 58), O. XXXIV (suits in the nature of construction summonses), and O. XXXVI (suits commenced by originating summons). Subject to what appears below as regards appeals, I am not aware of any other authorised method of originating proceedings under the Rules, unless it is provided by O. L."
>
>
>
> "It seems clear that, whereas decrees arise only in suits, orders may arise in proceedings which are not suits, to which class of proceedings I have referred above. If, therefore, as I believe, the application to the Supreme Court was not a 'suit', it could not result in a decree, but only in an order."

The reasoning which led to the findings expressed in the above passages was followed and adopted by this court in the Uganda appeal *Mityana Ginners Limited v. Public Health Officer, Kampala* (2), [1958] E.A. 339 (C.A.). In that case certain proceedings had been taken in a district court under the Public Health Ordinance (Cap. 61) and it was held that it could not be said that those proceedings were commenced in any manner prescribed by the Rules Committee to regulate the procedure of courts, and that they were therefore not a suit.

Equally in the present case it cannot be said that the proceedings were commenced in any manner prescribed by the Rules Committee. The Civil Procedure Rules, made by that committee under s. 85 of the Ordinance do contain, in O. 43, provisions regulating arbitrations under orders of a court. The present arbitration was not within that category and the proceedings were taken under powers conferred by the Arbitration Ordinance (Cap. 21) and under procedure laid down by the Arbitration Rules. Those Rules were made, pursuant to powers contained in s. 19 of the Ordinance, by "the High Court" and reference to the relevant Legal Notice No. 146 of 1943 shows that the Rules were in fact issued under the hands of the

Chief Justice and two puisne judges. The High Court therefore, is quite distinct from the Rules Committee under the Civil Procedure Ordinance. Rule 7 of the Arbitration Rules provides that within a prescribed period after notice of the filling of an award, a party objecting to it may apply for it to be remitted or set aside, and lodge his objections thereto – parties served may lodge cross objections within fourteen days. Rule 16 provides (inter alia) that applications under the Ordinance shall be by way of chamber summons unless otherwise directed by the Rules. The appellants in fact departed from this procedure by filing a notice of motion containing objections instead of a chamber summons and separate objections. There is, however, no doubt that the intention was to proceed under the Arbitration Ordinance and Rules. As required by r. 2 the proceedings were conducted under the serial number allotted on the filing of the award and cross objections were duly lodged. It would, in fact, avail the appellants nothing to suggest that the proceedings were taken otherwise than under the Ordinance and Rules as, in *C. U. Patel v. S. M. & N. M. Patel* (3), [1960] E.A. 154 (C.A), this court held that the power to set aside an award conferred by the Arbitration Ordinance (Cap. 15 of the Laws of Tanganyika) was exclusive, and that an application to set an award aside must be made under the Ordinance, which is in pari materia with the Uganda enactment.

For the reason I have given it is apparent that the order under consideration was not made in a suit, as defined by the Civil Procedure Ordinance, and cannot therefore be a decree. It follows that it is an order, which is defined by s. 2 of that Ordinance as follows:

> " 'order' means the formal expression of any decision of a civil court which is not a decree, and shall include a rule nisi;".

The fact that the order was made by the High Court brings it fully within this definition.

The subject of appeals from orders is dealt with, in the first place, in s. 68 and s. 77 of the Civil Procedure Ordinance (Cap. 6), the effect of the earlier section being greatly restricted by the later. They read:

> "68. Unless otherwise expressly provided in this Ordinance an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal."
>
> "77. (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in this Ordinance or by any law for the time being in force from no other orders:
>
> (*a*) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
>
> (*b*) an order on an award stated in the form of a special case;
>
> (*c*) an order modifying or correcting an award;
>
> (*d*) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
>
> (*e*) an order filing or refusing to file an award in an arbitration without the intervention of the court;
>
> (*f*) an order under s. 66;
>
> (*g*) an order under any of the provisions of this Ordinance imposing a fine or directing the arrest or detention in prison of any person except where such arrest or detention is in execution of a decree;

(*h*) any order made under rules from which an appeal is expressly allowed by rules.

"(2) No appeal shall lie from any order passed in appeal under this section."

It is to be observed that the opening words of s. 77 (which differs from the corresponding Kenya section) eliminate appeals from orders irrespective of the leave of any court, except in cases where provision is made for appeal in the Ordinance or any other law. Though some of the appeals authorised by s. 77 (I instance s. 1(*b*), s. 1(*d*) and s. 1(*e*)) would be applicable to orders made under the Arbitration Ordinance (Cap. 21) no provision is made for an appeal against an order, such as the present one, setting aside an award. Sub-section 1(*h*) refers to appeals authorised by Rules. In a most helpful analysis of s. 77 in *Rene Dol v. The Official Receiver of Uganda* (4) (1954), 21 E.A.C.A. 116, Briggs, J.A., pointed out that sub-s. 1(*h*) referred to Rules made under s. 85 of the Civil Procedure Ordinance. Order 40 of those Rules creates an appeal as of right against a number of orders (not here relevant) and then, by r. 1(2) provides –

"(2) An appeal under these Rules shall not lie from any other order save with leave of the court making the order or of the court to which an appeal would lie if leave were given."

When this rule is read together with s. 77(1)(*h*) of the Ordinance it is clear (and it was so held in *Rene Dol v. The Official Receiver of Uganda* (4)) that O. 40, r. 2, cannot operate to confer a right of appeal, even with leave, in the case of an order not made under the Civil Procedure Rules. It would appear, therefore, that orders made in an arbitration under order of a court by virtue of the provisions of O. 43 of the Civil Procedure Rules, if not appealable as of right, would be appealable with the leave of the appropriate court as falling within the ambit of O. 40, r. 1(2). On the other hand, orders made in relation to an arbitration under the Arbitration Ordinance and Rules, unless they fall within the specific categories mentioned in s. 77 of the Civil Procedure Ordinance, are not appealable even with the leave of a court. I do not in fact need to go so far as that in order to adjudicate upon the objection now under consideration, for there is clearly no appeal as of right provided in the case of the order made in the instant case, and even if an appeal did lie with the leave of the High Court or of this court, no such leave has been obtained.

For these reasons, in my opinion, the preliminary objection must be sustained, this court has no jurisdiction to entertain the appeal, and it must be struck out as incompetent with costs to the respondent. It is consequently unnecessary for me to express any opinion upon the substantive question raised by the appeal, which was whether the learned judge was wrong in making no order as to costs instead of awarding them to the successful party. As, however, this court heard argument de bene esse on the question, and in case I should be in error on the preliminary objection, I would express, without detailed discussion, the opinion that the appeal, if competent, is one which ought to have been allowed. The learned judge held that the matter had to be raised in the High Court through no fault of any party, but because of the errors of the arbitrators. The application was, however, strongly opposed by the respondent and in those circumstances it was, in my view, an error in principle amounting to a wrong exercise of discretion not to adhere to the rule that a successful party is entitled to his costs.

Sir Ronald Sinclair P: I agree and have nothing to add. There will be an order in the terms proposed by the learned Justice of Appeal.

Sir Alastair Forbes VP: I also agree.

Appeal struck out as incompetent.

For the appellants:
Patel & Shah, Jinja
J. M. Shah and *M. A. Patel*

For the respondent:
Visana, Raichura & Singh, Jinja
J. D. Raichura

Narinder Kumar Jolly and Another v Lall Singh s/o Basant Singh and others
[1962] 1 EA 203 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 April 1962
Case Number:	52/1961
Before:	Sir Alastair Forbes VP, Sir Trevor Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Connell, J.

[1] Mortgage – Construction – Enforcement – Covenant for repayment on specified date – Covenant for payment of interest meantime – Default in payment of interest before date for repayment – Whether mortgagee entitled to sue for principal before specified date for repayment – Indian Transfer of Property Act, 1882, *s.* 60, *s.* 67, *s.* 69 – *Indian Transfer of Property Act* (*Amendment*) *Ordinance*, 1959 (*K.*).

Editor's Summary

A mortgage dated 13th May, 1959, contained a covenant for repayment of the principal sum of Shs. 75,000/- on April 10, 1962, and that in the meantime interest should be paid by equal quarterly payments in advance on January 10, April 10, July 10 and October 10 in every year. Clause 4(iii) of the mortgage provided that if the mortgagors defaulted in payment of "interest or of the principal sum or of outgoings in manner herein provided for . . . the mortgagees shall be entitled to demand forthwith repayment of all the moneys due on this security any clause or provision to the contrary herein notwithstanding". The appellants sued the respondents to recover the principal sum lent and interest, alleging that the respondents had defaulted in payment of interest due on April 10, 1960, in payment of rates and an

insurance premium. The judge held that the suit was premature so far as the principal sum was concerned, that the default in payment of interest did not entitle the appellants to an order for sale but he gave judgment for the appellants for interest amounting to Shs. 2,062/50. On appeal it was not disputed that interest was in arrear but the respondents claimed that the covenant for repayment of principal on a specified date implied that it was not to be sued for before that date, that the word “due” in cl. 4(iii) should be construed contra proferentem as the mortgage had been drawn up by the mortgagees’ advocates and as meaning “due in point of time and payable”. For the appellants it was submitted that the construction adopted by the judge deprived cl. 4(iii) of all effect.

Held – Clause 4(iii) was clearly designed to provide a remedy upon the occurrence of one or more of a number of events and to construe the word "due" as meaning "owing" was in conformity with the context and with the maxim ut res magis valeat quam pereat.

Appeal allowed. Decree of the Supreme Court of Kenya varied so as to order payment of Shs. 75,000/- and to order directions for accounts and sale.

Cases referred to in judgment:

(1) *In re Stockton Malleable Iron Co*. (1875), 2 Ch.D. 101.

(2) *Ex parte Kemp* (1874), L.R. 9 Ch. 383.

(3) *Raja Setrucherla Ramabhadraraju v. Maharaja of Jeypore* (1919), 46 I.A. 151.

(4) *S.A. Maritime et Commerciale of Geneva v. Anglo-Iranian Oil Co. Ltd*., [1954] 1 All E.R. 529.

(5) *Kannu v. Natesa* (1891), 14 Mad. 477.

(6) *Faure Electric Accumulator Co. Ltd. v. Phillipart* (1888), 58 L.T. 525.

The following judgments were read:

Judgment

Gould JA: This is an appeal from part of a judgment of the Supreme Court of Kenya in an action in which the appellants sought judgment for the principal sum and interest intended to be secured by a mortgage of freehold land executed by the respondents in their favour; they sought also to enforce the security by sale of the land. The learned judge in the Supreme Court held that, so far as the principal sum was concerned the suit was premature, in that at the time the suit was brought the appellants were not entitled to payment of the principal; he gave judgement in favour of the appellants for interest amounting to Shs. 2062/50 but held that the default in payment of interest did not entitle the appellants to an order for sale of the property in the absence of any express provision to that effect in the mortgage. He ordered the appellants to pay four-fifths of the respondents' costs of the suit.

In the appeal to this court the appellants contend that the judge erred in denying them judgment for the principal sum, with a consequential decree for sale and order for costs in their favour. They do not challenge the correctness of the judge's refusal to order a sale on the basis of his finding that interest, only, was in arrear, but urge that, upon a proper construction of the mortgage deed they were entitled to judgment for the principal sum as well.

The question before this court, therefore, is primarily one of construction, and it is not necessary to set out the pleadings in full. The mortgage in question was dated May 13, 1959, and was to secure repayment of the principal sum of Shs. 75,000/-, together with interest from April 10, 1959, at the rate of 11 per cent. per annum, payable by quarterly payments in advance on the 10th days of January, April, July and October in each year. The appellants claimed that the respondents had made default in payment of interest due and payable on April 10, 1960, in payment of rates, and in payment of insurance renewal premiums. Whatever the position regarding rates and insurance it is now common ground that interest was in arrear at the relevant dates. The appellants claimed that under the terms of the mortgage the defaults above-mentioned rendered the principal sum payable and that demand had been made therefor.

It will be necessary to set out some of the provisions of the mortgage at length. They are:

"1. In pursuance of the said agreement and in consideration of the sum of shillings seventy-five thousand (Shs. 75,000/-) now paid by the mortgagees to the mortgagors (the receipt and payment of which sum the mortgagors hereby acknowledge) the mortgagors hereby jointly and severally covenant with the mortgagees to repay to the mortgagees the said sum of shillings seventy-five thousand on the tenth day of April one thousand nine hundred and sixty-two with interest thereon or any part thereof from time to time remaining unpaid in the meantime from the tenth day of April one thousand nine hundred and fifty-nine at the rate of eleven per cent. per annum, payable by equal quarterly payments in advance on the tenth day of January, the tenth day of April, the tenth day of July and the tenth day of October in every year, the first of such payments to be due and made on the tenth day of July one thousand nine hundred and fifty-nine (interest up to the ninth day of July, 1959, being payable on the signing hereof) and also so long after the tenth day of April one thousand nine hundred and sixty-two as the said sum of shillings seventy-five thousand or any part thereof shall remain owing to pay interest at the same rate and in the same manner on the moneys for the time being so remaining owing.

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"3. The mortgagors hereby jointly and severally further covenant with the mortgagees as follows:

(A) That they the mortgagors will during the continuance of this security duly pay all outgoings in respect of the mortgaged hereditaments as and when the same shall become due and will when requested by the mortgagees produce to them the receipts for such payments

(B) That they the mortgagors will during the continuance of this security keep the buildings comprised in and subject to this security and all buildings which may from time to time be so comprised or subject in good and substantial repair and also insured against loss or damage by fire to their full insurable value in some insurance company approved of by the mortgagees in writing in the joint names of themselves and the mortgagees and will immediately after every such policy shall have been so effected or if the same shall at the time of execution of these presents have been previously effected deposit the said policy with the mortgagees and will duly and punctually pay all premiums and moneys necessary for effecting and keeping up the said insurance when the same shall become due and will forthwith deliver the receipts for every such payments of premium to the mortgagees and in the event of the mortgagors failing to keep the buildings in good and substantial repair or to insure and keep insured the same as aforesaid or in depositing any such policy or in delivering any such receipt as aforesaid or in paying the aforesaid outgoings it shall be lawful for but not obligatory upon the mortgagees to repair and keep in repair the said buildings or any part thereof and to enter upon the mortgaged hereditaments for that purpose without thereby becoming liable as mortgagees in possession or as the case may

require to insure and keep insured the mortgaged hereditaments or any part thereof to the amount aforesaid or to pay the said outgoings and any moneys so expended by the mortgagees shall be repayable by the mortgagors on demand and until so repaid shall bear interest at the rate aforesaid and be a further charge on the mortgaged hereditaments.

(C) That the mortgagors will not require the mortgagees to accept repayment of the said sum of shillings seventy-five thousand or any part thereof except in the manner provided for in these presents any rule of law or equity to the contrary notwithstanding.

(D) That the mortgagors will not sell, assign, sublet (except on a monthly tenancy) or otherwise part with the possession of the mortgaged hereditaments or any part thereof during the continuance of this security.

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"4. Provided always and it is hereby expressly declared as follows:

(i) That if the mortgagors will in accordance with the provisions of these presents pay to the mortgagees the said sum of shillings seventy-five thousand with interest thereon in the meantime in accordance with their foregoing covenant in that behalf then the mortgagees at any time thereafter at the request and cost of the mortgagors will reconvey (such reconveyance to be prepared by the mortgagees' advocate) the mortgaged hereditaments to the mortgagors or as they shall direct.

(ii) That the mortgagors on seeking to redeem this security on the said tenth day of April one thousand nine hundred and sixty-two or at any time thereafter shall give to the mortgagees three months' previous notice in writing of their intention to pay off the said principal sum or the balance thereof then owing or pay to the mortgagees three months' interest in lieu of such notice and in like manner if the mortgagees desire to call in the said principal sum or the balance thereof then owing after the said tenth day of April one thousand nine hundred and sixty-two for any reason other than the default of the mortgagors in the performance or observance of any of the covenants and agreements herein contained or implied and on the part of the mortgagors to be performed and observed the mortgagees shall give to the mortgagors three months' previous notice in writing of their intention in that behalf addressed to the mortgagors at P. O. Box 2925, Nairobi, aforesaid or to the mortgaged hereditaments.

(iii) That in the event of the mortgagors making any default in the payment of interest or of the principal sum or of outgoings in manner herein provided for or failing to pay the premium or perform and observe the covenants and conditions under which the mortgaged hereditaments are held by them or any of the covenants herein set out and to be performed and observed by the mortgagors the mortgagees shall be entitled to demand forthwith repayment of all the moneys due on this security any clause or provision to the contrary herein notwithstanding.

(iv) That after the tenth day of April one thousand nine hundred and sixty the mortgagor shall be entitled to repay the aforesaid

principal sum hereby secured or any part thereof not less than shillings twenty-five thousand together with other moneys payable hereunder on any date on which the quarterly interest falls due on giving to the mortgagees three months' prior notice in writing or on paying a sum equal to three months' interest as compensation in lieu of such notice notwithstanding anything to the contrary herein contained.

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"4. That if any such interest as payable hereunder or any interest payable on arrears of interest capitalised under the present clause shall remain unpaid for fourteen days after the date on which the same ought to have been paid then and in every such case the interest so in arrear shall at the expiration of such fourteen days be capitalised and added for all purposes to the principal sum hereby secured and shall thenceforth bear interest to be computed from the day on which the same ought to have been paid and to be payable at the rate and on the days aforesaid and all covenants and provisions herein contained and all powers and remedies conferred by law or by this mortgage and all rules of law or equity in relation to the said principal sum of shillings seventy-five thousand and the interest thereon shall equally apply to such capitalised arrears and to interest on such arrears provided that the mortgagors may after three months' notice in writing pay to the mortgagees on any day hereinbefore fixed for payment of interest the whole of interest and accumulations of interest for the time being owing on this security, provided further, that nothing in this clause shall prejudice the rights and remedies of the mortgagees contained in cl. 4 (iii) of these presents."

It will be observed that there are two clauses each numbered "4" in the copy of the mortgage in the record and I will distinguish between them by referring to the earlier only in conjunction with a sub-clause thereof.

The claim of the appellants as plaintiffs was that the defaults relied upon in the plaint rendered all moneys intended to be secured by the mortgage payable on demand by virtue of cl. 4 (iii) above set out. The basis of the judgment in the court below was that the words "repayment of all moneys due on this security", in that sub-cl. contained a patent ambiguity which the learned judge resolved in favour of the respondents by holding that the principal sum was not included in "the moneys due". I find some difficulty in extracting from the judgment the reasoning which led to this conclusion and I propose therefore to turn to the arguments adduced before this court.

For the appellants Mr. O'Donovan submitted that the construction adopted by the learned judge deprived cl. 4 (iii) of all effect. That construction was in effect that the word "due" meant "due and payable"; if that was correct, nothing could be recovered under the clause which could not be recovered in any event. If interest was in arrear it could in any event be sued for upon the covenant to pay it. If there was a breach of the covenant to keep all buildings in good and substantial repair, cl. 4 (iii) would have no effect for there would be no moneys due and payable – if the appellants had expended money to repair the buildings that was in any event payable on demand and under cl. 3 (B). Counsel submitted further that the word "repayment" used as one of the operative words of cl. 4(iii) was more apt to describe principal than interest. He relied also upon the concluding words of the sub-cl., "any clause or provision to the contrary

herein notwithstanding"; he submitted that the learned judge had given a completely opposite meaning to these words by construing the provision as meaning that nothing could be claimed unless payable by virtue of other provisions of the deed. Counsel conceded that his interpretation of the sub-clause involved regarding the phrase "or of the principal sum" as otiose. As to the possible meaning of the word "due" he relied upon what was said by Jessel, M.R., in re *Stockton Malleable Iron Company* (1) (1875), 2 Ch.D. 101 at p. 103:

> "On the seventh article the argument addressed to me was this. It was said 'moneys due' included moneys owing, but not at present payable. To that I answer, adopting the criticism of Lord Justice Mellish in *Ex parte Kemp* on the words in the Bankruptcy Act, that the word 'due' may mean either owing or payable, and what it means is determined by the context. Now there is a context here which, to my mind, puts the thing out of all argument whatever."

I will set out a short passage from the judgment of Mellish, L.J., in *Ex parte Kemp* (2) (1874), L.R. 9 Ch. 383 at p. 387:

> "Now, the words 'debts due to him' are certainly words which are capable of a wide or a narrow construction. I think that prima facie, and if there be nothing in the context to give them a different construction, they would include all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not. On the other hand, there can be no doubt that the word 'due' is constantly used in the sense of 'payable', and if it is used in that sense, then no debts which had not actually become payable when the act of bankruptcy was committed would be included."

Counsel for the appellants, in support of his general argument, referred the court also to the case of *Raja Setrucherla Ramabhadraraju v. Maharaja of Jeypore* (3) (1919), 46 I.A. 151, in which the Privy Council preferred to attach to an ambiguous provision a meaning which had a substantial result rather than one "which would avail little".

Upon these submissions counsel for the appellants contended that there was in fact no ambiguity in cl. 4(iii) at all, by which I understand him to mean that the context is overwhelmingly in favour of construing the word "due" as "owing" rather than as "due and payable". Before turning to the submissions on behalf of the respondents I will refer briefly to the argument based on the use of the word "repayment". The standard of drafting of the document in question is not such as to lend much weight to this contention. Certainly the word is apt to describe principal rather than interest – but it is obviously intended to include interest. In cl. 4(i) the word "pay" is used in relation to the principal sum, and in cl. 3(B) "repayable" is used, correctly I think, concerning moneys expended by the mortgagees. In cl. 4(iii) the use of the word "repayment" is consistent with an intention to include the principal sum but, in my opinion, no further significance should be attached to it. The other arguments for the appellants, however, are undoubtedly of substantial weight.

Mrs. Kean, for the respondents, submitted that the scheme of the mortgage under consideration must be looked at. The usual procedure was to provide a notional date for repayment with a proviso that the mortgage would not be called in provided the interest was paid and the covenants and conditions performed and observed. In the present case there was a covenant to repay after approximately three years but that date was in fact rendered notional by the provision as to notice contained in cl. 4(ii). Being somewhat unusual in this respect, and having been drawn up by the

mortgagees' advocates, the document should be construed contra proferentem as regards the appellants. Clause 4(iii) was a far-reaching provision which allowed to the mortgagors no days of grace – therefore it should be construed narrowly. Counsel urged that whatever the word "due" might mean elsewhere in the law, when used in relation to mortgages it meant "due in point of time and payable", or at least there was a strong presumption to that effect. She called attention to s. 60 and s. 69 of the Indian Transfer of Property Act, which is in force in Kenya, where the word is used in that sense. I will refer to these sections later. Counsel submitted that in view of the covenant for repayment of principal on a specified date the implication was that it was not to be sued for before that date. The effect of s. 60 and s. 67 of the Indian Transfer of Property Act was that there was one particular date at which the mortgagor could redeem or at which the mortgagee could call in his mortgage.

I must pause here to say that I am unable to appreciate the relevance of these submissions concerning the scheme of the mortgage. If they are intended to suggest that cl. 4(iii) should be given one meaning if invoked before April 10, 1962, and another if invoked thereafter, I am, with respect, unable to agree; a default could occur as well before as (in the absence of the requisite notices from the mortgagors or the mortgagees) after that date and I see no reason to suppose nor anything in cl. 4(iii) which suggests that an early default and a late default should not be followed by the same consequences. The fact that the parties apparently contemplated a mortgage for three years with provision for it to be permitted to run on if convenient to both parties in no way detracts from the assumption that the mortgagees would want normal and adequate protection in the case of default during the first three years. I will deal at this stage also with the submission of counsel concerning the use of the word "due" in s. 60 and s. 69 of the Indian Transfer of Property Act in a sense favourable to her case. It would be wrong, I think, to assume that a draftsman who used a term susceptible to two meanings, would expect that one of them would automatically be chosen because that was the meaning attached to it in legislation upon a connected topic. He would know that his duty was to make the meaning clear specifically or by the context. In any event the word "due" does not appear in s. 60 in so far as the law of Kenya is concerned as it was incorporated into the section in 1929 by an amendment to the Act not in force in this territory. As counsel for the appellants pointed out, the present s. 69 was only brought into being by the Indian Transfer of Property Act (Amendment) Ordinance, 1959, which came into effect on May 5, 1959. It is hardly likely to have affected the mind of the draftsman of the present mortgage – if he had in fact studied it, he would have observed that s. 69(1) contains a careful explanation of what is meant by the phrase "when the mortgage money has become due" used earlier in the sub-s., and it is as follows:

> ". and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money, or part thereof, immediately due and payable."

I do not think considerations of this kind have any place in the problem before the court which is to construe the mortgage in accordance with ordinary legal principles. I do not for a moment dissent from the proposition that the word "due" can be used in a mortgage to mean "due and

payable"; but it can also have the meaning contended for by the appellants, and when the meaning "due and payable" is intended that exact phrase is often used. The question is which meaning is here appropriate.

I may now continue with the argument of counsel for the respondents upon what I believe to be the crucial question. That is, what meaning is to be attached to cl. 4(iii) if the submission of counsel for the appellants that "due" is to be read as "owing" is not to be accepted. Counsel for the respondents argued first that it was not necessary to attach any meaning to the sub-clause. This, she said, was no worse than striking out the words "or of the principal sum" which was an essential aspect of the construction urged by counsel for the appellants. The principle of interpretation which is involved is, of course, that, as far as possible effect must be given to every part of the document. As Somervell, L.J., said in *S.A. Maritime et Commerciale of Geneva v. Anglo-Iranian Oil Co. Ltd.* (4), [1954] 1 All E.R. 529 at p. 531:

> "Although one finds surplusage in contracts, deeds, and Acts of Parliament, one leans towards treating words as adding something, rather than as mere surplusage."

I think the argument of counsel for the respondents amounts to saying that where there is a choice between two evils one is justified in choosing the greater. If cl. 4(iii) is susceptible to a logical meaning in conformity with the intention of the whole document without the words "or of the principal sum", it appears to me better to attribute that meaning to it rather than deny meaning altogether to a provision which is, in terms, intended to take effect, "any clause or provision to the contrary notwithstanding". If, of course, the inclusion of the phrase in question in the sub-clause provided a reason for attributing to the latter some other meaning, that is a different question, but I am at the moment dealing with the submission that it is as logical to deny meaning to the whole sub-clause as to a small portion of it. I think the submission fails, both on general principles and, in the present case more particularly because the phrase "or of the principal sum", has no relevance to the problem before the court. That question concerns default in payment of interest and breach of covenant l – whatever the draftsman meant by his reference to the principal sum, he clearly intended that upon default in payment of interest or breach of covenant the mortgagees could demand "the moneys due on this security". That is the phrase which occasions the difficulty, and unless the reference to the principal sum can be shown to have some bearing upon the meaning to be attached to it I agree with counsel for the appellants that the reference is otiose.

Counsel for the respondents next contended that a meaning could in fact be attached to the words "or of the principal sum" in cl. 4(iii), and that the contention that the whole sub-cl. would fail of effect unless the word "due" were construed as "owing", was wrong. The first of these propositions was based upon the submission, with which I have already dealt, that the scheme of the mortgage required a different meaning to be attached to cl. 4(iii) before and after April 10, 1962. She submitted that after that date, upon a breach of covenant, the principal would be demandable under cl. 4(iii), but, until then, it would not. I see no logical basis for such an interpretation and do not propose to deal with it further. For the second proposition, that cl. 4(iii) was necessary even if the word "due" were construed as "due and payable" counsel referred to cl. 4 of the mortgage, dealing with the capitalisation of interest. She quoted the case of *Kannu v. Natesa* (5) (1891), 14 Mad. 477, in which it was held that there was no right to sue forthwith for interest in arrear on a mortgage which provided

for payment of interest upon interest so in arrear, and for an enhanced rate of interest to be paid upon the principal sum as from the occurrence of any such default. The court held that the mortgagee must be content with the compensation which the mortgage document gave him for the default in payment of interest. Upon this authority counsel contended that the appellants, by reason of cl. 4, could not have sued for interest in arrear, so the inclusion of cl. 4(iii) was necessary to preserve that right.

It may well be that the decision in *Kannu v. Natesa* (5) should be regarded as limited to the facts of the particular case, but I do not need to consider that question; even assuming that counsel is right in her contention that cl. 4 standing alone would negative a right to sue for interest, I am satisfied from my reading of the document as a whole that cl. 4(iii) was not introduced merely to confer that right. Such an object could have been simply attained by a few words inserted in cl. 4 declaring it to be without prejudice to any right of action upon default. The proviso to cl. 4 and the concluding words of cl. 4(iii) make it clear beyond doubt that the remedy provided by cl. 4(iii) is to prevail in all circumstances and to be available not only on any default in payment of interest but also upon the occurrence of one of a number of other events. An interpretation which would render that remedy available in one event and deny it in others is not one which should be preferred. If, for example, the respondents entered into a lease of the land for five years and parted with the possession of it contrary to cl. 3(D), is there no remedy in cl. 4(iii) because no moneys are “due and payable”? I do not think that can be right, for cl. 4(iii) clearly purports to provide some remedy for breach of covenant.

For these reasons I accept the argument of counsel for the appellants. Clause 4(iii), in my opinion, is clearly designed to provide a remedy upon the occurrence of one or more of a number of events. The reference to default in payment of the principal sum may be inapt. So may the words “failing to pay the premium or perform and observe the covenants and conditions under which the mortgaged hereditaments are held by them” in the light of a recital in the early part of the mortgage that the mortgagors are seised of the land in fee simple; I may be wrong in this as the matter was not referred to by either counsel. One cannot admire the drafting of the sub-clause but that is no reason to deny it substantial effect when it clearly applies, which would be the result if the interpretation urged for the respondents were to be accepted. By construing the word “due” as meaning “owing” I am not, I think, doing any violence to its meaning. It is capable of reflecting two meanings and the one I select is the one which I regard as most in conformity with the context as a whole and with the maxim ut res magis valeat quam pereat.

I am, therefore, of the opinion that the learned judge erred in finding that the suit for the principal sum was premature. The matter can be permitted to turn entirely upon the ground of interest in arrear and it is unnecessary for me to examine the matters of rates and insurance premiums. I would allow the appeal with costs. I would order that the decree of the court below be varied (*a*) by ordering payment of the principal sum of Shs. 75,000/- in lieu of the dismissal of the claim for that amount; (*b*) by ordering that the defendants pay the plaintiffs their costs of the suit in lieu of the order as to costs made by the learned judge and (*c*) by ordering directions for accounts and sale in accordance with the prayer in the plaint including the subsidiary or consequential orders mentioned in the prayer. Mrs. Kean, for the respondents, requested leave to be heard before the directions aforesaid are finalised and I would direct that in default of agreement

they be finalised by a judge of the Supreme Court after hearing such of the parties as desire to be heard.

Sir Alastair Forbes VP: I have read the judgment of Gould, J.A., with which I agree and to which I have nothing to add.

The appeal will be allowed and there will be orders in the terms proposed by him.

Crawshaw JA: I agree. "Due" can mean "due and payable" or, according to the context, "owing" in the sense "owing though not yet payable"; that "owing" can be used in such a sense appears (if authority was sought, although it has not been contested) *in Faure Electric Accumulator Co. Ltd. v. Phillipart* (6) (1888), 58 L.T. 525. Such a construction would, in the context of the mortgage deed, appear to be the obvious one; the relief thereby provided would be of a nature not uncommon in mortgage deeds.

Appeal allowed. Decree of the Supreme Court of Kenya varied so as to order payment of Shs. 75,000/- and to order directions for accounts and sale.

For the appellants:
Bryan O'Donovan, Q. C. and *G. S. Pall*, Nairobi

For the respondents:
Kean & Kean, Nairobi
Mrs. L. Kean

Bertram Ltd v Consolidated Agencies Ltd
[1962] 1 EA 212 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	29 March 1962
Case Number:	82/1961
Before:	Sir Alastair Forbes VP, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Weston, J.

[1] Limitation of action – Debt – Acknowledgement – Balance sheets of company showing loan due to creditor – Balance sheets signed by directors some time after end of financial years to which they related – Whether signature by directors constitutes acknowledgement of existing or past debt – Whether acknowledgement brings debt within provisions of Indian Limitation Act, 1908, *s.* 19.

Editor's Summary

The appellant company sued for money lent and interest. The respondent company's defence was that the

action was time-barred pursuant to the Indian Limitation Act, 1908, the relevant period being three years. The appellant company relied on certain balance sheets of the respondent company as acknowledgements of the existence of the loans to keep them alive under s. 19 of the Act and it was argued that the signature of the balance sheets by the directors of the respondent company operated as acknowledgements of the existence of the debts as at the date of signature, or, alternatively, that the balance sheets were effective admissions of the existence of the loans on the dates to which they referred. It was common ground that each balance sheet had been signed by the directors some time after the end

of the financial year to which it related. It was submitted that signature of a balance sheet was no more than an acknowledgement of a past liability and that s. 19 of the Act required an acknowledgement of subsisting liability and not of past liability. The judge held that the balance sheets were no more than acknowledgements of past liability, and, as such, not sufficient under s. 19 of the Act and therefore the appellant's claim was time-barred. On appeal

Held –

(i) an acknowledgement of debt, to be effective for purposes of s. 19 of the Indian Limitation Act, 1908, must be an acknowledgement of an existing debt, and if signature of a balance sheet by the directors merely operated as an admission of the existence of the debt as at the date to which the balance sheet refers, that is no more than an admission of a past debt and would not be effective as an acknowledgement for the purposes of s. 19.

(ii) signature of the balance sheets by the directors was an effective acknowledgement of the existence at the date of signature of the debt and accordingly acknowledgement was made within the period of limitation.

Jones v. Bellgrove Properties Ltd., [1949] 2 K.B. 700 applied.

Appeal allowed.

Cases referred to in judgment:

(1) *Jones v. Bellgrove Properties Ltd*., [1949] 2 K.B. 700; [1949] 1 All E.R. 498; [1949] 2 All E.R. 198.

(2) *Maniram Seth v. Seth Rupchand* (1906), 33 Cal. 1047.

(3) *Re Atlantic and Pacific Fibre Co. Ltd.*, [1928] Ch. 836.

(4) *Re Transplanters* (*Holding Co.*) *Ltd*., [1958] 2 All E.R. 711.

(5) *Rajah of Vizianagaram v. Official Liquidator* (1952), A.I.R. Mad. 136.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: This is an appeal from a judgment and decree of the High Court of Tanganyika dated September 19, 1961, whereby it was held that the bulk of the appellant company's claim against the respondent company was time-barred.

The background to the action from which the appeal arises is stated by the learned judge of the High Court as follows:

> "The parties to this action are private limited liability companies incorporated in this Territory and carrying on business in it, apparently as finance companies exclusively. The companies are two of a number formed by a Mr. Wali Dharsee, who died on November 16, 1959. This gentleman, who was a legal practitioner in these courts, was sole director of the plaintiff company (hereinafter referred to shortly as the plaintiff) from 1952 to the date of his death. He was also a director of the defendant company (hereinafter referred to shortly as the defendant) from 1951 until he died, the other director being one Mr. K. F. Jafrabadwalla. Mr. Houry who appeared for the plaintiff was exercised to impress upon me, and adduced evidence which does satisfy me, that in fact Mr. Wali Dharsee was in effective control of all these legal persons of his own creation, including

both plaintiff and defendant, and that they were mere incorporeal puppets brought into being solely to serve the purposes of Mr. Wali Dharsee."

The appellant company's claim concerns two loan accounts (hereinafter referred to as "Loan No. 1" and "Loan No. 2" respectively) and is stated in paragraph 3 of the plaint (which was filed on April 13, 1961) as follows:

> "3. The defendant company is indebted to the plaintiff company in the sum of Shs. 349,962/52, made up as follows:
>
> Shs. 23,427.52 on account of Loan No. 1 and
>
> Shs. 326,535.00 on account of Loan No. 2
>
> Shs. 349,962.52
>
> being moneys lent and advanced by the plaintiff company to the defendant company on an open and current account between the said two parties, which sum being repayable on demand, is due and owing, as per statements of accounts annexed hereto and marked 'A' and 'B' respectively, to which the plaintiff company craves leave to refer."

There was also a claim for interest on the sum of Shs. 349,962.52 in respect of the period January 1 to April 15, 1961.

The statement of account referred to in relation to Loan No. 1 is as follows:

"Consolidated Agencies Limited, Dar-es-Salaam

in account with

Bertram Limited

No. 1 Account

			Dr.	Cr.
9. 3.51	To :	Cash loan @		
		6 per cent. p.a.	Shs. 85,000.00	
Oct. 17	By :	Cash		11,615.00
Dec. 14	By :	Cash		20,000.00
Dec. 31	To :	Interest	3,924.73	
11. 3.52	To :	Interest	1,220.31	
7. 6.52	By :	Cash		30,000.00
31. 3.54	To :	Interest – two years	3,754.00	
16. 4.54	By :	Cash		4,000.00
31.12.54	To :	Interest	1,312.24	
15. 2.55	By :	Cash		10,000.00
18. 3.55	By :	Cash		5,000.00
31. 3.55	To :	Interest	287.50	
31. 3.56	To :	Interest	940.00	
31. 3.57	To :	Interest	940.00	
31. 3.58	To :	Interest	940.00	

15. 5.58	By :	Cash		300.00
31. 3.59	To :	Interest	1,044.18	
9. 6.59	To :	Cash (part payment repairs House 301 Regent Estate)	1,430.00	
12. 6.59	To :	Cash (ditto)	1,000.00	
31. 3.60	To :	Interest	1,223.50	
31.12.60	To :	Interest	1,326.06	
31.12.60	By :	Balance c/d		23,427.52
			Shs. 104,342.52	104,342.52
1. 1.61	To :	Balance b/d	Shs. 23,427.52	

E. & O.E.”

The statement of account in relation to Loan No. 2 is:

"Consolidated Agencies Limited, Dar-Es-Salaam

in account with

Bertram Limited

No. 2 Account

				Dr.	Cr.
3. 8.54	To :	Cash loan @	Shs.	269,000.00	
		6 per cent. p.a.	"	6,725.00	
31. 2.54	To :	Interest	"	4,035.00	
31. 3.55	To :	Interest	"	16,140.00	
31. 3.56	To :	Interest	"	16,140.00	
31. 3.57	To :	Interest	"	16,140.00	
31. 3.58	To :	Interest	"		
26. 8.58	By :	Cash	"		20,030.00
3. 2.59	By :	Cash			26,000.00
31. 3.59	To :	Interest	"	16,140.00	
31. 3.60	To :	Interest	"	16,140.00	
31.12.60	To :	Interest	"	12,105.00	
31.12.60	By :	Balance c/d	"		326,535.00
			Shs.	372,565.00	372,565.00
1. 1.61	To :	Balance b/d	Shs.	326,535.00	

E. & O.E."

By an amendment to the plaint the appellant company pleaded:

> "7. That the plaintiff's claim is not barred by the law of limitation as the debt due to the plaintiff company has been acknowledged by the defendant company in its books and accounts from year to year."

The respondent company pleaded inter alia that the accounts were time-barred under the provisions of the Indian Limitation Act, which applies in Tanganyika; the relevant period, which is not in dispute, being three years.

The appellant company relied on certain balance sheets of the respondent company as acknowledgements of the existence of the loans to keep them alive under s. 19 of the Limitation Act. That section (hereinafter referred to as "section 19") reads as follows:

> "19(1) Where, before the expiration of the period prescribed for a suit or application in respect of any property or right an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

"(2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but, subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

"Explanation I. – For the purposes of this section an acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with

a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

"Explanation II – For the purposes of this section, 'signed' means signed either personally or by an agent duly authorised in this behalf.

"Explanation III – For the purposes of this section an application for the execution of a decree or order is an application in respect of a right."

Although the particular loans made by the appellant company are not specified as such in the balance sheets, these loans are included in the general item "Loans" in each balance sheet, and the learned judge held, following *Jones v. Bellgrove Properties Ltd*. (1), [1949] 2 K.B. 700, that this would be a sufficient acknowledgement of the debt – subject, of course, to the point whether it could be said to be an acknowledgement of a subsisting liability. This part of the learned judge's decision, which is favourable to the appellant company, has not been challenged by the respondent company. The learned judge, however, continued:

"In order to appreciate Mr. O'Donovan's main contention it is necessary to return to the evidence of Mr. Houghton. This gentleman was unable to say when the balance sheets were signed by the defendant, but he testified that he signed them only after the defendant had done so. Since Mr. Houghton was able to give the dates on which he himself signed and the dates on which the balance sheets were sent to the defendant for signature in each case, the period within which, if not the precise date on which, the balance sheets were signed by the defendant can be fixed with certainty. It emerges that:

"(*a*) The balance sheet showing the defendant's financial position as at December 31, 1954, was sent to him for signature on October 19, 1956, and must have been signed by the defendant between that date and October 27, 1956, when Mr. Houghton testified he signed.

"(*b*) The balance sheet showing the defendant's financial position as at December 31, 1955, was sent to him for signature on November 6, 1957, and must have been signed by the defendant between that date and November 19, 1957, when Mr. Houghton testified he signed.

"(*c*) The balance sheet showing the defendant's financial position as at December 31, 1956, was sent to him for signature on March 12, 1958, and must have been signed by the defendant between that date and April 11, 1958, when Mr. Houghton testified he signed.

"(*d*) The balance sheet showing the defendant's financial position as at December 31, 1957, was sent to him for signature on April 28, 1959, and must have been signed by the defendant either on that date or on April 29, 1959, when Mr. Houghton testified he signed.

"Thus, in each case the balance sheet was signed a considerable time after the end of the financial year to which it related. Mr. O'Donovan argued strongly that this was a fatal defect. The authorities and learned commentators he contended are agreed that s. 19 of the Act requires an acknowledgement of a subsisting liability. An acknowledgement of a past liability has never been held sufficient. Learned counsel maintained that nothing could be clearer than that each of the balance sheets produced was no more than an acknowledgement of such a past liability."

The learned judge, after considering the case of *Maniram Seth v. Seth Rupchand* (2) (1906), 33 Cal. 1047 (P.C.), on which Mr. Houry relied,

agreed with Mr. O'Donovan's arguments and held that the accounts were time-barred, saying:

> "I find myself, therefore, unable to agree that the decision is in favour of the plaintiff in this case. I feel bound to decide that the balance sheets are no more than acknowledgements of past liability, and as such not sufficient under s. 19 of the Act.

"In view of this finding, I do not think it necessary to consider Mr. O'Donovan's other objection to the balance sheets.

> "I confess I come to this conclusion with some reluctance, the more so because it would appear that under English law the conclusion might well have been different. In *Jones v. Bellgrove Properties Ltd*., op. cit., the position was apparently substantively what it is here, yet the plaintiff had no difficulty there. The balance sheets showed the company's position as at May 21, 1939, 1940, 1941, 1942, 1943 and 1945, and good acknowledgement was held to have been made on December 31, 1946.
>
> "In the final result, I must find that the plaintiff's claim is time-barred. Accordingly, judgment will be entered for the plaintiff in the sum of Shs. 2,430/-, only, conceded by the defendant, together with interest on that amount at court rates from today's date until date of payment. The plaintiff will pay 95 per cent. only of the costs of this suit."

At the commencement of the hearing of the appeal Mr. Houry and Mr. O'Donovan, who appeared respectively for the appellant company and the respondent company both at the trial and on the appeal, put in an agreed statement, on the basis of which the appeal was argued. The statement is as follows:

"Conceded by Appellant and Respondent

That:

"1. Wali Dharsee (advocate) was the managing director of both plaintiff and defendant companies, i.e. Bertram Limited and Consolidated Agencies Limited.

"2. The books of account of both companies were kept in his office under his control and direction.

"3. The payment in No. 1 account of Shs. 300/- on the 15.5.58 and in No. 2 account Shs. 20,030/- on the 26.8.58 and Shs. 26,000/- on the 3.2.59 were paid by cheque by the defendant (respondent) company to plaintiff (appellant) company as appearing in the books of account of the said companies.

"4. No express promise to pay is required under the Limitation Act in acknowledgements under s. 19 of the said Act.

"5. The only issue is whether the suit is time-barred.

"6. If the suit is not time-barred there will be judgment for plaintiff (appellant) as prayed in the plaint."

In this court Mr. Houry argued, as he had done in the court below, that the signature of the balance sheets by the directors operated as acknowledgements of the existence of the debts as at the date of signature. Alternatively, he argued that the balance sheets must at least be effective admissions of the existence of the loans on the dates to which they referred, and that, taking into account the payments of Shs. 300/- in respect of Loan No. 1 on May 15, 1958, and Shs. 20,030/- and Shs. 26,000/- in respect of Loan

No. 2 on August 26, 1958, and February 3, 1959, respectively, which payments had been made by cheque, the suit would still be within the period of limitation. He relied on a passage in The Law of Limitation by Rustomji (5th Edn.), where at p. 346, the learned author says:

> "A statement in a balance sheet acknowledging a debt due by the company is sufficient within s. 19."

Mr. O'Donovan's reply to both arguments was that any statement of a debt in a company balance sheet, unless actually signed by the directors on the day to which it relates, is never more than an acknowledgement of the existence of a past debt, and that an acknowledgment of a debt, to be effective for the purposes of s. 19, must be an acknowledgement of an existing debt. He contended that the passage in Rustomji relied on by Mr. Houry was bad law.

I accept that an acknowledgement of a debt, to be effective for the purposes of s. 19, must be an acknowledgement of an existing debt. There is ample authority in India to this effect, and I agree with the learned trial judge that nothing in *Maniram Seth v. Seth Rupchand* (2) is in conflict with this view. It follows, I think, that if the signature of the balance sheets by the directors merely operates as an admission of the existence of the debt as at the date to which the balance sheet refers, that is no more than an admission of a past debt and would not be effective as an acknowledgement for the purposes of s. 19. That, I think, disposes of Mr. Houry's second argument. It remains, however, to consider whether the signature of the balance sheets can operate as admissions of the existence of the debt at the dates of signature.

At first sight Mr. O'Donovan's argument that the signature of a balance sheet can only operate as an admission of a debt shown thereon as at the date to which the balance sheet refers, appears sound. Nevertheless, this does not appear to be the interpretation which courts have put on balance sheets. So far as the passage in Rustomji, set out above, is concerned, the earlier of the Indian cases referred to by the learned author in the relevant footnote does not, with respect, appear to concern balance sheets; and the report of the later case, which appears to be the principal authority for his statement, is unfortunately not available. However, in the English case to which he refers, Re *Atlantic and Pacific Fibre Co. Ltd*. (3), [1928] Ch. 836, it was held, in respect of debentures and debenture interest, that:

> "the issue of the balance sheets constituted, in the circumstances, a sufficient acknowledgement of the company's indebtedness to the plaintiff and the other debenture holders under the debentures."

It appears implicit in this that the balance sheets were an admission of liability as at the date of issue of the balance sheets. The *Bellgrove Properties* case (1) followed the *Atlantic and Pacific Fibre Co*. decision (3). In the *Bellgrove Properties* case (1) the balance sheets considered were the balance sheets of the company as at May 21, 1939, 1940, 1941, 1942, 1943 and 1945, which were presented to the shareholders of the company on December 31, 1946, having been previously signed by a firm of chartered accountants as agents of the company and by two directors of the company. On these balance sheets it was held by Birkett, J. (as he then was) at first instance that

> "the company had made an acknowledgement in writing signed by their agents to the plaintiff that the debt remained unpaid and due to him on December 31, 1946";

> i.e. the date of presentation of the balance sheets to the shareholders, which was some nineteen months after the date to which the last balance sheet related. This finding was apparently not challenged on the appeal, and was accepted by the Court of Appeal. The *Bellgrove Properties* case (1) was considered and distinguished in *Re Transplanters* (*Holding Co*.) Ltd. (4), [1958] 2 All E.R. 711, but no comment was directed to this aspect of the case. The decision in the *Bellgrove Properties* case (1) was considered and applied in India by the High Court of Madras in *Rajah of Vizianagaram v. Official Liquidator* (5) (1952), A.I.R. Mad. 136. At p. 145 the court, after referring to the decision in the *Bellgrove Properties* case (1), and, inter alia, to the finding that the balance sheet contained an acknowledgement that the debt "at the date of the annual general meeting" remained unpaid and due, said:
>
> "Mr. Tiruvenkatachari contends that this decision should not be applied and is erroneous. On the other hand, Mr. Rajah Ayyar contends that the observations of the Privy Council in '*Maniram Seth v. Seth Rupchand*' 33 Cal. 1047 at p. 1060 are to the effect that the provisions of the Limitation Act in England regarding acknowledgement are more stringent than what they are in India. We have not been shown any reason why the judgment of the Court of Appeal should not be followed by us."

I think we ought to follow and apply those decisions in the instant case. The *Bellgrove Properties* case (1) relates to the date of presentation of the balance sheets to the shareholders at the annual general meeting, and not to the date of signature by the directors. However, the significance of the date of presentation to the shareholders is that under the English law the acknowledgement must be made to the person whose claim is being acknowledged. This is not necessary under s. 19. Under s. 19 signature by the directors as agents of the company is a sufficient acknowledgement. On the basis of the decision in the *Bellgrove Properties* case (1), and bearing in mind that the period of time in the instant case between the dates to which the balance sheets relate and the dates of signature of the balance sheets is comparable to the relevant period in the *Bellgrove Properties* case (1), I would hold that the signature of the balance sheets by the directors was an effective acknowledgement of the existence of the debt as at the date of signature. This is the opposite conclusion to that reached by the learned trial judge, but the learned judge did not have his attention drawn to the *Rajah of Vizianagaram* case (5), which shows that the *Bellgrove Properties* case has been followed in India in relation to s. 19.

If I am right, it follows that successive acknowledgements were made in the respective balance sheets which kept alive the right to recover the debt. The last balance sheet was signed on April 28 or 29, 1959, and accordingly the suit, which was filed on April 13, 1961, was within the limitation period.

I would accordingly allow the appeal with costs and order that judgment be entered for the appellant company with costs as prayed in the plaint.

Crawshaw JA: I have had the advantage of seeing the judgments of my brother judges, and agree that the appeal should be allowed with costs. The English cases to which they have referred are, I think, relevant in spite of the difference in the wording of s. 19 of the Indian Limitation Act, which is applicable in Tanganyika, and the English law at the time applicable to the decision of those cases.

Newbold JA: I agree that the appeal should be allowed with costs. In *Jones v. Bellgrove Properties Ltd*. (1), which was followed in *Rajah of*

Vizianagaram v. Official Liquidator (5), it was held that a statement in a balance sheet of an amount owing to creditors constituted an acknowledgement in writing that the debt remained unpaid and due at the date of the annual general meeting. This being so it must equally be an acknowledgement of a subsisting debt at the date the balance sheet is signed by the director, as that date must be earlier than the date of the annual general meeting. I am fortified in this view by the fact that the books of the respondent company, the evidence of the auditor and, in relation to the earlier balance sheets, the subsequent balance sheets show that the debts in question were subsisting at the date of the signature of each of the balance sheets. If the balance sheets are acknowledgements of subsisting debts at the date of their signature, then, as each such acknowledgement was made within the limitation period, the right to recover the debts was kept alive and the suit was filed within the limitation period.

Appeal allowed.

For the appellant:
George N. Houry & Co., Dar-es-Salaam
G. N. Houry, Q.C., *G. S. Patel* and *R. G. Houry*

For the respondent:
Bryan O'Donovan, Q.C., and *P. R. Dastur*, Dar-es-Salaam

Coal Export Corporation v Notias George and others
[1962] 1 EA 220 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	5 April 1962
Case Number:	75/1961
Before:	Sir Alastair Forbes VP, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden – Le Gallais, C.J.

[1] Shipping – Admiralty jurisdiction – Action for wages and deductions therefrom for a provident fund – Claim for compensation for premature termination of employment – Seamen employed under written contracts made in Greece – Ship arrested at Aden – Maritime lien – Lex loci contractus – Lex fori – Colonial Courts of Admiralty Act, 1890, *s.* 2(1) *and* (2) – *Evidence Ordinance* (*Cap.* 58), *s.* 39, *s.* 91 (*A.i – Indian Evidence Act*, 1872, *s. i s.* 84 – *Greek Act, No.* 3170 *of* 1955, *art. i and art.* 46 – *Greek Acti No.* 3816 *of* 1958, *art.* 205 – *Merchant Shipping Ordinance* (*Cap.* 95), *s.* 2, *s.* 65 (*A.*) – *Admiralty Court Act*, 1861, *s.* 10 – *Merchant Shipping Act*, 1894.

[2] Conflict of laws – Admiralty jurisdiction – Action for wages and deductions therefrom for a provident fund – Claim for compensation for premature termination of employment – Seamen employed

under written contracts made in Greece – Ship arrested at Aden – Maritime lien – Lex loci contractus – Lex fori – Colonial Courts of Admiralty Act, 1890, *s.* 2(1) *and* (2) – *Evidence Ordinance* (*Cap.* 58), *s.* 39, *s.* 91 (*A.*) – *Indian Evidence Act*, 1872, *s.* 38, *s.* 84 – *Greek Act*, *No.* 3170 *of* 1955, *art.* 19 *and art.* 46 – *Greek Act*, *No.* 3816 *of* 1958, *art.* 205 – *Merchant Shipping Ordinance* (*Cap.* 95), *s.* 2, *s.* 65 (*A.*) – *Admiralty Court Act*, 1861, *s.* 10 – *Merchant Shipping Act*, 1894.

Editor's Summary

The "Pacific Pioneer", a vessel owned by a Panamanian corporation, was registered in Liberia and flew that flag. The master and crew were Greeks. A Japanese bank not concerned in this appeal held a first mortgage over the vessel, and the appellant company, which was American, held a second mortgage. In 1960 both mortgagees took proceedings at Aden to enforce their mortgages and on their application the vessel was on February 6, 1960, arrested and a receiver appointed. The vessel had to be moved to different moorings so the receiver retained the captain and crew till February 15, when, subject to certain deductions, he paid them their wages which had been much in arrear. Thereafter the captain and crew were repatriated to Greece, the vessel was sold and, since the proceeds of sale were insufficient to meet all the claims thereon and the owners were insolvent, questions of priorities arose. The captain and crew sued for certain unpaid wages and deductions therefrom, claiming that these constituted a maritime lien over the vessel. Their claim comprised £2,737 for deductions made from their wages by the owners which under their service contracts made in Greece should have been but had not been paid to a Greek mariners' fund known as N.A.T., and £2,081 being the owners' contributions to the fund which were also unpaid. The appellant company intervened on the ground that the deductions were not recoverable as unpaid wages and did not constitute a maritime lien with priority over the mortgages. The owners did not contest the suit and did not appear at the hearing. After evidence had by consent been given by affidavit the judge awarded the respondents half the sum claimed as compensation for early determination of their services, holding that the ship had been "sold" within the relevant clause in the service contracts. He also awarded the respondents the full £2,737 and £2,081 claimed and held that the deductions for wages and owners' contributions attracted a maritime lien whereas the compensation did not. Both parties appealed without, however, disputing the sums awarded by the judge. At the hearing of the appeal the main arguments were whether the lex fori or the lex loci contractus applied and whether the awards by the judge attracted a maritime lien.

Held –

(i) questions of priorities attaching to claims for moneys in the nature of wages alleged to be due to the captain and crew of a vessel are to be determined by the lex fori. *The Tagus*, [1903] P. 44 and *The Zigurds*, [1932] P. 113 adopted.

(ii) the respondents were entitled to a lien over the ship and freight in priority to the appellant company in so far as the compensation, deductions from wages and owners' contributions were "wages", and the questions for determination were therefore whether these were wages or awards in the nature of damages.

(iii) by virtue of the contract between the owners and N.A.T. the owners' contributions were payable to N.A.T. and not to the seamen; in the circumstances the owners' contributions could not be "wages" which attract a maritime lien.

(iv) the deductions from their wages were part of the seamen's gross wages which the owners were authorised to pay to N.A.T.; these deductions were wages still in the hands of the owners and attracted a maritime lien.

(v) the claim for compensation which was made pursuant to the contracts of employment was founded on a provision for payment of compensation on lawful discharge; this compensation was in the

nature of “wages” and recoverable as such.

Appeal allowed in part. Cross-appeal allowed. Order of the Supreme Court varied to give respondents priority for the claims for deductions from wages and compensation but not for the owners' contributions.

Cases referred to in judgment:

(1) *The Yuri Maru, The Woron*, [1927] A.C. 906.

(2) *The Tagus*, [1903] P. 44.

(3) *The Colorado*, [1923] P. 102.

(4) *The Zigurds*, [1932] P. 113.

(5) *The Sara* (1889), 14 App. Cas. 209.

(6) *The British Trade*, [1924] P. 104.

(7) *The Gee Whiz*, [1951] 1 All E.R. 876.

(8) *The Arosa Kulm* (1960), 1 Lloyd, L.R. 97.

(9) *The Arosa Star* (1959), 2 Lloyd, L.R. 396.

(10) *The Pacific Challenger*, Suit No. 3684 of 1959, P. (unreported).

(11) *The Chieftain*, 167 E.R. 316.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: This appeal and cross-appeal, which arise out of a decision of the Supreme Court of Aden exercising jurisdiction as a Colonial Court of Admiralty, concern the priorities of claims against the proceeds of sale of a vessel, the "Pacific Pioneer", which was sold at Aden in pursuance of an order of the court as a result of proceedings taken there by the first and second mortgagees of the vessel. The proceeds of sale of the vessel are inadequate to meet all the claims against it, and the owners are insolvent – hence the importance of the priorities attaching to the different claims. The "Pacific Pioneer" was owned by a Panamanian corporation, the Pacific Pioneer Trading Corporation, hereinafter referred to as "the owners". It was registered in Liberia and flew the Liberian flag. The master and crew were Greek nationals. We were informed that the first mortgage over the "Pacific Pioneer" is held by a Japanese bank. It is not concerned in these proceedings. The second mortgage is held by the appellant company, a company incorporated in the United States of America. I understand it holds the second mortgage as trustee for certain banks, but this is not material. Proceedings were taken in Aden in 1960 by both mortgagees to enforce their mortgages against the "Pacific Pioneer" and, on the application of the mortgagees, the vessel was arrested on February 6, 1960, and a receiver was appointed. It was apparently necessary to move the vessel to different moorings, and for this purpose the receiver retained the captain and crew on board till February 15, 1960. At the time of arrest the wages of the captain and crew were considerably in arrears. These wages were subject to certain deductions. On February 15, 1960, the receiver paid the captain and crew all arrears of wages up to that date, but not including the deductions I have mentioned, which are part of the subject matter of these proceedings. The captain and crew were

then repatriated to Greece.

The captain and crew were employed under individual “Employment Agreements”, made in Greece between the individual concerned and the owners’ representatives, which were all in similar form and which provided, inter alia:

(*a*) for the application to the contract of employment of “the Official Collective Agreement of Employment ruling at the time”;

(*b*) for the payment, in the event of "sickness, accident or loss of the ship as a consequence of the vessel being ship-wrecked, or for any other cause" of such compensation as he might be entitled to according to Greek Law No. 1752/1951 and the Greek Collective Employmen Agreement of 7.2.1956 as subsequently amended or varied; such compensation to be only half the compensation provided for in such law in the event of the ship being sold;

(*c*) for the engaged seaman to be insured with the Greek Mariners' Provident Fund (hereinafter referred to as "N.A.T.", by which designation it was referred to throughout the case) and for the "normal sums" to be deducted from his wages by the Master by way of contribution to N.A.T.; and

(*d*) for disagreements arising from the agreement to be settled in accordance with Greek law.

The relevant Collective Agreement for Employment, dated April 11, 1959, required, inter alia, the insurance of the ship with N.A.T. The insurance of Greek merchant seamen by N.A.T. is regulated by Greek law, to which I will refer later. A contract dated October 17, 1956, between the Director of N.A.T. and the representatives in Greece of the owners provided for the insurance by N.A.T. of Greek seamen serving on the "Pacific Pioneer", and provided, inter alia, that:

"(2) The contribution of the shipowner, in favour of the N.A.T. is fixed to (9 per cent.) nine per cent. of the salary calculated as in the foregoing clause, and that of the seamen to (8 per cent.) eight per cent."

These contributions by the seamen to N.A.T., the deduction of which from wages was authorised by the individual agreements, are the deductions referred to above, which were not included in the wages paid to the captain and crew by the receiver.

After their repatriation, the captain and crew, who are the respondents to this appeal, filed the suit, from which this appeal arises, against the owners and persons interested in the "Pacific Pioneer", claiming a decree for a sum of Shs. 59,141/75, alleged to be due as unpaid wages, together with interest and costs, and an order that the amount due be paid out of the proceeds of the sale of the "Pacific Pioneer". It was pleaded that the amounts due as unpaid wages attracted a maritime lien over the vessel. The appellant company intervened in the suit, contesting that the amounts claimed were recoverable as unpaid wages, or attracted a maritime lien with priority over the mortgages. There was also an intervention by a party claiming a right in rem in respect of necessaries supplied to the "Pacific Pioneer", but this intervener has not appealed.

In November, 1960, an amended plaint was filed in pursuance of an order of the court. By the amended plaint the respondents claimed:

"(i) a decree for Shs. 136,365.10 with interest on the said amount at 6 per cent. from date of filing suit till judgment, and further interest on the sum so adjudged at 6 per cent. from date of decree till payment;

"(ii) and costs of this action;

"(iii) and that the amount due to the plaintiffs be paid out of the sale proceeds of the said vessel 'm.v. Pacific Pioneer', subject always to the priority of maritime liens;

"(iv) such further and other relief as the court considers just and proper."

The total sum claimed by the respondents was made up as follows:

(*a*) £2,019 15*s*. 0*d*. claimed by the respondents

"by way of compensation of early determination of their service of their respective wages . . . Payable under art. 76 of the Act No. 3816 of 1956 of Greece".

The respondents claimed a maritime lien over the "Pacific Pioneer" in respect of the moneys claimed under this head in priority to all other liens and charges.

(*b*) £2,737 6*s*. 9*d*., alleged to be the amount of deductions made from the respondents' wages in respect of their contributions to N.A.T. and which had not been paid by the owners to N.A.T.

The deductions in question were the amounts not included in the wages paid to the captain and crew by the receiver, representing a proportion of such wages payable to N.A.T.

(*c*) £2,081 5*s*. 4*d*., alleged to be the amount of contributions payable by the owners to N.A.T. in respect of the respondents' employment and which had not been paid.

The respondents asserted that both the amounts claimed under (*b*) and (*c*) above were due from the owners as unpaid wages, and accordingly claimed a maritime lien having priority over all other liens and charges in respect of these moneys also.

The appellant company as intervener conceded that if the moneys claimed by the respondents in the amended plaint were recoverable as wages, the same would be the subject of a maritime lien. The appellant company, however, contested the right of the respondents to recover the moneys claimed under (*a*) and (*c*) above; and contested that any of the moneys claimed, would, if recoverable, be recoverable as wages attracting a maritime lien.

The owners, as defendants, did not contest the respondents' claims, and did not appear at the hearing. The appellant company as intervener did not seriously challenge the respondents' claim to judgment against the owners in respect of the amounts claimed, though drawing attention to certain relevant considerations; it did dispute that the respondents were entitled to priority in respect of any amounts awarded. With the consent of the appellant company, affidavit evidence was accepted. In the event the learned Chief Justice, who heard the case, gave judgment for the respondents against the owners:

(*a*) In respect of the claim for compensation for early determination of service, in the sum of Shs. 20,197/50, i.e. compensation for half the period claimed, holding that the ship had been "sold" within the meaning of the relevant clause of the employment agreements. I will refer to this award as "the compensation".

(*b*) In respect of the claim for the amounts alleged to have been deducted from the respondents' wages but not paid to N.A.T., in the sum of Shs. 54,746.75, i.e. the full amount claimed. I will refer to this award as "the deductions".

(*c*) In respect of the claim for contributions payable by the owners to N.A.T., in the sum of Shs. 41,623/35, i.e. the full amount claimed. I will refer to this award as "the contributions".

The learned Chief Justice also decreed interest upon the said sums and costs against the owners, but the details are not material to this appeal.

This part of the learned Chief Justice's decision is not challenged on the appeal.

As regards the appellant company's contentions, the learned Chief Justice held that both the deductions and the contributions came within the meaning of wages due, and accordingly attracted a maritime lien; but that the compensation, though recoverable against the owners under a right in rem, nevertheless did not attract a maritime lien. It was decreed, as regards this part of the case:

> "2. That the plaintiffs shall have priority of payment over all interveners in these proceedings by virtue of their maritime lien in respect of the sum of Shs. 54,746/75 and Shs. 41,623/35, being part of the aforesaid sum of Shs. 116,567 and in respect of interest upon the said sums of Shs. 54,746/75 and Shs. 41,623/35 as set out in the Second Schedule hereto, and in respect of the sum of Shs. 3,668/25, being proportionate costs upon the said two sums.
>
> "3. That the Coal Export Corporation, Intervener, shall have priority of payment over the plaintiffs by virtue of its mortgage in respect of the sum of Shs. 20,197/50, being part of the said sum of Shs. 116,567/60, and in respect of the sum of Shs. 511/97, being proportionate costs upon the said sum of Shs. 20,197/50."

The appellant company have now appealed against that part of the learned Chief Justice's decision which held that the respondents were entitled to a maritime lien in respect of the deductions and the contributions; and the respondents have cross-appealed (leave having been granted to file the cross-appeal out of time) against that part of the decision which held that the respondents were not entitled to a maritime lien in respect of the compensation.

The first question which has to be considered is the law which has to be applied in determining whether or not the awards in question attract a maritime lien. Mr. Horrocks, who appeared for the appellant company, contended that the law applicable to ascertain whether or not the respondents were entitled to a maritime lien was the lex fori, that is, the relevant English law as applicable in Aden. Mr. Sanghani, who appeared for the respondents, argued that the law applicable was the lex loci contractus, that is, Greek law, under which there was express provision conferring a maritime lien in respect of debts of the nature of the awards in issue. The learned Chief Justice in considering the question of priorities, did not specifically state which law he considered applicable, but appears to have had regard to the lex fori.

The jurisdiction of the Supreme Court of Aden as a Colonial Court of Admiralty derives from the Colonial Courts of Admiralty Act, 1890 (53 and 54 Vict. c. 27), sub-s. (1) and sub-s. (2) of s. 2 of which read:

> "(1) Every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of Admiralty or which, if no such declaration is in force in the possession, has there in original unlimited civil jurisdiction, shall be a court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the

> Governor is the sole judicial authority, the expression 'court of law' for the purposes of this section includes such Governor.
>
> "(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that court to international law and the comity of nations."

The jurisdiction vests in the Supreme Court as a court having original unlimited civil jurisdiction, no specific declaration having been made in respect of it. The effect of sub-s. (2) is to limit the jurisdiction of the Supreme Court as a Colonial Court of Admiralty to the Admiralty jurisdiction of the High Court of England as it existed at the passing of the Act (*The Yuri Maru*, *The Woron* (1), [1927] A.C. 906). The matter for consideration, therefore, is the law which would be applicable to the determination of priorities in England, bearing in mind that any changes in the law in England since 1890 which are not made applicable in Aden will not apply. The position in England with regard to the law applicable to determine priorities is stated in Cheshire's Private International Law (5th Edn.) at p. 665 as follows:

> "It has consistently been held that the order in which property in the possession of the court is distributable among creditors must be governed by English law. The priority of creditors in such a case is a procedural matter that is determinable by the lex fori. It forms no part of the transaction under which a creditor has acquired his right. It is extrinsic, and comprises in effect a privilege dependent upon the law of the country where the remedy is sought. Thus priorities of creditors claiming in bankruptcy or on an intestacy are governed exclusively by the lex fori. It is the same in the case of liens. Where, for instance, two or more persons prosecute claims against a ship that has been arrested in England, the order in which they are entitled to be paid is governed exclusively by English law.
>
> "In the case of a right in rem such as a lien, however, this principle must not be allowed to obscure the rule that the substantive right of the creditor depends upon its proper law. The validity and nature of the right must be distinguished from the order in which it ranks in relation to other claims. Before it can determine the order of payment, the court must examine the proper law of the transaction upon which the claimant relies in order to verify the validity of the right and to establish its precise nature. When the nature of the right is thus ascertained the principle of procedure then comes into play and ordains that the order of payment prescribed by English law for a right of that particular kind shall govern."

The matter was considered in relation to wages claimed by the master of a vessel in *The Tagus* (2), [1903] P. 44. The headnote of that case reads:

> "In proceedings in rem by the foreign master of an Argentine vessel in an English port, the claim of the master consisted of (1) wages as supercargo, and afterwards as master; (2) disbursements whilst acting as supercargo, and afterwards as master. On the question of priority as against a mortgagee intervening:

> "**Held**, by Phillimore, J., that, though by the lex loci the master could only claim his wages and disbursements for the last voyage as a 'privileged debt' in priority to the mortgagee, the question was one of remedy, and therefore the lex fori applied, under which, by reason of the maritime lien conferred by s. 167 of the Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60), he could claim, in priority, the whole of his wages and disbursements whilst master. He was also entitled to add thereto his wages as a seaman whilst acting as supercargo, and such disbursements as he had then made by way of advances to the crew on account of their wages."

In *The Colorado* (3), [1923] P. 102 the English Court of Appeal held that while the question of priorities must be determined by the lex fori, the right under which a party claimed, in that case a French "hypothèque", was to be determined according to the lex loci; that under French law, the lex loci, the hypotheque conferred a right corresponding to a maritime lien; and that therefore the priorities to be determined under English law, the lex fori, must be on the basis of the existence of a maritime lien. The decision appears somewhat at variance with the decision in *The Tagus* (2), but the decision in *The Tagus* (2) was not disapproved. In the course of his judgment in *The Colorado* (3) Scrutton, L.J., said (at p. 108):

> "It is clear law in England, as stated by Lord Brougham in *Don v. Lippmann* (1837), 5 Cl. & Fin. 1, 13, that 'whatever relates to the remedy to be enforced, must be determined by the lex fori, the law of the country to the tribunals of which the appeal is made'. The nature of the right may have to be determined by some other law, but the nature of the remedy which enforces the right is a matter for the law of the tribunal which is asked to enforce the right. Thus in *The Milford* (1858) Sw. 362, 366, where an American master of an American ship claimed in England a lien on the freight for his wages, Dr. Lushington declined to consider whether by United States law he had no such lien, but applied the lex fori, saying: 'The proceeding originated in this country; it is a question of remedy, not of contract at all.' This was followed by Phillimore, J., in *The Tagus*, [1903] P. 44, where the learned judge excluded the law of the flag which gave the master a lien only for wages for his last voyage, and applied the lex fori, which gave him an unlimited lien. Hamilton, J., in *American Surety Co. v. Wrightson* (1910), 16 Com. Cas. 37, applied the same principle when he excluded evidence of the remedies given on an American contract by American law, saying that as contribution between co-insurers depends not on contract but on equity, the law governing the matter must be the law of the domicil or the law of the contract. It is clear that priorities of creditors in bankruptcy, or intestacy, are dealt with by the lex fori, and not by the law of the countries where the debts are contracted, except so far as such laws are necessary to establish that there are debts. The same result follows in the case where an English court divides amongst creditors the proceeds of a ship arrested and sold in England."

Atkin, L.J., in the course of his judgment (at p. 110) said:

> "Nevertheless, in determining whether there exists a maritime lien the court will apply the lex fori, and will give effect to the lien as it exists by English law: see *The Milford and The Tagus*."

The Colorado (3) was considered in *The Zigurds* (4), [1932] P. 113, in which case Langton, J., said (at p. 124):

> "As a matter of distinction, however, between *The Colorado* and the present case, the difference in the two positions is plain to see, and I cannot ignore it. It is to my mind a vital distinction. In the one case the court seeks instruction in order to deal with an instrument which has only a parallel, and not an exact equivalent, in the English law (see for example Scrutton, L.J., in *The Colorado*: 'It (the English court) has also a claim by a person who has a hypotheque, and it may legitimately consult the foreign law as to what a hypotheque is'). In the other it is deliberately invited to invest a class of creditor perfectly well known to English law with certain special attributes on the ground of a foreign law
>
> "Mr. Atkins for the mortgagee claims *The Colorado* as an authority in his favour. It certainly is so to this extent, that it is only one more of the long line of authorities which have established that the English courts will look to English law and English law only for the purpose of ranking competing claims against a ship or its proceeds. Because in *The Colorado* case the court, in special circumstances, first turned aside to look at a foreign law, in order to obtain light concerning the legal character of a foreign instrument, I do not think that the case can be claimed as an authority for the introduction of any foreign law which any party chooses to adduce in order to qualify and alter the English rules of ranking. Indeed it is noteworthy that both Hill, J., and the Court of Appeal declined to take any note of the French law in the matter outside of the instruction which they derived from the evidence as to the nature of a French 'hypothèque'. Once they were clear as to what it was, they returned at once to the English law to decide the order of its ranking. I am of opinion, therefore, that Mr. Carpmael's valiant and determined effort to persuade me that *The Colorado* decision affords ground for enabling him to say that his necessaries man has a maritime lien, thus forcing me to disregard the lex fori as to necessaries men, is unavailing."

It is convenient here to consider the position of the moneys due to N.A.T. and compensation for termination of employment under Greek law.

It may be noted that no expert evidence was given as to the Greek law applicable, the evidence of the relevant Greek law before the court consisting of the relevant Greek Gazettes, together with official translations of the Greek legislation in question, which the parties accepted as being accurate translations. In view of the provisions of s. 39 of the Evidence Ordinance (Cap. 58) I think this was sufficient evidence of the Greek laws in question. Section 39 is in the same terms as s. 38 of the Indian Evidence Act, 1872, and in the commentary on that section in Sarkar on Evidence (9th Edn.) at p. 394 the learned author says that the effect of the section and s. 84 of the Indian Act (which corresponds to s. 91 of the Evidence Ordinance)

> "is that proof of foreign law may be obtained directly from books and without the aid of expert witnesses who according to English practice are required for the purpose".

Mr. Horrocks did not challenge the terms of the Greek laws in question as set out in the translations before the court.

N.A.T. is constituted by Greek Act No. 3170 of 1955, the objects being:

> "(*a*) the insurance of the Hellene seamen against the risks of incapacity, labour, accident and old age, and

> "(*b*) the insurance of the families of the seamen in case of their death."

It is constituted a "juristic person", represented before the courts by the president of the board of directors. By art. 19 of Act No. 3170 N.A.T. has a lien

> "upon the vessel and the freight, in whole, and a priority of claim, under the paragraph (*a*) of art. 239 of the Commercial Law"

for dues to which it is entitled under the Act. Article 205 of Greek Act No. 3816 of 1958 (which replaces the portion of "the Commercial Law" containing the article referred to in art. 19 above) provides, inter alia, that:

> "(*b*) the claims of the master and of the crew, originating with the contract of labour, as well as the dues to the Merchant Marine Veterans' Fund, deriving from their enlistment"

have a lien on the vessel and freight and rank in priority over mortgages.

Article 46 of Act No. 3170 provides for the application of insurance by N.A.T. to Greek crews serving on ships under foreign flags. A decree dated August 4, 1955, under Act No. 3170 provides:

> "Article 1.
>
> "1. Hellene mariners, engaged on board any vessel, flying an alien flag, are obliged to pay, during their whole service on the vessel, to the Merchant Marine Veterans' Fund (N.A.T.) and to the funds for assistance to Hellene mariners, to which they belong, their appropriate contributions, which are to be retained from their salaries and wages, so far as the owner, the manager or the representatives of the vessel, would have accepted, by their declaration in writing, deposited with the N.A.T. or with the merchant marine authorities, to have the Hellene mariners serving on board of their vessel, collectively insured and to pay the contributions imposed on the owner in favour of N.A.T.
>
> "2. Contributions, as per the foregoing paragraph, are calculated on the salaries and wages, provided by the collective contracts, in force for the vessels flying the Hellenic flag and, in the absence of such contracts, on the salaries and wages provided by the decisions of the Minister, in consideration of the capacity in which the mariner has been engaged and is serving on board the vessel.
>
> "Article 2.
>
> "Any shipowner, who accepted, either directly or by the agency of manager of representative, to have the Hellene mariners, serving on his vessel, under alien flag, insured collectively by the N.A.T. will pay, in favour of the N.A.T. the contribution provided by law for shipowners."

Regulations approved by that decree provide for deductions from wages due to mariners of contributions to N.A.T. to be made by owners of vessels, and the payment of such deductions to N.A.T. by such owners.

It appears from these provisions that by Greek law N.A.T. has a lien over a vessel and freight for dues due to it; but it is not clear that the master and crew have any lien in respect of such dues unless, as is claimed in this case, such dues can be claimed as wages "originating with the contract of labour". The claims of the master and crew for compensation for premature termination of employment would, as was conceded by Mr. Horrocks, under art. 205 of Act No. 3816, be entitled to a lien on the vessel and freight.

To revert to the question whether the lex fori or lex loci should be applied in the instant case, it appears to me that the provisions of Greek law relating to liens in respect of dues to N.A.T. and compensation for termination of employment are essentially provisions relating to the priority of such claims; that is, they relate to the remedy in respect of the right and do not confer a substantive right. It is not a question, as it was in the case of *The Colorado* (3), of the effect of an instrument which has no exact equivalent in English law. It is a question of the priorities attaching to certain claims for moneys in the nature of wages alleged to be due to the captain and members of the crew of a vessel. It seems to me, on the basis of *The Tagus* (2) and *The Zigurds* (4), that this is a matter to be determined by the lex fori and that the priorities conferred by Greek law, even if applicable to these claims, are not relevant. It was pleaded and argued that the moneys claimed comprised part of the "wages" of the captain and crew of the "Pacific Pioneer". It is necessary to have regard to the contracts and the Greek law applicable to determine whether the moneys claimed are "wages"; but, if they are "wages", whether or not they are wages which attract a maritime lien is a matter for English law. As was said in *The Zigurds* (4):

> "English courts will look to English law and English law only for the purpose of ranking competing claims against a ship or its proceeds."

I may mention here that Mr. Horrocks stated that, having regard to the effect of sub-s. (2) of s. 2 of the Colonial Courts of Admiralty Act, 1890, there might have been a question as to whether the right of the captain to a lien for wages was on the same footing as the seamen's right to a lien; but he expressly stated that he was not taking the point and conceded for the purposes of the case that if the members of the crew have a lien in respect of the awards or any of them, the captain should be assumed to have a similar lien. The matter accordingly was not argued, and the effect of s. 65 of the Merchant Shipping Ordinance (Cap. 95) was not considered. I propose to deal with the appeal on the basis of Mr. Horrocks's concession, and will treat the captain's claims as being on the same footing as the claims of the crew in relation to the existence or otherwise of a maritime lien.

It will be convenient to consider the different awards separately, although some of the arguments put forward apply to each of the awards. I propose to take the contributions first.

Mr. Horrocks argued that a seaman's lien for wages depended on the original jurisdiction of the High Court of Admiralty; that such jurisdiction was confined to wages arising under a simple "mariner's contract", and did not extend to claims in the nature of damages arising under a special contract; that the Admiralty Court Act, 1861, which extended the jurisdiction of the High Court of Admiralty, did not create any lien where none had existed before; that the contracts under consideration in the instant case were special contracts; that the claim for contributions was, in effect, a claim for damages; and that the contracts did not give rise to any lien in respect of the contributions, whether held to be wages, or, as he contended, damages.

Section 10 of the Admiralty Court Act, 1861, which is the provision which enlarged the jurisdiction of the High Court of Admiralty, reads as follows:

> "10. The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the

> ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship: provided always that if in any such cause the plaintiff do not recover fifty pounds, he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court."

The proposition that s. 10 of the Admiralty Court Act, 1861, did not create any maritime lien which had not existed before the Act was established by the decision in *The Sara* (5) (1889), 14 App. Cas. 209. In *The British Trade* (6), [1924] P. 104, at p. 111, the learned president, Sir Henry Duke, said:

> "By virtue of the decisions in *The Sara* and *The Castlegate*, [1893] A.C. 38, I must take it that s. 10 of the Admiralty Court Act, 1861, did not create any maritime lien which had not existed before that Act, but merely conferred upon the Court of Admiralty jurisdiction in cases where previously it had not jurisdiction."

In that case the court was considering claims by the chief engineer and the master of the vessel in question. The learned president continued:

> "As to the chief engineer then, it is necessary to inquire whether his claim arises under a special contract, so that it became cognisable in Admiralty by the Act of 1861, or was a claim such as that court always had within its jurisdiction. As to the master, the like question arises under the two statutes.
>
> "The distinction between a seaman's contract, which was cognisable before 1861 in the Court of Admiralty, and a special contract such as was within the Admiralty jurisdiction by the Act of 1861 was clearly defined when important rights were constantly dependent upon it. Lord Tenterden described the contract which was enforceable in the Court of Admiralty as 'a hiring on the usual terms made by word and writing only and not by deed': Abbot on Shipping, (11th Edn.), p. 511. Lord Stowell discusses it at some length in *The Minerva* (1825), 1 Hagg Adm. 347, 353, under the name of 'the mariner's contract', and speaks of it as an ancient instrument in which two stipulations only were necessary – on the part of the owner the description of the intended voyage; on the part of the seaman the rate of wages he was content to accept for his services on that voyage. Whether the contracts here put in suit to ground the claims for damages made by the plaintiffs are such as were cognisable in the Court of Admiralty appears from examination of them."

The learned president proceeded to hold that the contracts in that case were special contracts, partly because they were contracts under seal, and partly because of the terms. As to the terms, he said:

> "The employment undertaken by the master is employment not for a voyage but for a year certain and thereafter for a period determinable by notice, and with terms and incidents which arise from his association with the company as a shareholder. The chief engineer's agreement, again, entitled him to be employed until the termination of the first voyage and thereafter until determination of the contract by three months' notice in writing or constructive total loss of the vessel. Both of them are, in my opinion, special contracts such as were not

> within the ancient jurisdiction of the Court of Admiralty."

It was admitted by the interveners in *The British Trade* (6) that the chief engineer and master had a lien for the wages they in fact earned; but so far as their claim extended to damages the learned president held:

> ". . . . they can only be asserted upon proof of the contracts. They therefore could not have been entertained by the Court of Admiralty without the statutory authority of the Act of 1861, and they consequently do not carry with them any right to a maritime lien."

Mr. Horrocks contended that in the instant case, though the contracts were not under seal, the terms were such as to make them special contracts; in particular, that the contracts provided for employment for an indefinite term on payment of a monthly salary, instead of for a definite voyage; and that the contracts contained special terms as to employment and insurance which depended on agreements made between the owners and third parties.

Mr. Sanghani argued that the learned president's observations in *The British Trade* (6) on the terms of the contract were obiter since the contracts were under seal and ipso facto could not have been entertained by the Court of Admiralty before the Act of 1861; that the contracts in the instant case (which are not under seal) are not special contracts as they do not incorporate any special terms; that the mere fact that the contract is on a time basis and not on a voyage basis does not make it a special contract, and that the other terms are usual terms at the present time; that in any case wages earned by the services of the seamen would attract a maritime lien; and that the contributions awarded by the court to the respondents as wages, were part of the wages structure, and should be held to be wages; and he referred to *The Gee Whiz* (7), [1951] 1 All E.R. 876; *The Arosa Kulm* (8) (1960), 1 Lloyd, L.R. 97; *The Arosa Star* (9) (1959), 2 Lloyd, L.R. 396; and the reasons for the Admiralty Registrar's decision *in The Pacific Challenger* (10), Suit No. 3684 of 1959, in the Probate, Divorce and Admiralty Division of the High Court of Justice in England (unreported), a copy of which was before the court by consent of the parties.

In the Supreme Court the learned Chief Justice, dealing with both the contributions and the deductions together, said:

> "the question of whether priority is attracted to the plaintiffs' claim or any part of it must be determined. It is conceded that the only way in which the plaintiffs could enjoy priority over either of the interveners in respect of any of the three parts of their claim would be by establishing that all or any of them attracted a maritime lien. To quote from Roscoe's Admiralty Practice (5th Edn.) at p. 217:
>
> > "'Both seaman and master have a maritime lien on the ship and freight for wages which arises not from contract but from services rendered.'
>
> "It is for the plaintiffs therefore to show that each part of their claim is in law a claim for 'wages'.
>
> "It is clear from exhibits 7, 8 and 10 that by Greek maritime law it was necessary for the plaintiffs to make contributions from their wages to be paid to the 'N.A.T.' organisation, which is a kind of social insurance scheme, while in turn they are entitled to certain benefits. Mr. Sanghani submitted that such contributions were in fact part of the plaintiffs' wages, as were also the proportionate contributions due from

the owners. He relied on the case of the 'Gee Whiz', [1951] 1 All E.R. 876 which is referred to in the case of the 'Arosa Star', 2 Lloyd's List Reports 396.

"The question was also dealt with in the case of the 'Pacific Challenger' Suit No. 3684 of 1959 in the High Court of Justice of England (Probate, Divorce and Admiralty Division), in the following way:

> "'With regard to the other main question, owners' contributions. I am satisfied that the owners voluntarily entered into the Greek pension scheme, that the scheme was obligatory on them and on their crew during the relevant period, that the contributions to the various funds were part of the wages agreement structure and that they applied to the owners' contributions to the appropriate fund. The contributions were payable for the benefit of the crew and represented a way of putting part of the wages into something which is not unlike a savings bank. The evidence which I accept was that if the owners' contribution was not paid the crew suffered loss of benefit as a direct consequence and that contributions paid by the crew would not be repaid to them but remain in the hands of the scheme'

"In developing his argument Mr. Sanghani stressed that the plaintiffs' contracts expressly provided for the application of Greek law as did the ship's articles (exhibit 9).

"Mr. Horrocks submitted that the case of the 'Gee Whiz' (supra) should not be relied upon as the issue was never fully argued. He conceded, however, that all benefits in return for services were emoluments but were not necessarily wages. With respect I find this argument difficult to sustain in view of the definition of 'wages' contained in s. 742 of the Merchant Shipping Act, 1894.

"It was also submitted that owners' contributions were not payable to seamen, but to a fund, and consequently could not come within the definition of wages. Mr. Horrocks went on to urge that although the Admiralty Court Act of 1861 extended jurisdiction, it did not give rise to any new lien. Furthermore, he said, there was no evidence to show how the funds of 'N.A.T.' were disposed of nor was there evidence that the plaintiffs had a right to the return of their own contributions.

"Again I think, with respect, that Mr. Horrocks has taken too narrow a view of the law. As stated in Halsbury (3rd Edn.) Vol. 1 at p. 57:

> "'The present Admiralty jurisdiction of the High Court over claims for seamen's wages and master's wages and disbursements, comprises a wider jurisdiction than the inherent jurisdiction in suits for seamen's wages possessed by the Court of Admiralty before 1840'

"The definition of wages contained in the Act of 1861 (supra) includes emoluments, and the case of 'The Chieftain', 1863, Brown & Lush, p. 104, which, although not available to me, is quoted in Roscoe (supra) at p. 217, is authority for the proposition that a maritime lien is attracted to wages due for services rendered. I also hold the view that the cases of the 'Gee Whiz', 'Arosa Star' and 'Pacific Challenger' (supra) are sufficient authority for the proposition that deductions from wages and owners' contributions fall within the definition of wages. Furthermore, exhibits 10(*d*) and 6(*a*) indicate that the sums in question were part of the plaintiffs' wages structure, and as I see it

> both the amounts deducted and the owners' contributions were considerations for the plaintiffs' services.
>
> "I accordingly hold that both 'N.A.T.' deductions and contributions in the instant case come within the meaning of wages due and accordingly attract a maritime lien."

I think, with respect, the learned Chief Justice, in relying on the passage he cited from Halsbury's Laws of England (3rd Edn.), Vol. 1 at p. 57, overlooked the distinction between extension of the jurisdiction of the Court of Admiralty and the conferring of a maritime lien, the distinction being clearly drawn in *The Sara* (5) and *The British Trade* (6). Nevertheless, it would seem that in practice the distinction, so far as regards claims which rank as "wages", is not of undue importance. In *The British Trade* (6) the decision of the court was confined to claims which were for damages. The learned president said (at p. 112 of the report):

> "In view of the admission of the interveners that the plaintiffs have the lien they assert for the wages they in fact earned I have no concern with any question as to whether the existence of special contracts would have prevented the Court of Admiralty from entertaining in the case of the chief engineer, as a seaman, a claim to a lien for wages upon proof of service performed. No such question is raised in this case with regard to either of the plaintiffs."

In *The Gee Whiz* (7) and *The Arosa Kulm* (8), both of which were uncontested cases, the point does not appear to have arisen, though the contracts would appear to have been "special" in that they made provision for contributions in respect of insurance and social benefit schemes. *The Arosa Star* (9) was a decision of the learned Chief Justice of the Supreme Court of Bermuda, who was a former president of this court. The contracts considered in that case appear, as in this, not to have been limited to the duration of a voyage. At p. 400 of the report, the learned Chief Justice said:

> "I now come to the question whether or not the whole of the amounts decreed due to the master, officers and crew of the ship in actions Nos. 123 of 1958 and 2 and 3 of 1959 rank for priority over the mortgagees as 'wages earned on board'. Mr. Patton has argued that this expression must be strictly construed and that their maritime lien for wages due and unpaid does not cover any part of the decretal sum awarded as damages for breach of contract, as to which they must be deferred to the mortgagees. He contended that any sum decreed as wages due to a seaman with a consequent maritime lien must come strictly within s. 10 of the Act of 1861. But I can see no reason in principle why the Act should be strictly construed against seamen. I think that it should be given a fair and reasonable construction, and, indeed, in doubtful cases, the Admiralty Court seems generally to have adopted a rather benevolent attitude to seamen's claims when these have been contested by a mortgagee. In *The Nonpareil* (1864), Brown & Lush, 355, at p. 357, Dr. Lushington said:
>
> > "'There is a well-known principle, which has been acted on in many cases in this court, that if a doubt arises upon the construction of a mariner's contract, the mariner is entitled to the benefit of the doubt.'
>
> "It may be that the learned judge was speaking of the mariner's contract in its technical sense (see *The British Trade*, [1924] P. 104, at p.

> 111; (1924) 18 LL.L. Rep. 65 at p. 67), but, even if that were so, I can see no reason why the principle should not apply also to a special contract. In *The Sara* (1889), 14 App. Cas. 209, at p. 215, Lord Halsbury, L.C., explains that the Admiralty Court had jurisdiction in respect of the ordinary seaman's contract because this was presumed to be made on the credit of the ship, whereas other contracts, where under seal or where the terms were special and unusual, were said to be on the personal credit of the owners; but he goes on to speak of the 'practical abolition of the distinction as regards wages "earned on board the vessel" under a special contract or an ordinary contract'. I think that the cases of *The British Trade*, *supra*; and *The Camilla* (1858) Sw. 312, are consistent with the principle. I refer especially to the following passage from the judgment of the president (Sir Henry Duke) in *The British Trade* [1924] P. 104, pp. 108 and 109; (1924), 18 Lloyd, L.R., at p. 66:
>
> > "'. . . . The argument on the part of the interveners that a seaman's lien upon the ship for wages exists only in respect of wages earned by the seaman on board the ship in the strict literal sense of these words must be examined in the light of decisions in the Court of Admiralty, which extend over a long period, and under which the seaman's lien has been held to include subsistence money, viaticum, and, as it seems, whatever he could be fairly said to have earned by his services.'
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> "Mr. Patton laid stress upon a passage in the same judgment (at pp. 111 and 67 of the respective reports) where the learned president said:
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> > "'. . . . By virtue of the decisions in *The Sara* (1889), 14 App. Cas. 209, and *The Castlegate*, [1893] A.C. 38, I must take it that s. 10 of the Admiralty Court Act, 1861, did not create any maritime lien which had not existed before that Act, but merely conferred upon the Court of Admiralty jurisdiction in cases where previously it had not jurisdiction.'
>
> "That, however, does not really carry us much further for the main question still remains, the same as in *The British Trade*, supra, namely, are the plaintiffs, respectively, in point of substance, claiming wages under their respective contracts which remain unpaid, or are they claiming damages for breach of contract?"

The basis for the subsistence of the lien appears to be that a seaman's or master's maritime lien arises not from the contract but from the services rendered; and where the claim is for wages payable under the contract in respect of services which have been rendered on the ship, the lien exists notwithstanding the form of the contract.

In the instant case, on the authority of *The British Trade* (6) I incline to the view that the contracts are special contracts. But I think, nevertheless, that the respondents are entitled to a lien over the ship and freight in priority to the appellants in so far as the contributions, deductions and compensation are "wages". The points for determination therefore are whether the contributions, deductions and compensation are "wages" of the respondents; or whether they are awards in the nature of damages.

So far as the contributions are concerned, I am unable to see how, on the evidence, they can be held to be wages. I accept that "wages" includes emoluments. Section 2 of the Merchant Shipping Ordinance (cap. 95) carries the same definition as is contained in the Merchant Shipping Act, 1894. In *The British Trade* (6) as indicated in the passage I have cited

from *The Arosa Star* (9) it was held on the authorities that "wages" was not to be construed in a strict literal sense, the learned president saying that under the authorities "the seaman's lien has been held to include subsistence money, viaticum, and, as it seems, whatever he could be fairly said to have earned by his services". In *The Arosa Star* (9) the learned Chief Justice also examined the question whether, inter alia, employers' contributions for social insurance under a German contract were "wages". He said (at p. 402 of the report):

> "The question is whether these various items claimed, or any, and if so, which of them, are wages earned on board the ship. *The Tagus*, [1903] P. 44, is authority for the view that a maritime lien for wages is not limited in English law to wages earned on the last voyage; but still they must be wages earned on board. 'Wages' is defined by s. 742 of the Merchant Shipping Act, 1894, as including emoluments. Since this is a question of remedy and the lex fori applies, I think that definition must apply even to the case of a foreign ship and foreign seamen (see *The Milford*, (1858) Sw. 362, at p. 367; and *The Tagus*, supra). Wages have been held to include a bonus (*The Elmville* (No. 2) [1904] P. 422, and *Shelford v. Mosey*, [1917] 1 K.B. 154); also a victualling allowance (*The Tergeste*, [1903] P.26). This case relates to an Italian ship seized in England and sold at the instance of the Italian crew in an action for wages. Mr. Justice Phillimore held that a victualling allowance payable to the crew was equivalent to wages carrying a maritime lien. 'Wages' has also been held to include a master's national insurance contributions, where these have been agreed to be paid by the owner (*The Gee Whiz* (1951), 1 Lloyd, L.R. 145, referred to in Temperley's Merchant Shipping Acts (5th Edn.), at p. 121, n. 5). I would refer once again to the passage in the judgment of Sir Henry Duke in *The British Trade*, [1924] P. 104, at pp. 108 and 109; (1924), 18 Lloyd, L.R., at p. 66, in which he referred to:
>
> > "'. . . . decisions in the Court of Admiralty, which extend over a long period, and under which the seaman's lien has been held to include subsistence money, viaticum, and, as it seems, whatever he could be fairly said to have earned by his services.'
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> "Consistent with this is the language of Sir Francis Jeune, P., in *The Elmville* (No. 2), supra, at p. 428, where he said, referring to a bonus claimed by the master:
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> > "'. . . . If it is not wages, I am satisfied it is an emolument; but I should rather call it wages, because that word is used in the Act in a large sense so as to include, not only what a master gets as a wage, but what he obtains in the course of his service as recompense for the execution of his duty.'
>
> "I think this is a matter in which the courts must keep up-to-date and have regard to the changed and changing conditions of seamen's employment. I suppose that, today, few are serving under the simple mariner's contract for a specified voyage, and that, as a consequence of changed conditions and modern conceptions of welfare, most seamen are engaged on special contracts which provide for notice of termination of service, paid leave, sick leave, bonuses, and so on, which can be and are properly regarded as additions to wages, additions which the mariner can 'be fairly said to have earned by his services'.
>
> "For these reasons, therefore, I have decided to allow the claims of

> these two plaintiffs in full They will, of course, have the priority conferred by their maritime lien."

In *The Gee Whiz* (7), to which the learned Chief Justice referred, a master's national insurance contributions were held to be included in his "wages"; and in *The Arosa Kulm* (8) contributions to social benefits, stated to be similar to national health contributions, were held included in the term "wages". As I have already indicated, however, neither the claims in *The Gee Whiz* (7) nor *The Arosa Kulm* (8) were contested. In *The Pacific Challenger* (10) the learned Admiralty Registrar held on the basis of *The Gee Whiz* (7), *The Arosa Kulm* (8) and *The Arosa Star* (9), that contributions payable by the owners of the vessel to "the Greek Pension Fund" (possibly the same fund which is under consideration in this case) were part of "wages". The learned registrar said:

> "With regard to the other main question, owners' contributions, I am satisfied that the owners voluntarily entered into the Greek Pension Scheme, that the scheme was obligatory on them and on the crew during the relevant period, that the contributions to the various funds were part of the wages agreement structure, and that this applies to the owners' contributions to the appropriate fund. The contributions were payable for the benefit of the crew and represented a way of paying part-wages into something which is not unlike a saving bank. The evidence, which I accept, was that if the owners' contributions were not paid, the crew suffered loss of benefits as a direct consequence and that contributions paid by the crew would not be repaid to them but remain in the hands of the scheme. In my view, the crew are entitled to recover the owners' contributions, which I am satisfied were payable and not paid, as part of their claim for wages. It seems to me that the right to recover is supported by the decisions in *The Gee Whiz* (1951), 1 Lloyd, L.R. 145, *The Arosa Kulm*, 1959, Folio 29, and *The Arosa Star* (1959), 2 Lloyd, L.R. 396, although these deal with a master's contributions to National Insurance in this country and to German contributions payable by owners, not with the Greek scheme. I do not think the rights of recovery are affected by any such rights the fund may have, particularly as there appears to be no power in the crew to force the fund to take proceedings nor any certainty of practical success if an action were to be begun."

In none of these cases does the point which was at issue in *The British Trade* (6) appear to have been considered, that is to say, whether the contributions to the fund in question in the particular case were recoverable by the seamen as wages under the contract in respect of services performed, or whether they were only recoverable as damages for breach of contract. The evidence before the learned registrar in *The Pacific Challenger* (10) does not appear to have been as full as the evidence before the court in the instant case. The evidence here indicates (*a*) that the owners' contributions were payable by virtue of the contract between the owners and N.A.T., and under Greek law, to N.A.T. and not to the seamen, and (*b*) that N.A.T. had a right to recover such contributions from the owners. I cannot see how the seamen could claim to recover the owners' contributions as "wages" under their contract. The contract was for payment to N.A.T. On failure of the owners to pay the contributions to N.A.T. there was a breach of contract, and, as it seems to me, the seamen could only recover the amount of contributions on the basis of breach of their contracts of employment. I have already indicated that in my view the contracts in the instant case

are special contracts, and a claim for damages "can only be asserted upon proof of the contracts". Following *The British Trade* (6) I do not think such a claim could have been entertained by the Court of Admiralty without the statutory authority of the Act of 1861, and I accordingly do not think they can be included in "wages" which attract a maritime lien.

The position as regards the deductions is somewhat different. It appears to me that under the contract these are part of gross wages which the owners were authorised to deduct to be paid to N.A.T. They were, in effect, payments by the owners on behalf of the seamen of the contributions to N.A.T. payable by the seamen. It seems to me that the deductions could be recovered by the seamen under their contracts as part of their wages earned on the ship; and that they do not have to depend on breach of the contract to entitle them to these sums as something in the nature of damages. The deductions, as I see it, are wages of the seamen still in the hands of the owners. The seamen are seeking recovery of these wages and not damages for breach of a contract. The fact that under the contract these wages ought to have been paid, on behalf of the seamen, to a third party, is immaterial. They were not so paid, and the seamen are claiming the amount of the deductions as part of the wages originally due to them.

The compensation is on a different footing. The learned Chief Justice dealt with the matter as follows:

> "I come now to the question of compensation. Mr. Sanghani submitted that it was clear from the plaintiffs' contract of service, that the plaintiffs were not engaged for a specific voyage, but for a period of service, terminable after a certain time by one side, at least, by thirty days' notice. Also, he pointed out, under cl. 5 of exhibit 7, each plaintiff was entitled to special consideration if discharged at a port other than the one where he was engaged, as was the case here. He then referred to the case of the *Ferrett*, 1882/3 8 A.C. 329 as a basis for jurisdiction in the instant case. He adverted to the fact that s. 10 of the Admiralty Court Act, 1861, gave jurisdiction over claims for wages earned on board, and drew attention to note 'T' on p. 1,064 of Abbots Merchant Shipping Acts which quoted the case of the 'Great Eastern', the report of which is not available to me, as authority for the proposition that the Court of Admiralty has jurisdiction to entertain a claim by seamen for wrongful dismissal and for the consequential damages. I would point out, however, that this is not an authority for saying that such damages necessarily attract a maritime lien.
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> "Roscoe (supra), at p. 215, however, states, 'The court has also jurisdiction to award a sum as damages in respect of wrongful dismissal and there is a maritime lien for such damages'. It was accordingly submitted on behalf of the plaintiffs that this proposition applies to the instant case, as although here the dismissal was not unlawful, it was nevertheless 'wrongful' in that it terminated the plaintiffs' services before the intended duration of their contracts.
>
> "Mr. Horrocks submitted that Mr. Sanghani's argument could not be maintained. He pointed out that the whole basis of the plaintiffs' claim in this respect was for 'early determination' and not 'wrongful dismissal', and that in any event the plaintiffs' services had never been terminated by the owners, but by the receiver appointed by the court.
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> "This history of the maritime lien is dealt with in the case of the *Sara*, 14 A.C. 209, and in the case of the *British Trade*, [1924] P. 104. The case of the *Arosa Star*, previously referred to, deals with the

> question of compensation, but I think it may be distinguishable in that the crew in that instance had been served with notice before the writ.
>
> "I think that the key to the problem here is that there is no evidence of 'wrongful dismissal' by the owners. Indeed such a circumstance was not pleaded. In the instant case the right to compensation arises from the specific terms of the plaintiffs' contracts rather than from services rendered. Thus it appears to me that the *British Trade* (supra) is entirely in point.
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> "The plaintiffs here were all employed under special contracts, and therefore their claim would not have fallen within the ancient jurisdiction of the Court of Admiralty. To quote from the judgment in the *British Trade* at p. 112:
>
> > "'So far, however, as their claims extend to damages, they can only be ascertained upon proof of the contracts. They, therefore, could not have been entertained by the Court of Admiralty without the statutory authority of the Act of 1861, and they consequently do not carry with them any right to a maritime lien.'
>
> "I find no justification for departing from this authority, and although damages, or rather compensation, as it has been called, is clearly in my view recoverable as against the defendants, and I think under a right in rem, I hold, following *British Trade*, that none of the plaintiffs has a maritime lien in this respect."

With respect I do not think the learned Chief Justice has applied the correct ratio decidendi in his reasoning. The authorities were reviewed in The *British Trade* (6), and, at p. 110 of the report, the learned president said:

> "The distinction between a claim for wages and a claim for damages under a seaman's contract which has been broken depends upon purely legal considerations. The true view, I think, is that if there has been merely a breach of the contract by the employer the contract subsists and can be made the subject of a simple claim for wages, but on the other hand if the employer has repudiated the contract and the seaman has accepted the repudiation the contract is at an end, and any claim to be made by him in respect of its stipulations is a claim for damages: see *Johnstone v. Milling* (1886), 16 Q.B.D. 460."

In the instant case, as I see it, the claim for compensation was made directly under and in accordance with the terms of the employment agreements. I agree that there has been no wrongful determination of the contract in this case, and the claim is not founded on breach of contract. The contract provides for payment of the compensation on lawful discharge and the claim is founded on that provision in the contract. I think it may be said that the employment in effect continues until the expiry of the period for which compensation is payable, and that the seamen have not accepted repudiation of the contract earlier than that date. In my view the compensation is in the nature of wages and is recoverable by the seamen under the terms of the contract and not as damages by reason of breach of the contract.

It follows from what I have said that I would allow the appeal in part and would allow the cross-appeal. I would set aside the decree of the Supreme Court in so far as it relates to priorities and would substitute an order (*a*) that the respondents have priority over all interveners by virtue of their maritime lien in respect of the deductions, amounting to Shs.

54,746/75, and the compensation, amounting to Shs. 20,197/50, and proportionate interest thereon and also priority in respect of proportionate costs awarded in the Supreme Court attributable to such sums; and (*b*) that the appellant company have priority by virtue of its mortgage in respect of the contributions and proportionate interest and costs attributable to the amount of the contributions.

As regards costs in this court, the appellant company have been partially successful on the appeal and I think are entitled to half the costs of the appeal. The respondents have been wholly successful on their cross-appeal and are entitled to the costs of the cross-appeal.

Crawshaw JA: I agree with the order proposed by the Hon. Vice-President. On the claim for compensation, cl. 9 of the Collective Agreement prescribes a period during which the agreement is to remain in force. The period shown in the copy agreement exhibited in the lower court expired on September 30, 1959; the point was not taken before us and I assume that the agreement was extended or else that the copy was only a specimen of the relevant form of agreement. Clause 9 continues,

> "it '(the agreement)' can be denounced (terminated) earlier by anyone of the contracting parties. In case of denunciation the agreement will continue to be in force for another month from the date of notification of its denunciation to the other of the parties".

I can only read this to mean that notice purporting to terminate the contract is in effect notice that the contract will terminate on a date one month thereafter. If this is so, the maritime lien would, in my opinion, apply alike to the wages due during that period of one month as to arrears of wages due at the date of the notice purporting to terminate the agreement. I do not think the expression "services rendered" should be applied too literally; it is to be observed that although the master and crew were unable to continue service on the ship arrested, the owners were, under the terms of the Employment Agreement, free to use their services on any other of certain classes of ships, and it seems to me that during the period of one month following the notice of determination the service rendered by the master and crew was the holding of themselves in readiness to assume such responsibilities if and when called upon by the owners. That there may be a lien in respect of wage earned after leaving the ship is, I think, supported by *The British Trade* (6) and the authorities referred to therein.

As to contributions by the owners to N.A.T., it might be argued that the obligation to pay them was a part of the general terms of service; this does not mean that they are a part of the wages. Under a service agreement there may be many benefits accruing to the employee which do not form part of the actual wages, and I would say that the contributions come under that head and that no lien attaches in respect of them.

As to deductions, I think there can be no doubt that they were part of the wages. The question arose, however, whether as by contract and Greek statute law they could not be claimed by the crew but had to be dealt with in a certain way, the crew could claim a lien on them. I think that for the purposes of lien one has to ignore what obligations may attach to the wages when earned, as being matters extraneous to the liability of the ship for the mariners' wages, and that it is erroneous to look at them as "deductions" and not as "wages". For these reasons I think that the maritime lien extends to the wages in full.

Newbold JA: I agree with the order proposed by Forbes, V.-P. In my view the essential point in this appeal is whether the sums of money which have been referred to respectively as contributions, deductions and compensation can be regarded as wages earned on board the ship within the meaning of s. 10 of the Admiralty Court Act, 1861. If any such sum of money can be so regarded, then, in my view, a maritime lien attaches in favour of the respondents in respect of that sum: I understand *The Sara* (5) and the subsequent cases on this point to decide, in effect, that there is now no distinction, as regards wages earned on board the ship, between those earned under a special contract and those earned under a mariner's contract. If any such sum of money cannot be so regarded, then, on the facts of this case, no maritime lien attaches in favour of the respondents in respect of that sum.

As regards the contributions, I cannot see how any sum of money can be described as wages earned by a seaman (in which expression I include the master) on board the ship unless such sum is either owed to the seaman or payable to a third person by order of the seaman. The contributions were never payable to the seamen nor did the seamen ever have any obligation to pay the contributions to N.A.T. The obligation of the owners to pay the contributions to N.A.T. arose outside any contract of employment between the seamen and the owners. Even if the seamen could sue the owners for the contributions, a question which is irrelevant for the purposes of this appeal, this does not mean that the contributions are wages of the seamen earned on board the ship. Such contributions may be part of the general circumstances which induce a seaman to serve on a ship, but I cannot regard such contributions as forming part of the wages earned on board the ship any more than I can regard any other amenities, such as a swimming pool or the provision of music during working hours, as part of such wages. I appreciate that in *The Arosa Star* (9 similar sums were regarded as "additions to wages" and that in *The Pacific Challenger* (10) the learned registrar held that these contributions formed part of the "wages agreement structure", but, with respect, I cannot regard any sum of money which is not payable to a seaman, or in discharge of a seaman's obligations, as being part of his wages earned on board the ship within the meaning of s. 10 of the Admiralty Court Act, 1861. To do so would, in my view, lead to great uncertainty as to what amenities and fringe benefits which can be reduced to terms of money would be included within wages and would lead to a consideration of matters far removed indeed from the position as it existed in 1861. In *The Gee Whiz* (7), and, it would seem, *The Arosa Kulm* (8), the sums claimed represented amounts which the owners had agreed to pay in discharge of the seamen's liabilities and therefore these sums might properly be regarded as part of the wages which had accrued to the seamen. I would accordingly allow the appeal in this respect.

As regards the deductions, the matter is, in my view, clear. They were deductions from wages and thus, ipso facto, part of the wages earned on board the ship and payable by order of the seamen to N.A.T. I would accordingly dismiss the appeal in this respect.

As regards the compensation, in my view this represents a predetermined assessment of the wages which would have been earned on board the ship if the employment had been prematurely determined. It is something earned by the seaman under his contract in respect of his service on board the ship and I cannot see why, as it represents wages which would have been earned on board the ship, it should be said that it is not wages. *The British Trade* (6), and the authorities therein referred to, show that wages may

include amounts payable in respect of a period subsequent to the termination of the service and that such wages carry a maritime lien. *The Chieftain* (11), 167 E.R. 316, is authority for saying that it is not necessary to be physically on board the ship in order to say that the wages were earned on board the ship. I do not regard the claim as one for damages for breach of contract, nor is the claim so made; it is a claim for wages earned on board the ship arising under the contract by reason of the service on board the ship and by reason of the "early determination" of such service. This being so, I do not see any reason why the amount so earned should not be as much wages carrying a maritime lien as any other amount which can be said to be wages earned on board the ship. I would accordingly allow the cross-appeal.

Appeal allowed in part. Cross-appeal allowed. Order of the Supreme Court varied to give respondents priority for the claims for deductions from wages and compensation but not for the owners' contributions.

For the appellant:
Horrocks, Williams & Beecheno, Aden
G. Horrocks and *S. R. Daruwalla*

For the respondents:
K. H. Daftary and *P. K. Sanghani,* Aden

Maria Rita Sofia Godinho v Jashbhai C Patel and Others
[1962] 1 EA 242 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	3 April 1962
Case Number:	67/1961
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Bennett, J.

[1] Limitation of action – Postponement of date from which limitation runs – Action for relief from consequences of alleged mistakes of law and fact – Agreement to lease premises but no lease granted – Tenants occupying shop premises for seven years – Claim for recovery of premium paid to landlord by tenant over seven years ago – Whether tenant made mistake of law or fact – Limitation Ordinance, 1958, *s.* 4 *and s.* 26 (*U.*) *– Rent Restriction Ordinance* (*Cap.* 115), *s.* 3 (2) (*U.*).

[2] Rent restriction – Premium – Recovery – Agreement to lease shop for term of seven years – Lease never executed or registered – Whether receipt of premium unlawful – Meaning of "on" in Rent Restriction Ordinance (*Cap.* 115), *s.* 3 (2) (*U.*).

Editor's Summary

In consideration of a premium duly paid the appellant agreed to lease a shop to the respondents for seven years form July, 1953, at a monthly rent of Shs. 650/-. The respondents were duly given occupation of the shop and paid the agreed rent for seven years. Subsequently the respondents sued the appellant for recovery of the premium on the grounds that the receipt thereof by the appellant was illegal by s. 3 (2) of the Rent Restriction Ordinance and that they were not in pari delicto with the appellant. The defence was that the action was time barred. It was conceded that under s. 4 of the Limitation Ordinance, 1958, the period of limitation applicable was six years and that the

suit was not filed until more than six years after payment of the premium but the respondents relied on s. 26 of the Limitation Ordinance, which provides that in an action for relief from the consequences of mistake the period of limitation shall not begin to run until the plaintiff has, or could, with reasonable diligence have discovered the mistake. The trial judge held that payment of the premium was illegal as a breach of s. 3 (2) of the Rent Restriction Ordinance; that the first respondent's belief that he was doing nothing unlawful was a mistake of law and that, since this mistake was not discovered until 1960, the action was not time barred. The judge based his decision that payment of the premium was illegal on the grounds that the word "lease" in the second proviso to s. 3 (2) did not include an agreement for lease and he construed the words "on the . . . grant . . . of a . . . lease" in the proviso to mean "at or about the time when a lease is granted". On appeal only the issue of limitation was argued.

Held –

(i) section 3 of the Rent Restriction Ordinance was not intended to make it unlawful for a landlord to receive a premium in consideration of the grant of a lease of business premises for seven years or more.

(ii) the word "on" in the proviso to s. 3 (2) ibid. should be construed as meaning "in consideration of".

(iii) a premium is either lawful or unlawful at the time of payment; its legality cannot depend on subsequent events; as the premium was paid in consideration of the grant, to be made in the future, of a lease for seven years, it was a lawful payment and not in breach of s. 3 (2) ibid.; accordingly there was no mistake of law on the part of the respondents nor was there at the time of payment any mistake of fact.

(iv) section 26 of the Limitation Ordinance had no application in this case and the respondents' claim was barred by limitation.

Appeal allowed.

Cases referred to in judgment:

(1) *Kiriri Cotton Co. Ltd. v. Dewani*, [1960] E.A. 188 (P.C.); [1960] 2 All E.R. 177.

(2) *Phillips-Higgins v. Harper*, [1954] 1 All E.R. 116; [1954] 2 All E.R. 51.

The following judgments were read by direction of the court:

Judgment

Sir Ronald Sinclair P: This is an appeal from a judgment and preliminary decree of the High Court of Uganda.

The respondents, who are the plaintiffs in the suit, seek to recover the sum of Shs. 18,000/- from the appellant, Mrs. Godinho, as money had and received by the appellant for the use of the respondents. The material part of the plaint reads as follows:

> "1. In the year 1951 the defendant was the registered proprietor of Plot No. 16, Market Street, Kampala comprised in Freehold Register, vol. 49, folio 18.
>
> "2. On or about the 27th day of March, 1951, the defendant through her agent Tulsidas Madhavji and her advocates Messrs. Patel & Mehta verbally agreed to lease to the plaintiffs for a term of seven years

one shop, being shop No. 4, in the premises then in course of erection on the said land at a monthly rent of Shs. 650/-.

"3. In consideration of the lease the defendant through her said agents and advocates, Messrs. Patel & Mehta, asked for and did receive, from

the plaintiffs on the 27th day of March, 1951, the sum of Shs. 18,000/- by way of premium and other than by way of rent.

"4. The said verbal agreement to lease was not reduced to writing in spite of repeated requests by the plaintiffs, and no lease for the said term of seven years was ever executed or registered in the Register of Titles.

"5. On or about the 24th day of September, 1952, the defendant sold and transferred the said land to Norman Godinho & Sons Ltd.

"6. The plaintiffs entered into occupation of the said shop No. 4 on or about the 1st day of July, 1953.

"7. By reason of the matters hereinbefore set out the plaintiffs entered into occupation as aforesaid and continue in occupation as monthly tenants at the rent of Shs. 650/- per month.

"8. By virtue of the provisions of sub-s. (2) of s. 3 of the Rent Restriction Ordinance (Cap. 115) the receipt of the said sum of Shs. 18,000/- by the defendant from the plaintiffs was illegal, but the plaintiffs are entitled to recover same since they were not in pari delicto with the defendant.

"9. The plaintiffs claim from the defendant the said sum of Shs. 18,000/- as money had and received by the defendant for the use of the plaintiffs."

One of the defences pleaded was that the claim was barred by limitation. Paragraph 3 of the written statement of defence which relates to this defence reads:

"The alleged debt did not accrue within six years before the action and was and is barred by the Limitation Law."

The respondents filed a reply, para. 2 of which is as follows:

"2. As regards para. 3 of the defence the plaintiffs' claim is for relief from the consequences of a mistake, namely:

(*a*) That from and after the 24th day of September, 1952, the grant of a lease for seven years by the defendant to the plaintiffs became impossible of performance by the defendant. The said mistake was not, and could not with reasonable diligence have been discovered by the plaintiffs until the 23rd day of May, 1960, when a search in the Land Registry disclosed the transfer of the property by the defendant on the said date.

(*b*) That the plaintiffs consulted their advocate Mr. A.I. James, on or about the 21st day of April, 1960, and did not discover and could not with reasonable diligence have discovered until that date that

(i) the said premium was illegal; and

(ii) the said premium was recoverable from the defendant."

The defence of limitation was tried as a preliminary issue, evidence being called by both parties limited to that issue. The learned judge held that the suit was not barred by limitation. It is this decision which is the subject of the present appeal.

It is common ground that under s. 4 of the Limitation Ordinance, 1958, the period of limitation applicable to this action is six years. The plaint was not filed until June, 1960, more than six years after the payment of the money sought to be recovered, but the appellants relied on s. 26 of the Limitation Ordinance, 1958, the relevant portion of which reads:

"Where, in the case of any action for which a period of limitation is prescribed by this Ordinance, either –

.....(*a*) ; or

.....(*b*) ; or

(*c*) The action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered . . . the mistake . . . or could with reasonable diligence have discovered it."

The reply sets out two mistakes – one of fact and one of law – upon which reliance was placed for the purpose of taking the claim out of the operation of s. 4 of the Ordinance.

The learned judge found it necessary to deal only with the mistake of law. For the purpose of determing the preliminary issue he assumed that the facts averred in the plaint were true: that is to say, that the respondents did pay Shs. 18,000/- to the appellant as a premium in consideration of a promise by the appellant to grant the respondents a lease for seven years of a shop in a building on plot No. 16, Market Street, Kampala, which was then in course of erection. He accepted the evidence of the first respondent, J.C. Patel, that when he paid the Shs. 18,000/- he did not know he was doing anything unlawful and that he had no occasion to alter his view until he read of the *Kiriri Cotton Co. case* in "The Uganda Argus" early in 1960. He held that the payment of the money by the first respondent to the appellant, if it was paid in consideration of the letting of business premises, was in breach of s. 3 (2) of the Rent Restriction Ordinance and consequently unlawful, that the first respondent's mistaken belief that he was not doing anything unlawful was a mistake of law and that since the first respondent did not discover his mistake until 1960, the suit was not barred by limitation.

Section 3 (2) of the Rent Restriction Ordinance (Cap. 115) provides:

"Any person whether the owner of the property or not who in consideration of the letting or sub-letting of a dwelling-house or premises to a person asks for, solicits or receives any sum of money other than rent or any thing of value whether such asking, soliciting or receiving is made before or after the grant of tenancy shall be guilty of an offence and liable to a fine not exceeding Shs. 10,000/- or imprisonment for a period not exceeding six months or to both such fine or imprisonment;"

Then follow two provisos, only the second of which is relevant. It reads:

"And provided further that nothing in this section shall be deemed to make unlawful the charging of a purchase price or premium on the sale, grant, assignment or renewal of a long lease of premises where the term or unexpired term is seven years or more."

This proviso was repealed in 1954, but was in force in 1951 when the money was paid to the appellant. It relates only to business premises by virtue of the definition of "premises".

I would observe here that the *Kiriri Cotton Co*. case (*Kiriri Cotton Co. Ltd. v. Dewani* (1), [1960] E.A. 188 (P.C.)), referred to by the first respondent in his evidence, concerned the recovery of a premium paid for a lease for more than seven years of a residential flat. The premium was unlawful; the second proviso to sub-s. (2) of s. 3 of the Rent Restriction Ordinance having no application. It was decided that the premium was recoverable by the tenant from the landlord, the parties not being in pari delicto. That decision has no bearing on the question whether a premium paid in consideration of the grant of a lease for seven years of business premises is unlawful.

The learned judge based his decision that the payment of the premium was unlawful on two grounds. First, he held that the word "lease" in the second

proviso to s. 3 (2) means an agreement which confers on the tenant an estate or interest in the land and does not include an agreement to grant a lease which is only enforceable as between the parties to it and that, since no written lease was ever executed, the transaction did not fall within the proviso. Secondly, he construed the words "on the . . . grant . . . of a . . . lease" in the proviso to mean "at or about the time when a lease is granted."

With respect to the learned judge, I am unable to agree with his construction of the words "on the . . . grant . . . of a . . . lease". In Maxwell on Interpretation of Statutes (10th Edn.) in the chapter dealing with the rule that penal statutes shall be construed strictly, it is said at p.263:

> "The rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language."

In the first place, I do not think that the word "on" means "simultaneously with". Such a construction would not be reasonable and would in many cases defeat the object of a premium. It will be noted that the proviso refers to the "charging" of a premium not to the "payment" of a premium. The learned judge himself did not place such a narrow construction on the word and Mr. James for the respondents does not suggest that its meaning should be so limited. In the second place, if "on" does not mean "simultaneously with", I can see no good reason for construing it as meaning "at or about the time when". Reading s. 3 as a whole, I do not think it was the intention of the legislature to make it unlawful for a landlord to receive a premium in consideration of the grant of a lease of business premises for seven years or more. To my mind, the receipt of a premium in such circumstances is not within the mischief aimed at. It is clearly lawful to receive a premium simultaneously with the execution of a lease of business premises for seven years and I cannot conceive that there would be any mischief in receiving a premium in consideration of the grant of such a lease in the future. If the learned judge's construction is correct, it would be an offence to receive a premium in consideration of the grant of a lease for seven years or more, even if such a lease were subsequently executed, unless the premium were received at or about the time the lease was executed. On that construction also, I think the receipt of such a premium would constitute an offence if the tenant subsequently refused to execute a lease. That is not a reasonable construction, bearing in mind the mischief aimed at. In my view, a premium is either lawful or unlawful at the time of payment: its legality cannot depend on subsequent events. If it did, then, in order to avoid the possibility of the commission of an offence, the payment would have to be made simultaneously with the execution of a lease and that, as I have said, would not be reasonable. My conclusion, therefore, is that reason and good sense require the word "on" to be construed as meaning "in consideration of". I think this disposes of the argument based on the distinction between a formal lease and an agreement to grant a lease. A payment of a premium is in consideration of the formal lease whether paid on the signing of that lease or on the promise to grant that lease. If there is a refusal to grant the lease, that may give rise to an action for breach of contract; but that is not the issue in this appeal. As the premium was paid in consideration of the grant, to be made in the future, of lease for seven years, it was a lawful payment and not in breach of s. 3 (2) of the Rent Restriction Ordinance. There was, accordingly, no mistake of law on the part of the respondents.

Although the learned judge did not deal with the alleged mistake of fact,

counsel agreed that we should deal with it, if it became necessary, in order finally to dispose of the whole issue of limitation. The mistake of fact alleged is that the premium was paid to the appellant in consideration of the grant of a lease for seven years and that by the time the premises were erected in 1953 and the lease could then have been granted, the appellant, by transferring the land to Norman Godinho & Sons Ltd. on September 24, 1952, had made it impossible to grant a lease. It is further alleged that the mistake was not, and could not with reasonable diligence, have been discovered by the respondents until May 23, 1960, when a search in the Land Registry disclosed the transfer of the property by the appellant on September 24, 1952. I cannot see that the money was paid under any mistake of fact. The mistake must exist at the time of payment and the money be paid in consequence of the mistake: see *Phillips-Higgins v. Harper* (2), [1954] 1 All E.R. 116. At the time when the premium was paid to the appellant, she was in fact the registered proprietor of the land. There was no mistake on the part of the respondents. Furthermore, even if there were a mistake, the respondents could, with reasonable diligence, have discovered it long before the period of limitation had expired. If the respondents had taken steps to obtain a lease when the premises were ready for occupation in 1953 and had pressed for specific performance, they would then have discovered the transfer. Indeed, Mr. James for the respondents conceded that the respondents had not used reasonable diligence to discover the mistake and virtually abandoned the allegation that there had been a mistake of fact.

For those reasons, I am of opinion that s. 26 of the Limitation Ordinance has no application in this case and that the respondents' claim is barred by limitation.

I would allow the appeal with costs and order that the judgment and preliminary decree of the High Court be set aside and that the respondents' suit be dismissed with costs.

Sir Alastair Forbes VP: I agree.

Gould JA: I also agree.

Appeal allowed.

For the appellant:
Korde & Esmail, Kampala
R.E.G. Russell and *K.G. Korde*

For the respondents:
Hunter & Greig, Kampala
A.I. James

Raya Binti Salim Bin Khalfan El Busaidi v Hamed Bin Suleiman El Busaidi and another

[1962] 1 EA 248 (SCZ)

Division:	HH The Sultan's Court for Zanzibar at Zanzibar
Date of judgment:	30 January 1962
Case Number:	100/1959

Before: Horsfall J

Sourced by: LawAfrica

[1] Mohamedan law – "Widda" – Husband as manager of wife's properties – Husband receiving wife's income – Husband and wife living together – Wife maintained by husband – Claim by widow after husband's death for income received by husband – Defence that doctrines of equity apply – Presumption of advancement – Whether law of Islam applies – Whether husband entitled to usufruct of properties – Transfer of Property Decree (*Cap*. 82), *s.* 116 (*Z.*) – *Indian Limitation Act*, 1908, *s.* 60 – *Zanzibar Order-in-Council*, 1924 – *Courts Decree* (*Cap*. 3), *s*. 7 (*Z.*) – *Mohamedan Marriage, Divorce and Succession Ordinance* (*Cap*. 148), *s.* 4 (*K.*) – *Married Women's Property Act*, 1882.

Editor's Summary

The plaintiff, a sister of the late Sir Ali bin Salim, married when aged eighteen a rich Arab of Zanzibar who was a subject of the Sultan. Both husband and wife were Muslims of the Ibathi sect. The husband died at Zanzibar on December 17, 1956, some fifty years later. On the death of her father the plaintiff inherited her share of his large estate which included land and buildings at Mombasa, Shangamwe and Malindi in Kenya. As the plaintiff was illiterate and kept in strict purdah, her properties in Kenya were managed by the office of her brother, but her husband, in addition to supervising generally these interests and personally managing her Zanzibar properties, received the rents and other income. The plaintiff's husband maintained for many years bank accounts at Mombasa and Zanzibar, into which the income from the plaintiff's properties was paid and, whilst informal records were kept of the income from these sources, businesslike accounts were not kept by him. Upon the death of the husband the defendant, as brother of the deceased, was appointed administrator of his estate. Since there were no children of the marriage the plaintiff and the defendant were the sole heirs and, according to the Sharia law, the plaintiff was entitled to one-quarter and the defendant to three-quarters of the deceased's estate. During administration of the estate the plaintiff became uneasy regarding her business affairs and what she considered was her own property as distinct from the deceased's estate and she became alarmed after signing a receipt in June, 1958, acknowledging that she had received from the defendant, as administrator, Shs. 28,298/- in payment of her share in the net estate left in Mombasa of her husband. Shortly afterwards having received a summons in a suit filed by the defendant for the directions of the court concerning the division of the deceased's estate she consulted advocates at Zanzibar who made a claim on her behalf for the return of her income deposited with the deceased during his lifetime. The defendant's attitude was that the plaintiff had made a gift of her income to the deceased and he refused to recognise this claim, following which the plaintiff sued for an account and consequent relief. The preparation and presentation of the plaintiff's claim was not assisted by the defendant but during the trial his advocate conceded that the dispute was confined only to the income from the plaintiff's properties during the life of the deceased. In her evidence the plaintiff stated that soon after she inherited her share of her father's estate she reached an understanding with her husband that he would look after her property on the basis that if she wanted anything she would tell him and he would then obtain it for her and would keep her funds for her. There was also evidence that the funds of the deceased and those

of the plaintiff had been mixed mainly because of unbusinesslike bookkeeping. The defendant's case was that the plaintiff gave her husband the usufruct of her properties and that having made no claim until eighteen months after her husband's death was estopped by her conduct from pursuing the claim.

Held –

(i) in the absence of any decree of H.H. the Sultan the fundamental law of Islam was the proper law applicable to the case.

(ii) it would be wrong to apply principles of equity devised to suit Christian society in England in order to import a presumption whereby to gauge the intention of a Muslim husband and wife living in Zanzibar whose social and cultural background is very different.

(iii) no adverse inference could be drawn against the plaintiff from her silence for some eighteen months after her husband's death, since she had no reason to distrust the defendant.

(iv) the plaintiff had proved an arrangement whereby the deceased agreed to receive the income and other proceeds of the plaintiff's properties during his life and hold them on deposit for her benefit; accordingly the administrator was liable to account in respect of and to the extent of the assets in his hands.

Order for an account and where precise details are not available that evidence be taken.

Cases referred to in judgment:

(1) *Mohammad Akbar Khan v. Attar Singh & Others* (1936), A.I.R. P.C. 171.

(2) *Chandiprasad v. Jugalkishore* (1948), A.I.R. Nag. 377.

(3) *Edward v. Cheyne* (No. 2), 13 App. Cas. 385.

(4) *Hamira Bibi & Others v. Zubaida Bibi and Others* (1916), 43 I.A. 294.

(5) *Fatuma binti Mohamed bin Salim Bakhshuwen v. Mohamed bin Salim Bakhshuwen*, [1952] A.C. 1.

(6) *Wakf Commissioners v. Public Trustee*, [1959] E.A. 368 (C.A.).

(7) *Nawazish Ali Khan v. Ali Raza Khan* (1948), A.I.R. P.C. 134.

Judgment

Horsfall J: The plaintiff is the widow of the late Seyyid Seif bin Suleiman (hereinafter called the deceased) who died in Zanzibar on December 17, 1956. The defendant is the administrator of the deceased's estate and is his brother. There were no children of the marriage between the plaintiff and the deceased. The plaintiff and the defendant are the sole heirs. According to Sharia the plaintiff is entitled to one-quarter of the estate and the defendant to three-quarters. The deceased was a rich man in his own right. The estate duty affidavit sworn by defendant as administrator on February 27, 1957, shows the net estate liable for duty as valued at Shs. 1,155,902/-.

The plaintiff was married to the deceased when she was eighteen years old and lived with him in Zanzibar until his death some fifty years later. She was the daughter of a wealthy Arab of the mainland, Salim bin Khalfan el-Busaidi, and on his death in 1920 she inherited among his other children her share

of his estate. Annexure “A” to the amended plaint lists particulars of immoveable properties situate at Mombasa, Changamwe and Malindi in the Colony and Protectorate of Kenya which she inherited from her father’s estate. Annexure “B” lists particulars of immoveable properties at Zanzibar similarly inherited.

Her properties in Kenya were directly managed by the office of Sir Ali bin Salim in Mombasa. He was her brother. The deceased, her husband, in Zanzibar kept a general supervising eye over matters. Lists “A” and “B” to annexure “C” list the

> "net rent balance paid to the credit of Seif bin Suleiman (Bibi Raya's husband) in the National Bank of India Ltd., Mombasa, by the late Sir Ali bin Salim".

These lists begin with the rent payment dated March 26, 1932 and continue with regular rent payments until March 2, 1951 when the deceased's account in Mombasa was closed and the agents remitted the rent payments direct to the credit of his account with the Standard Bank, Zanzibar. The sum total of these two lists amounts to Shs. 185,739/62. The procedure of Sir Ali bin Salim's office was every month more or less regularly to send to the deceased in Zanzibar a copy of the rent returns of the plaintiff's mainland properties for the period elapsing since the last return. The returns showed the names of the tenants, the rents paid and the expenses incurred and a balance was struck showing the net rent for the period. This balance was paid into deceased's bank account in Mombasa and a copy of the paying-in slip in his name was posted to him with each return. Files produced from Sir Ali's office showed a complete record from 1931 to 1955. In addition to copies of rent returns and paying-in slips they contain correspondence with deceased relating to the plaintiff's mainland properties, his instructions, a few receipts for cash taken by him on visits to Mombasa and other matters connected with property management.

These two lists have been compared with the copies of the paying-in slips in the seven exhibits produced from Sir Ali's office and they correspond. A copy of the deceased's No. 1 account with National and Grindlays Bank Ltd., Mombasa has been produced. Apart from a few clerical errors in transcribing all these paying-in slips representing rent returns from the plaintiff's properties appear as credits in the deceased's No. 1 account. Apart from three credits (which are not explained), no other money was credited to this account from the date of its opening on March 26, 1932 until the date when it ceased to be operated on March 2, 1951.

There were other dealings with plaintiff's properties in Kenya, namely receipts of premium, ground rents and compensation in respect of two properties acquired by the Government. Particulars of these dealings are shown in list "C" to annexure "C". A total of Shs. 187,187/33 is claimed.

Exhibit "C" contains a receipt signed by plaintiff for compensation paid of Shs. 10,768/14 in respect of property acquired by Government. The witness, R. M. Doshi, an advocate of the Supreme Court of Kenya, acted for the plaintiff's estate in Mombasa professionally. His practice was to make out cheques in the name of the plaintiff for money collected as premium or ground rent and send the cheques to the deceased in Zanzibar. Cheques have been produced. I will only refer to exhibits "E" and "K" as examples since they are dated after 1953 and can be traced as credited into the deceased's No. 2 account with the National and Grindlays Bank Ltd., Zanzibar. These cheques bear the signature of the plaintiff on the back in Arabic and also the signature of the deceased in English confirming such endorsement. Exhibit "E" is a cheque for Shs. 19,043/50 dated June 9, 1955 and exhibit "K" is a cheque for Shs. 9,375/- dated May 19, 1955.

Details of how the ground rents totalling Shs. 98,010/- are made are shown in the list contained at p. 58 and p. 59 of exhibit "A".

There remains the management of the plaintiff's properties in Zanzibar. These were managed by the deceased himself directly without the intervention of professional local agents as in the case of the Kenya properties. Only rough diaries mainly kept in Arabic but of which there is an agreed translation have been produced, two scribbling pads, a notebook, bank statements relating to deceased's No. 1 and No. 2 accounts at the National and Grindlays Bank Ltd., Zanzibar, and paying-in slips and cheques relating to operations on those

accounts. In consequence it has not been possible for the plaintiff's advisers to put forward a claim to a firm sum. Annexure "D" to the plaint contains a summary of the estimated income from the properties set out in annexure "B" at Shs. 157,138/95. Finally there is a claim in annexure "E" for Shs. 802,250/- being the estimated net income from a shamba at Mbaleni, Zanzibar. This was purchased in the name of the plaintiff by conveyance dated November 26, 1940, for the sum of Shs. 125,500/-. The plaintiff claims that this purchase price was made up of moneys derived from part of the income of her properties in Kenya. It is not denied that the deceased managed Mbaleni from the time of purchase up to his death.

The total sum claimed in respect of the mainland properties listed in annexure "A" to the plaint for which figures exist, is Shs. 372,926/95. The estimated total sum claimed in respect of the Zanzibar properties listed in annexure "B" for which there are no adequate supporting figures is Shs. 157,138/95.

Similarly, the estimated total sum claimed in respect of Mbaleni shamba is Shs. 802,250/-.

The total gross sum involved is in the region of Shs. 1,332,315/90. From this total there is deducted Shs. 125,500/- being purchase price of Mbaleni shamba and a sum of Shs. 6,000/- being the estimated cost of a house built on the shamba. A total net sum of Shs. 1,200,815/90 is involved.

The plaintiff claims that shortly after she inherited her share of her father's property she came to an understanding with deceased.

> "I told him that he will look after my property and if I want anything I will let him know what I want and he is to buy it for me. He agreed to this. He agreed to keep the money. If I saw anything I wanted to buy I will tell him and he will buy it. That is total of our agreement. I made no gift of my property to him. I did not agree to his mixing my money with his. Mine and his are separate. He did not mix my money with his money. During my marriage he collected rents and put them in the bank. He told me about them. He used to tell me but I never kept it at heart because I trusted him."

It is a fact that by power of attorney dated July 14, 1945 the plaintiff empowered A. F. Saldanha who was then the manager of Sir Ali bin Salim's office in Mombasa to manage her properties in Kenya and to

> "hand over the net proceeds of rent or other moneys realised in respect of my immoveable properties to my husband Seif bin Suleiman against a proper receipt or as he may in writing direct from time to time".

Defendant in cross-examination related that he thought it was a gift because deceased received her money, no account was kept and she had no witness to confirm the deposit arrangements. Her conduct in claiming no receipts from her husband convinced him that it was a gift of her income. He went on to say that she made no claim until long after her husband's death. He considered that Seif must have spent money for her in developing her shambas. Defendant said that plaintiff agreed that Seif spent money in any way he liked and that he had income for both to spend in any way he pleased. He added that she told him this a few weeks after her husband's death. He did not remember telling this to his advocate. She told him that her husband could do what he liked with her money.

In outlining the case he proposed to open for the defence, Mr. Inamdar stated:

> "Conduct is consistent with plaintiff granting husband the usufruct. Dispute does not concern corpus. Dispute concerns only the income during his life. Admit that she owns the properties. From date of husband's

> death she is undisputed owner of income. He mixed his own and wife's income during his life. He spent moneys from this mixed fund on his own and his wife's properties indiscriminately."

There was an arrangement by which deceased could spend his wife's money for joint purposes. In the course of his cross-examination the defendant admitted that he was not now denying that deceased had received his wife's income. He was denying that deceased had received the income as a deposit. He alleged that it was a gift. The issues left to be decided at the close of the evidence are as follows.

The plaintiff will succeed if she establishes that there was a contract of deposit, repayable on demand, of her income from her share of her father's inheritance received by deceased in his lifetime. She must fail if I consider that there was a gift of such income or usufruct rather than a deposit. In approaching the case I must bear in mind that the husband is not now living to come forward to give the court the benefit of his explanation. The plaintiff is the only direct living witness to the arrangement, if any, which she now says that she came to with the deceased. I must bear in mind that direct witnesses are liable to speak untruth or be mistaken. Any circumstantial evidence there may be going to show the plaintiff's or the deceased's conduct in relation to the management of her estates is most important. Is this conduct more consistent with a deposit repayable on demand or a gift of the income or usufruct?

As regards the law to be applied the parties are Arabs, subjects of His Highness the Sultan and Muslims of the Ibathi sect. I am sitting in court as judge of H.H. the Sultan's Court for Zanzibar rather than in my other capacity of judge of Her Britannic Majesty's Court for Zanzibar. I quote from "The Dual Jurisdiction in Zanzibar" by J.H. Vaughan, published in 1935 by the Government Printer, Zanzibar, at p. 47.

> "To sum up, the law enforced in the Sultan's Courts consists of the decrees of His Highness the Sultan, and subject to their provisions, and in so far as they do not apply, to the fundamental law of Islam as interpreted according to the rules of the Ibathi and Shafei Schools."

I do not think that it is necessary for me to lengthen this judgment by examining the sources or the reasoning on which this statement is based. It is set forth in the preceding pages of Mr. Vaughan's volume. It is necessary to refer to s. 116 of the Transfer of Property Decree (which appears in Part VII relating to Gifts) (Cap. 82).

> "Nothing in this part relates to gifts of moveable property made in contemplation of death, or *shall be deemed to affect any rule of Mohammedan law*, or, save as provided by s. 110, any rule of Hindu or Buddhist law."

I have underlined the relevant words in this section. No other relevant decree has been cited to me. In the absence of any local decree relating to the Mohamedan law of Widda or deposit and gifts I consider that the fundamental law of Islam is the proper law for the court to apply in deciding this case. See also the passage in Vaughan at p. 46.

In the Hidaya, Book XXVIII, p. 471, column 2, para. 3, it is stated:

"Of Widda, or Deposits.

> "Widda in the language of the law, signifies a person empowering another to keep his property. The proprietor of the thing is styled Modee, or the depositor; the person so empowered, the Moda or trustee. The property so left with another, for the purpose of keeping it, is styled Widdeeyat, because Widda literally means to leave, and the thing in question is left with the Moda or trustee."

At p. 472, column 2, para. 2, of the Hidaya it is stated

> "If he mix it inseparably with his own property, he must make the proprietor compensation."

Indian cases were also cited to me explaining the meaning of the word "deposit" as used in s. 60 of the Indian Limitation Act. In *Mohammad Akbar Khan v. Attar Singh and Others* (1) (1936), A.I.R. P.C. 171, Lord Atkin said at p. 173:

> "The distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the depositee to seek out the depositor and repay him. He is to keep the money till asked for it. A demand by the depositor would therefore seem to be a normal condition of the obligation of the depositee to repay."

Also in the Indian case of *Chandiprasad v. Jugalkishore* (2) (1948), A.I.R. Nag. 377 at p. 380, column 2, para. 12, it is stated:

> "The word deposit is not defined in the Limitation Act and it does not appear that that word has been used in a technical sense, that is the return of goods or money in specie. Such a meaning would be contrary to the ordinary usage of language. Therefore art. 60 (Indian Limitation Act) should be deemed to apply to a case where one man places money in the hands of another on terms that an equivalent sum has to be paid back on demand."

In para. 16 of the amended defence the defendant pleaded that the plaintiff made a gift to her husband of all the moneys received by him and alternatively in para. 17 that she expressly or impliedly granted, allowed or permitted him the right to enjoy the usufruct of her separate properties.

In para. 16 the defence is referring to a gift (hiba) which is defined in the "Principles of Mahomedan Law" by D. F. Mulla (14th Edn.), para. 138

> "as a transfer of property made immediately, and without any exchange, by one person to another, and accepted by or on behalf of the other".

In para. 149 the three essentials of a gift are said to be

> "(1) a declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee and (3) the delivery of such possession as the subject of the gift is susceptible of by the donor to the donee".

In para. 17 of the defence the defendant is referring to an AREEAT which is defined in para. 170 of the same volume (Mulla (14th Edn.)).

> "The grant of a licence, resumable at the grantor's option, to take and enjoy the usufruct of a thing."

In an explanatory note it is stated that an areeat is not a transfer of ownership but a temporary licence to enjoy the profits so long as the grantor pleases. It is the making another person the owner of the usufruct without any consideration.

Mr. Inamdar for the defendant submitted that English equity can be used to gloss Mohamedan law. He was referring to the English presumption of advancement which arises where a wife residing with her husband and maintained by him knowingly allows him to receive the income of her property. In these circumstances, unless a contrary intention is proved, English law presumes that she has conferred a gift of the income on her husband. Mr. Inamdar cited a passage in the judgment of Lord Macnaghten quoting

Lord Cottenham in *Edward v. Cheyne* (No. 2) (3), 13 App. Cas. 385, at p. 388:

> ". . . 'separate money of the wife paid to the husband with her concurrence or by her direct authority, to be inferred from their mode of dealing with each other cannot be recalled; . . . the practice between the husband and wife is proper evidence to show acquiescence and concurrence'. Lord Cottenham refers the foundation of rule to the broad grounds of convenience and practice, and points out that the rule is necessary for the peace of families. Indeed, if the rule were otherwise it would be, as his lordship observes, impossible to tell what confusion might not be introduced into a family."

He also referred to the passage of Lord Parker in the judgment of the Privy Council case of *Hamira Bibi* and *Others v. Zubaida Bibi and Others* (4) (1916), 43 I.A. 294, on appeal from the Allahabad High Court, reported at p. 301 to the effect that the

> ". . . rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England are not foreign to the Mussalman System, but are in fact often referred to and invoked in the adjudication of cases."

This general principle of law is no doubt correct having reference to the scope of jurisdiction of the Indian tribunal in which the proceedings originated. It is stated at p. 84 of "Anglo-Muhammedan Law" by Wilson (4th Edn.).

> "Our Courts are to be guided by the principles of equity, justice and good conscience. The Mohamedan is the only law of this country in so far as the Legislature has adopted it as the law of British India, and so far as we see clear authorities in it on a particular point. In all cases, therefore, where there is no clear and positive authority in the Mohamedan law, I think it is our duty to follow the dictates of justice and good conscience."

See also the "Principles of Muhammedan Law" by Tyabji (3rd Edn.), p. 88 where the learned author makes it clear that the expression

> "justice, equity and good conscience is generally interpreted to mean rules of English law, if found applicable to Indian society and circumstances".

In His Highness the Sultan's Court the position is different. A clear distinction is made between the jurisdiction exercised by that court and Her Britannic Majesty's High Court for Zanzibar which is created and exercises jurisdiction under the Zanzibar Order-in-Council, 1924. I quote from Vaughan's "Dual Jurisdiction in Zanzibar" at p. 37:

> "Until the year 1908 the only law enforced in the courts of His Highness the Sultan was Mohamedan law and it is still provided by s. 7 of the Courts Decree 1923 (Cap. 3) under which the present courts of His Highness the Sultan are constituted that 'in civil matters of the Law of Islam is and is hereby declared to be the fundamental law of the Protectorate'."

Mr. Inamdar referred me to a Privy Council decision *Fatuma binti Mohamed bin Salim Bakhshuwen v. Mohamed bin Salim Bakhshuwen* (5), [1952] A.C. 1. The broad principle that Mohamedan law does not vary from one British territory to another and that decision of the Privy Council given on appeals from India are equally binding on the Court of Appeal for Eastern Africa must be read subject to the qualification that there is no local law on the subject making alterations to the particular rule of Mohamedan law.

Counsel on both sides referred me to *Wakf Commissioners v. Public Trustee* (6), [1959] E.A. 368 (C.A.) at p. 373 where Windham, J.A. says at para. F:

> "In view of the mandatory terms of this section (s. 4 of the Kenya Mohamedan Marriage, Divorce and Succession Ordinance, Cap. 148) I consider that the principles of equity, even if otherwise applicable, are expressly excluded . . ."

It seems to me that I must decide this case in accordance with the fundamental principles of Mohamedan law without the assistance of English principles of equity relating to advancement. Going back to first principles it would be wrong to apply principles of equity which were devised to suit Christian society in England during the last century in order to import a presumption whereby to gauge the intention of a Muslim husband and wife living in present-day Zanzibar whose social and cultural background is very different from that of Victorian England. If hardship or injustice is liable to be caused in a particular matter by following too closely the fundamental law of Islam it is open to the Legislature to remedy the matter by local Decree of His Highness the Sultan. I also refer to the judgment of Sir John Beaumont in the case of *Nawazish Ali Khan v. Ali Raza Khan* (7) (1948), A.I.R. P.C. 134 at p. 139:

> "Their lordships think that there is no difference between the several schools of Muslim law in their fundamental conception of property and ownership. A limited interest takes effect out of the usufruct under any of the schools. Their lordships feel no doubt that in dealing with a gift under Muslim law, the first duty of the court is to construe the gift."

As regards the two principal witnesses in the case the plaintiff is an elderly Arab lady who was kept by her husband for most of the fifty years of their married life in strict purdah. She was uneducated in the ways of the world and had no knowledge of business. She and her husband were deeply attached and she trusted him and was sure of her hold over him, so much so that when some twenty years ago he ventured to marry a second wife she had no doubt that he would shortly return to her, as indeed he did within a month or so. She was commonly known as the "lady of the top floor". She rarely ventured into the streets. She never entered a bank and had no banking account until defendant opened one for her after her husband's death. She has no knowledge of any language except Swahili and cannot write in any language except her name in Arabic characters. I believe that occasionally, when he required to consult her, she visited his office in the ground floor of the house where they lived in Zanzibar. She had no idea whether he was mixing her moneys with his moneys. She never interfered with his management of her estates. As a Muslim woman she possessed definite rights over her own property. See "Institutes of Mussalman Law" by Abdur Rahman (1907 Calcutta) art. 206, and "Mohammedan Law, Vol. II" by Seyed Ameer Ali (2nd Edn.) at p. 17 and p. 18 for a description of the property status of a Muslim woman as compared with that of a woman in a western country before the advent of the Married Woman's Property Act, 1882. As a witness she impressed me. She was at first inclined to be reserved in her demeanour and remote like a recluse but later she warmed to her story. She impressed me as genuinely trying to tell the truth as to these events so far as her limited experience allowed her to understand them. As regards the defendant I say at once that his story that plaintiff told him that she had made a gift of her income to her husband is a fabrication. Until this remark came out in his cross-examination there had never been any hint of such a conversation. His counsel never cross-examined the plaintiff on the matter and never asked him any question on the subject in examination-in-chief. When he let slip the remark early in his cross-examination it came as a surprise to everyone in court. That he was telling a deliberate

lie and was not the victim of a careless slip of the tongue was amply made clear during the course of the cross-examination when learned counsel continued to press him on the matter. I was not impressed with the defendant as a fairminded witness or as a witness to truth.

But that is not the end of the matter. In addition to the direct evidence there is a body of circumstantial evidence whose correct evaluation will assist in indicating where the truth lies. The importance of this circumstantial evidence lies in any light it can shine on the conduct of the plaintiff and the deceased. How is their conduct consistent with a deposit or a gift of the income or usufruct? The shamba at Mbaleni was purchased in the name of the plaintiff for Shs. 125,500/-. The indenture of conveyance dated November 26, 1940 recites that the purchase price of Shs. 125,500/- was paid by the purchaser to the vendor. At the back page of his notebook the deceased recorded rough figures starting from the year 1940 and ending with the year 1953 which appear to represent taking from the Mbaleni clove crops. There is also the evidence of the deceased's overseer Abdalrahman, to the effect that he kept the Mbaleni crops stored separately on deceased's instruction and that he also made a seperate note of Mbaleni expenses on the deceased's instructions. Defendant also admitted in the course of his evidence that the Mbaleni crop belonged to the plaintiff. This being so it is interesting to try to trace the source of the purchase money paid for Mbaleni. [The judge here referred to withdrawals from the bank accounts of the deceased on August 15, 1940, of two sums of Shs. 90,000/- and Shs. 26,000/- respectively and that the source of most payments into the deceased's No. 1 account, Mombasa, was the rents from the plaintiff's properties in Kenya. He continued:] I find it conclusively proved that Shs. 96,000/- of the total price paid for Mbaleni came from the plaintiff's money. I now turn to examine the ownership of the Shs. 30,000/-. Deceased's No. 2 account, Mombasa, was opened on July 20, 1935, with a credit of Shs. 93,408/46 "Pro. of ZBR Dft" which I understand to mean was remitted by Zanzibar bank draft. Mr. Inamdar has submitted that there is no evidence that this money belonged to the plaintiff. He submitted that, as it was used to open a bank account in the name of the deceased, the proper inference is that this sum was money belonging to the deceased. A glance at this account, as it appears at p. 118 of exhibit "A", shows that it was mainly dormant. Until the death of the deceased in 1956 there were only seven debits, including the debit of Shs. 30,000/-. There was only the single credit of Shs. 93,408/46 over this period of twenty years. I have no evidence as to what the other six debits relate to. It was not explained in evidence why this No. 2 account was opened by the deceased since he resided in Zanzibar and had his main business interest there. I would have thought that No. 1 account, Mombasa, would have been enough. Mr. Inamdar admitted in his closing speech that it was common ground that deceased had no income-bearing property in Mombasa. I gained the impression during the trial that deceased used to draw upon moneys in his No. 1 account, Mombasa, to pay any expenses which he incurred on his visits to Kenya. Accepting that deceased owned no property in Kenya it is curious that he should remit a large sum of Shs. 93,408/- and allow it to lie dormant for over twenty years. On the evidence as a whole I consider that the proper inference to draw is that the deceased regarded this account as containing money belonging to his wife. I make a finding that Mbaleni was purchased for the plaintiff by the deceased out of the accumulated income arising from the plaintiff's properties in Kenya and that deceased knew that it was her money.

Another piece of evidence which has weighed with me is the file, exhibit "Z", which the plaintiff says that she found upstairs in a box after her husband's death. It is a red file and bears on the outside in deceased's handwriting the words "Old file completed". It is important because in it are filed from January, 1932 until December 21, 1937 copies of the rent returns and paying-in slips

relating to the plaintiff's properties in Kenya. Other copies of these rent returns and paying-in slips are lodged in the file from Sir Ali bin Salim's office to which I have already referred. The inference I draw is that the deceased was a careful man in preserving records concerning his wife's properties and that other files similar to exhibit "Z" were also kept by him but have in some unexplained manner disappeared. I reach the conclusion that deceased kept these papers so filed together because he recognised that it was income belonging to his wife.

In exhibit "Z" is found preserved in chronological order with other documents . . . a formal letter from the N.B.I. in Kenya dated December 31, 1932 informing him that his current account had that day been balanced by Shs. 48,635/46 due to him and that this amount has been carried forward to his credit in a new account. At p. 124 of exhibit "A" under date December 8, 1932, his No. 1 account, Mombasa, balanced at this sum. The finding of this letter carefully preserved among rent returns relating to his wife's properties lends significance to the deceased believing at the time he placed it there that the money in No. 1 account, Mombasa, belonged to his wife. These acts of the deceased can only be satisfactorily explained on the footing that he was managing the estates of the plaintiff by way of deposit and not as a gift.

It is said by the defence that the true interpretation of the evidence reveals that the deceased has mixed his moneys with the moneys which he received from her properties both in Kenya and Zanzibar and that there was a gift of her moneys. As regards the moneys received for premium, ground-rents and compensation listed in list "C" to annexure "C" of the plaint the source of all these payments can be traced in the evidence. The fact that the moneys were paid into deceased's bank account does not amount to a mixing. The plaintiff's endorsing the cheques to the deceased carries no implication of a gift. She was illiterate and had no banking account of her own. The only way in which she could cash the cheques was by endorsing them and there was no person more convenient, near at hand, than her literate husband whom she trusted. He was a product of Cairo University. She was known as the "lady of the top floor". Compensation paid on the compulsory acquisition of property is, I comprehend, in the nature of corpus or capital sums as distinct from the usufruct or income. It is to these moneys, I comprehend, that the defence of gift (hiba) as distinct from the defence of areeat is directed. Ground-rents and premium are, I comprehend, usufruct or income. As regards the rent returns listed in lists "A" and "B" to annexure "C" of the plaint the origin of all of these payments can be separately traced. Every item in deceased's No. 1 account, Mombasa, except three, relates to a rent return. Over the years the account reveals debits. They are few and those unexplained are comparatively small when compared with the total of the explained credits and the only large debit of Shs. 96,000/- with which I have already dealt. List "B" to annexure "C" reveals a few cash payments made to the deceased of small sums at rare intervals. In a file produced from the office of Sir Ali bin Salim are a few receipts for small cash sums signed by the deceased. I am satisfied that this was money advanced by Sir Ali bin Salim's office to deceased to meet his expenses when he was on an occasional visit to Mombasa. It is possible that deceased repaid these small loans but it is immaterial whether he did or not since I am satisfied that they are sums spent on his expenses in connection with visits concerning his wife's properties.

I find that there was no mixing of the income from these properties.

As regards the plaintiff's properties in Zanzibar, which the deceased personally managed, the position is more obscure. The deceased was a careful man, even miserly in the way he treated money but I don't think that he had much knowledge of business method in the accepted sense or knowledge of how to keep accounts. Various records kept by the deceased have been produced. They seem to be a record of

expenses incurred for wages and other matters and

possibly receipts in respect of shambas in Zanzibar. They appear to include shambas owned by him and shambas owned by the plaintiff. No balance of expenditure over revenue is anywhere struck. It is difficult to think of these diaries as anything more than aide-memories kept by the deceased for his own interest. I believe that the deceased used to manage his own and his wife's shambas in Zanzibar from his office in his house. I think that he paid out from a drawer in this office moneys to meet day-to-day expenses concerning the shambas and perhaps household expenses and that he put into the same drawer receipts of moneys from the shambas. I don't think that he kept moneys received and expended on his wife's shambas separate from moneys received and expended on his own shambas. A glance at deceased's accounts with National and Grindlays Bank Ltd., Zanzibar, would seem to confirm the evidence of the overseer, Abdulrahman, that deceased did not like withdrawing money from the bank. Over the years from 1945 there were few operations on the accounts. They are mainly for substantial sums. This would seem to confirm Abdulrahman's evidence that it was deceased's habit to accumulate money in his drawer and pay in when a large sum had collected. Similarly he withdrew money when a large sum was required. I draw the inference that deceased used the combined moneys from his own and his wife's shambas in Zanzibar for running those shambas. Even though he mixed the moneys from Mbaleni the note (exhibit 7) taken in conjunction with the other evidence relating to Mbaleni is a recognition that he regarded the Mbaleni income as the property of his wife, and that he was not authorised to do with it as he liked. Owing perhaps to want of knowledge of how to keep business accounts and perhaps indolence he kept no true account of the Mbaleni shamba. The inference is that he mingled the moneys but not that he regarded the income from Mbaleni as a gift to him from his wife. [The judge went on to refer to certain transactions concerning the deceased's bank accounts at Zanzibar and continued:] The overall impression I form from deceased's Zanzibar bank accounts and from his management of the Zanzibar properties is that he did mingle his own and his wife's moneys.

The matter is not important because I feel sure that she did not know what was going on and that she did not consent or acquiesce in any mixing. He was a rich man on his own account. There was no economic necessity for him to have to resort to the use of her income in order to enable them to live. My impression is that even though he was a rich man the deceased was tight with money and I think that in consequence the money spent on personal or household expenses was slight. The plaintiff lived in such strict seclusion that I doubt if she often got opportunity to go shopping in the streets or to come into contacts which encouraged her to spend money on herself. Deceased was a reserved man not given to speaking openly about his money affairs. Yet in spite of this, if there had been a gift to him of his wife's income, I would have expected some close relative like the witness, Said bin Seif el-Busaidi, the eldest surviving male of that family, or the witness, Ali bin Ahmed el-Riyami, a life-long acquaintance, to have heard. Neither of the witnesses from the office of Sir Ali bin Salim, who had been in contact with deceased for years over the management of his wife's estates, gained the impression that there had been an areeat or gift of the income. I accept as the truth Mr. Saldanha's answer after he had admitted that in correspondence with deceased he often used the words "our" or "your" in referring to the properties. "By your I meant that he was managing the plot". If there had been a gift of the income by the wife what would have been easier when the lawyers presumably drew up the power of attorney in 1945 to go on to relate when referring to the

> "handing over of the net proceeds of rent or other moneys realised in respect of my immoveable properties to my husband Seif bin Suleiman against a proper receipt or as he may in writing direct from time to time",

that she had given the proceeds of rent, etc., as a gift to her husband during his life.

I have already said enough concerning my opinion of the relationship between the plaintiff and the deceased, the disparity between their educational attainments, to show my belief that no inference in favour of there having been a gift can be drawn from the fact that during their long life together she never asked him for a receipt or any paper to show what was the nature of their arrangement or made any demand on him for the return of the moneys. Only once did he give her a receipt and that was for Rs. 50,000 which she lent him. She distinguishes this transaction for the reason, which I accept, that she regarded this money as her own money in a different sense than the income accruing from her inherited properties. The Rs. 50,000 represented proceeds of the sale of her jewellery, and unspent money given to her by her father in his lifetime. Deceased gave her the receipt unasked. After his death she tore it up because she did not want it to be said that he had borrowed from her. He had never asked her for another loan. Also no adverse inference can be drawn against the plaintiff from the fact that she remained silent for some eighteen months or so after her husband's death. The fact is that the defendant was her late husband's brother and though she did not know him well at the time of death she had no reason to distrust him. As time passed she became increasingly uneasy about what she considered was her own money as distinct from the money belonging to her late husband's estate. No adverse inference can be drawn against her from her failure to reply to the defendant's three letters suggesting a division of the estate. She was illiterate and did not know where to turn for advice. She became truly alarmed after she had signed the paper dated June 9, 1958 acknowledging that she had received from the defendant as administrator the sum of Shs. 28,298/02

> "in payment of my share in the net estate left in Mombasa by my husband the late deceased".

She was alarmed after thinking the matter over because she believed that her late husband had left no money of his own in Mombasa. To her recollection it was her money. She received a summons in a suit filed by defendant to obtain the directions of the court concerning the division of the estate. She consulted Messrs. Wiggins and Stephens. In the result the lawyers' letter was written by Messrs. Wiggins and Stephens on behalf of the plaintiff to Messrs. Inamdar and Inamdar on behalf of the defendant. This is the first intimation in the correspondence that the plaintiff was demanding the return of her income deposited with her husband during his lifetime. Incidentally it is interesting to note that this sum of Shs. 28,298/02 was paid out of deceased's No. 2 account, Mombasa, and together with two other sums of Shs. 5,000/- and Shs. 5,105/54 respectively payable in favour of the defendant as administrator exhaust the credit standing in that account (see p. 118 of exhibit "A"), on June 16, 1958. As regards the deceased's No. 1 account, Mombasa, after the debit of Shs. 96,000/- on August 15, 1940 credits were allowed to accumulate to a balance of Shs. 80,792/01 shown at March 2, 1951. After that date rent returns were paid directly by the Mombasa agents to the credit of deceased's account at the Standard Bank, Zanzibar. From March, 1951, deceased's No. 1 account, Mombasa, remained dormant until after his death the balance of Shs. 80,792/01 was withdrawn by two cheques, dated August 15, 1958 and June 16, 1958 totalling Shs. 79,788/51 in favour of the defendant as administrator and one cheque dated August 15, 1958 in favour of Inamdar and Inamdar.

The defence of estoppel was raised in the amended defence. Counsel for the defence has not referred to it during the trial. My understanding is that he has abandoned it and I need not discuss it.

My finding is that the plaintiff has proved the arrangement whereby the deceased agreed to receive the income and other proceeds of her properties during his life and hold them on deposit for her benefit. After his death a demand for the payment of such moneys has been made on her behalf on the defendant as administrator of her late husband's estate. He refused to acknowledge her demand and has put her to the proof. Her own evidence together with the accumulated effect of the other evidence, which I have accepted, lead me to the irresistible conclusion that her claim is proved up to the hilt and that she is entitled to succeed.

I order that the defendant in his capacity as administrator is liable to account in respect of and to the extent of the assets in his hands.

I order that an account be taken on that basis with direction that where precise details are absent owing to books being absent evidence be taken to ascertain the best estimates.

On the subject of costs I am of opinion that defendant was properly sued both in his capacity as administrator and in his personal capacity since he is personally interested as an heir in three-quarters of the deceased's estate.

The defendant by his belated admission under cross-examination that he was not now denying the receipt by the deceased of the plaintiff's income has increased the costs of this case. He and his advisers have not been frank in disclosing material documents in the preliminary application relating to discovery. The deceased's Mombasa banking accounts have played an important part in assisting the plaintiff to prove her case as has also the notebook kept by deceased (exhibit 7). I am unable to agree with counsel for defence's statement in court trying to justify para. 2 of his client's affidavit relating to discovery filed on October 31, 1959. My strong impression is that the defendant and his advisers have tried to make it as difficult as they could for the plaintiff to prove her case. If he had succeeded, defendant as heir would have been entitled to a three-quarter share. Perhaps greed has overshadowed his other duty as administrator of a deceased estate. It would in my opinion be wrong to order that the costs of this action be paid out of the estate as the effect would be that he is defending at the widow's expense. Costs incurred to date will already be high. More costs will be incurred when the accountants commence their work.

I order that plaintiff's costs be paid by defendant No. 2 personally and that the costs of defendants be borne by defendant No. 2 personally, and shall not be borne by the estate. I certify costs of two counsel.

Order for an account and where precise details are not available that evidence be taken.

For the plaintiff:
Wiggins & Stephens, Zanzibar
P. S. Talati and *K. S. Talati*

For the defendant:
Inamdar & Inamdar, Mombasa
I. T. Inamdar and *S. T. Inamdar*

Akbar Suleman Ladha v R

[1962] 1 EA 261 (HCT)

Division:	High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	18 April 1962
Case Number:	127/1962
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Customs – Charge – Interfering with goods subject to customs control – Labels torn from packed goods in dock area – No evidence that goods in customs area – Whether tearing label from package constitutes interference with goods – Meaning of "goods" and "package" – East African Customs Management Act, 1952, *s.* 2, *s.* 13, *s.* 56 (2), *s.* 108, *s.* 149 (*f*), *s.* 167 – *Criminal Procedure Code*, *s.* 171, *s.* 206 (1) (*T.*) – *Indian Evidence Act*, 1872, *s.* 24.

Editor's Summary

The appellant, a clerk employed by a clearing and forwarding house, was charged with interfering with goods subject to Customs control contrary to s. 149(*f*) of the East African Customs (Management) Act, 1952. The main evidence was that the appellant was seen at the Tanganyika shed in the Dar-es-Salaam dock area to tear off the labels tied by wire to two bundles of flush pipes and to throw these under some pallets nearby. There was almost no corroboration of this evidence except an oral statement allegedly made by the appellant to a Customs official (not called as a witness) to the effect that he had removed the labels. This evidence was tendered by another witness who heard the conversation between the appellant and the Customs official. At the trial no objection was taken by defence counsel to this evidence. The appellant did not give evidence or make an unsworn statement but called two witnesses who said that ten bundles of flush pipes had a few days before the incident which was the subject of the charge been cleared by another clearing and forwarding agent for the consignee of the two bundles of flush pipes from which the labels had allegedly been torn. The magistrate accepted the prosecution evidence and without referring specifically in his judgment to the alleged statement by the appellant to the Customs official, he convicted the appellant and sentenced him to imprisonment. On appeal against conviction it was submitted inter alia that there was no evidence that the goods were subject to Customs control, and that an offence contrary to s. 149 of the Act could only be committed by a person with a fraudulent intent as to which there was also no evidence. Further it was contended that there was no evidence of any attempt to evade duty and even if the appellant did remove the labels it was not an act committed "in any matter relating to the Customs" in the context of s. 149.

Held –

(i) no Customs official had given evidence and without evidence as to the location of the Tanganyika shed, the court could not assume or infer that the goods remained in the Customs area.

(ii) although there were separate definitions for "goods" and "package" in the Act, it could not be said that it was an offence to interfere with goods and not an offence to interfere with the material in which the goods are contained or packed; the offence created by s. 149(*f*) of the Act embraced any alteration to, movement of or interference with the material in which imported goods are packed,

with the articles by which they are secured or the label indicating the name of the consignee or his agent.

(iii) the Crown had failed to prove that the appellant had done any act “in any matter relating to the Customs”.

Appeal allowed. Conviction quashed and sentence set aside.

Cases referred to in judgment:

(1) *Samwiri Senyange v. R.* (1953), 20 E.A.C.A. 277.

(2) *Desiderio Kawunya v. R.* (1953), 20 E.A.C.A. 281.

(3) *Willy John v. R.* (1956), 23 E.A.C.A. 509.

Judgment

Mosdell J: The appellant was convicted in the district court of Dar-es-Salaam at Dar-es-Salaam on March 13, 1962, of interfering without authority with goods subject to Customs control contrary to s. 149(*f*) of the East African Customs Management Act, 1952 (hereinafter called "the Act"). He was sentenced to six months' imprisonment. On March 14, 1962, he was released on bail by this court and at the hearing of his appeal his bail was extended until the determination thereof. He is still therefore on bail.

The appellant had also been charged in the same charge with another similar offence but at the conclusion of the case for the prosecution the learned resident magistrate held that there was no case for the appellant to answer on this count and he was discharged under the provisions of s. 205 of the Criminal Procedure Code. The particulars of the offence of which he was convicted read as follows:

> "Akbar Suleman Ladha on the seventh day of February, 1962, at about 09.45 hours in the port area in the Extra Province (sic) of Dar-es-Salaam, without authority, interfered with two bundles of flush pipes, goods being (sic) subject to Customs control, contrary to s. 13(*a*) of the Customs Management Act (sic) 1952, to wit, removed the labels thereon to destroy the marks of the consignee, in order to take delivery of them, being not (sic) his property".

It would be a euphemism to state that these particulars are badly drafted. It would have been better had they read as follows:

> "Akbar Suleman Ladha on the seventh day of February, 1962, at Dar-es-Salaam in the Extra Provincial District of Dar-es-Salaam in a matter relating to the Customs, without authority, interfered with two bundles of flush pipes, being goods subject to Customs control."

However, at his trial the appellant was represented by counsel. That the offence with which he was charged in this count was one contrary to s. 149(*f*) of the Act was abundantly clear and no prejudice was occasioned to the appellant by the careless drafting of the particulars. Moreover, this matter has not been made a ground of appeal.

The evidence disclosed that on February 7, 1962, at the Tanganyika shed in the dock area of Dar-es-Salaam the appellant was seen by one Hamisi Juma, a prosecution witness, to tear labels from two bundles of flush pipes. The appellant at the material time was a clerk working for the Tanganyika Clearing and Forwarding House. Hamisi Juma was a labourer working for the Landing and Shipping Company of East Africa Limited (hereinafter called "the company"). The labels were tied to the bundles with wire. This witness also saw the appellant throw these labels under some pallets which were nearby. This evidence the learned resident magistrate credited, and from a perusal of the record there appears to have been no reason why he should not have done so. There was no other directly corroborative evidence of this fact apart from a statement alleged to have been made by the appellant to one Bramly, who at the material time was in charge of the central documents office of the company at Dar-es-Salaam. He

deposed that on February 8, 1962, he saw the appellant in the office of one Taylor, who apparently is a Customs official but

whose status was not disclosed in the evidence. He was not a witness at the trial. Taylor asked the appellant if he had removed the labels from the flush pipes and the evidence of Bramly proceeded:

> "At first he denied it and then after repeated questioning he admitted that he had removed the labels from the flush (sic) but the marks were illegible. Mr. Taylor asked him how it was possible to read 'Jiwanji' clearly from one of the labels. This being the mark of Jiwanji Hardware Stores, for which Tanganyika Clearing and Forwarding had no documents. The mark which they were clearing was Hukas. Taylor asked him whether he tore off someone's label, but did not receive any reply, although he admitted having done it."

At the trial no objection to the admissibility of this evidence was made by Mr. Shah for the appellant, and the learned resident magistrate admitted it, though in his judgment he made no reference to it. It is questionable whether he should have admitted it in view of the provisions of s. 24 of the Indian Evidence Act. It is clearly arguable that Mr. Taylor was a person in authority and that the repeated questioning of the appellant could have amounted to an inducement or threat having reference to the charge against the appellant proceeding from a person in authority and sufficient to give the accused grounds which would appear reasonable for supposing that by making it he would gain some advantage or avoid some evil of a temporal nature in reference to the proceedings against him.

However, in view of the absence of any reference to this evidence in his judgment, the matter does not appear to have carried any weight in the learned resident magistrate's mind and he appears to have based his finding of guilt in the appellant upon other evidence, principally that of Hamisi Juma who actually saw the appellant remove the labels from the two bundles of flush pipes.

The appellant did not give evidence or make an unsworn statement at his trial but called in his defence two witnesses who both referred to ten bundles of flush pipes which had been delivered to J. P. Patel & Company, a clearing and forwarding agent operating in Dar-es-Salaam, on January 30, 1962, and a declaration and disposal order was produced by the defence to show that on January 23, 1962, ten bundles of flush pipes and thirty cisterns had been cleared by J. P. Patel & Company on behalf of Jiwanji Hardware Stores Ltd., apparently the consignee of the two bundles of flush pipes, the subject of the charge. There was no evidence, however, to show where these two bundles of flush pipes came from. The prosecution, however, did not allege that the appellant removed the labels from a part of this consignment and it appears to me to be immaterial, for the purposes of this case, whether these two bundles of flush pipes were or were not part of the latter consignment. It is stated in ground 2(*d*) of the appellant's petition of appeal (wrongly called memorandum of appeal):

> ". . . in any event the prosecution case was too confused to justify conviction in that the prosecution allegation that the labels belonged to ten bundles of flush pipes consigned to Jiwanji Hardware Stores could not possibly have been true and there was evidence on the record that the said ten bundles of flush pipes consigned to Jiwanji's Hardware Stores had been delivered prior to the date of the alleged offence."

I cannot deduce from the record that the prosecution was alleging that the two bundles of flush pipes from which the appellant was seen to have removed labels were a part of the consignment of ten bundles of flush pipes consigned to Jiwanji Hardware Stores Ltd. Admittedly, one of the labels which was produced in the lower court came from one of the bundles of flush pipes in question. It bore the letters "J.P." which might be taken to indicate that a

reference was intended to be made to the agent, "J. P. Patel & Company", to whom the ten bundles of flush pipes were consigned, but, as I understand the position, it was not part of the prosecution case that the two bundles of flush pipes from which it was alleged the appellant removed the labels were part of the consignment of ten bundles for Jiwanji Hardware Stores Limited.

I pass now to the matters of law which were raised in this appeal. But before doing so it is necessary to set forth several provisions of the Act. Section 149 reads as follows:

> "Any person who, in any matter relating to the Customs:
>
> (*a*) makes any entry which is false or incorrect in any particular; or
>
> (*b*) makes or causes to be made any declaration, certificate, application, or other document, which is false or incorrect in any particular; or
>
> (*c*) when required in accordance with the provisions of this Act to answer any question put to him by an officer, refuses to answer such question or makes any false or incorrect statement in reply thereto; or
>
> (*d*) obtains any drawback, rebate, remission, or refund, of duty which to his knowledge he is not entitled to obtain; or
>
> (*e*) in any way is knowingly concerned in any fraudulent evasion of the payment of any duty; or
>
> (*f*) except by authority moves, alters, or in any way interferes with, any goods subject to Customs control; or
>
> (*g*) brings into the Territories, or has in his possession, without lawful excuse any blank or incomplete invoice, bill head, or other similar document, capable of being filled up and used as an invoice for imported goods; or
>
> (*h*) counterfeits or in any way falsifies, or knowingly uses when counterfeited or in any way falsified, any document required or issued by, or used for the purposes of the Customs,
>
> shall be guilty of an offence against this Act and liable on conviction therefore to imprisonment for any term not exceeding three years, or to a fine not exceeding three thousand shillings, or to both such imprisonment and fine."

Section 13 (ibid.), so far as it is relevant, reads as follows:

> "(1) the following goods shall be subject to Customs control:
>
> (*a*) all imported goods including goods imported through the post office, from the time of importation until delivery for home consumption or until exportation, whichever first happens."

In s. 2 (ibid.) "goods" are interpreted as follows:

> " 'goods' include all kinds of articles, wares, merchandise and livestock, and where such goods are sold under the provisions of this Act the proceeds of such sale."

In the same section "package" is interpreted as:

> " 'package' includes every means by which goods for conveyance may be cased, covered, enclosed, contained, or packed."

Section 56 (2) (ibid.) reads as follows:

> "Subject to the provisions of s. 42, where any goods have been warehoused in a bonded warehouse, then, except with the approval of the proper

officer, such goods shall not be moved or interfered with in any way, nor shall any alteration be made in the marks or numbers of any package."

Section 108 (ibid.) reads as follows:

"Where any goods liable to duty according to weight are imported in any package, and such goods are intended for sale, or are normally sold retail, in such package, then, if such package –

(*a*) is not marked or labelled with the net weight thereof; or

(*b*) is not commonly sold as containing, or as reputed to contain, a specific quantity or weight,

and in either such case, the owner of such goods is unable to satisfy the proper officer of the correct net weight thereof, the goods shall be liable to duty according to the gross weight of such package and its contents."

Section 167 (ibid.) reads:

"In any proceedings under this Act –

(*a*) it shall not, unless it is expressly so provided, be necessary to prove guilty knowledge;

(*b*) the onus of proving the place of origin of any goods, or the payment of the proper duties, or the lawful importation, landing, removal, conveyance, exportation, carriage coastwise, or transfer, of any goods, shall be on the person prosecuted or claiming anything seized under this Act."

Ground 2(*a*) of the petition of appeal is as follows: "The goods in question were not subject to Customs control". It is of course a necessary ingredient of the offence with which the appellant was charged that the goods which he is alleged to have interfered with are goods subject to Customs control. Were the goods, namely the two bundles of flush pipes, with which the appellant was alleged to have interfered, "subject to Customs control" at the material time? It will be seen from s. 13(1)(*a*) of the Act that goods are deemed to be subject to Customs control if they are imported, as indeed the two bundles of flush pipes were – as to this there was no dispute – "from the time of importation until delivery for home consumption". It is the interpretation to be placed on this latter phrase which causes some difficulty. It was submitted by Mr. Shah that there was no evidence that on February 7, 1962, the two bundles of flush pipes were in Customs control because delivery had taken place on January 30, 1962. I have already expressed my opinion that this is a "red herring". The question here is, had the two bundles of flush pipes in the Tanganyika shed on February 7, 1962, been delivered for home consumption? When does delivery take place? Mr. Konstam for the Crown submitted that it takes place when the goods have been handed over by the company to the consignee or his representative, in other words, when the consignee or his agent has authority for taking them out of the docks. It is at that moment that they are delivered. It is a great pity that a senior Customs official did not give evidence in this case. No Customs official gave evidence. It would have been advantageous to say the least if such officer had explained the machinery of Customs clearance in Dar-es-Salaam and the inter-relationship between the Customs Department and the company. A court cannot take judicial notice of such matters and an explanation of the inter-relationship between these two organisations would have rendered a solution to the problem as to when goods cease to be under Customs' control far easier to attain. As things were, far too much was left to inference.

In the absence of any statutory definition of the phrase "delivery for home consumption" one must, I think, draw on one's resources of common sense,

and I interpret the phrase to mean that when imported goods have been cleared by the Customs through the agency of the company, and by that organisation handed over to the consignee or his agent, then and at that time the goods have been delivered for home consumption. Had that step been reached in the instant case? The evidence on this point is exceedingly vague. Indeed it is only by inference that the trial court could, and this court could, even deduce that there was no authorisation, documentary or otherwise, to the consignee for delivery of the two bundles of flush pipes by the company. Where were the two bundles of flush pipes when the appellant was seen to remove the labels therefrom? According to Hamisi Juma at "Gate No. 1" of the Tanganyika shed. No evidence was given as to the location of the Tanganyika shed. Am I to assume that it is within the Customs area as defined in the East Africa High Commission Customs Area Notice, being Legal Notice No. 25 of 1960? In my view I cannot so assume so that, even were I to hold that goods remain in Customs' control until they leave the Customs area, it has not been proved that Gate No. 1 of the Tanganyika shed is within the Customs area. Moreover I do not consider I would be justified in drawing the inference from the evidence that the Customs Department had not authorised delivery of the two bundles of flush pipes to the consignee, or that a representative of the company had not so delivered them.

It is not clear on the evidence in this case, in my view, that at the material time the two bundles of flush pipes had not been delivered for home consumption. The burden of proof in this matter was on the Crown. I hold, therefore, that the Crown did not prove that at the material time the goods were subject to Customs control. This finding would be sufficient to dispose of the appeal in the appellant's favour, but in case I am wrong in so holding I proceed to consider the other matters raised.

Ground 2(*b*) of the petition of appeal is as follows:

> "That the interference by the appellant with the labels did not amount to interference with goods within the meaning of the Act".

Here Mr. Shah for the appellant raised a rather subtle point. He submitted that as "goods" and "package" were separately defined in the definition section of the Act, namely, s. 2, and in view of the absence of any reference to "package" in s. 149(*f*) of the Act, it was an offence only to interfere with goods and not an offence merely to interfere with the material within which goods are contained, or the label attached thereto.

Further, to draw the distinction between "goods" and "package" Mr. Shah referred to s. 56 (2) and s. 108 of the Act (quoted earlier herein). Mr. Konstam for the Crown countered with the submission that although it was perfectly true that there were separate definitions of "goods" and "package", the definition of goods could hardly be defined more widely and there was nothing in the definition section or anywhere else in the Act to suggest that "goods" did not, in the present context, include the "package" within which they were contained and the labels attached thereto. Mr. Konstam submitted that pieces of paper, pieces of tin and wire are all articles, and hence within the definition of "goods". Moreover he supported this submission by the illustration that if polythene were a prohibited import, an importer could say, on the hypothesis that Mr. Shah's interpretation is the correct one,

> "If I cannot bring polythene is as goods I can wrap other goods in polythene and bring polythene into Tanganyika as a package."

This interpretation, Mr. Konstam submitted, would permit the importation of a prohibited article. With respect, I think Mr. Konstam's interpretation is the correct one. It would be absurd to say that if the material with which legally

imported goods are wrapped were to consist of a prohibited import it could nevertheless be imported because the goods did not consist of such material but only the package in which such goods were contained.

The offence created by s. 149(*f*) of the Act must, I think, be interpreted so as to embrace any alteration, movement of or interference with, the material in which imported goods are packed, the articles with which they are secured and the label indicating the name of the consignee or his agent. This does not mean, of course, that in other contexts a distinction does not have to be made between "goods" and "package".

Ground 2(*c*) of the petition of appeal is: "The interference was not in respect of any matter relating to the Customs". Again the meaning of the phrase "in any matter relating to the Customs" is not defined. It was submitted by Mr. Shah that an offence contrary to s. 149 of the Act could only be committed by a person who had a fraudulent intent. In this case Mr. Shah submitted there was no evidence of any such intent: there was no evidence that the appellant sought to evade the payment of duty; and that in effect the Customs had ceased to be interested in the two bundles of flush pipes lying in the Tanganyika shed in the possession of the company and that, therefore, even if the appellant did remove the labels therefrom it was not an act committed "in any matter relating to the Customs".

Mr. Konstam for the Crown found some difficulty over the latter phrase but submitted that the difficulty arose because of bad drafting; and that so far as the offence created by s. 149(*f*) of the Act was concerned the phrase "in any matter relating to the Customs" was mere surplusage and did not carry the matter further one way or the other because by the terms of s. 149(*f*) the goods had to be subject to Customs control anyway. Mr. Konstam submitted that as the phrase "in any matter relating to the Customs" preceded all the sub-paragraphs of s. 149 it could not have the special meaning in connection with para. (*f*) that there had to be an intention to defeat the Customs. As I read s. 149 and in particular the words "in any matter relating to the Customs" the offences therein listed must be committed in connection with goods imported to Tanganyika and in which the Customs Department has an interest whether by way of the imposition of Customs duty thereon or by way of satisfying itself that the goods in question are not dutiable or are not prohibited imports, or that the correct duty has been paid thereon. If the words be thus interpreted then they are not out of place in connection with any of the sub-paragraphs in s. 149. Did the Crown prove in the instant case that the act of the appellant in removing the labels was done "in any matter relating to the Customs"? I think not. Again I refer to the lack of evidence from a Customs officer. At the material time the Customs Department may have ceased to be interested in the two bundles of flush pipes and hence, if my interpretation of the phrase be the correct one, the appellant's act was not one connected "in any matter relating to the Customs". I think there could be an offence contrary to s. 149(*f*) of the Act without any fraudulent intent but only if the Customs Department had not ceased to be interested in the goods in the sense I have mentioned.

It follows then that I decide two of the legal points raised in this appeal by the appellant in his favour, but there are some other aspects of the trial to which I must refer, although they were not raised in the appellant's petition of appeal. Firstly, it is not apparent from the record that the learned resident magistrate complied with the provisions of s. 206 of the Criminal Procedure Code. There is endorsed on the record, after the conclusion of the evidence of the prosecution witness Habib Hirji Kassum, "Close of prosecution case" and thereunder "Section 206 (1) of the Penal Code complied with. The accused". The words from "Section" to "accused" have been deleted and there is no indication from the record that the provisions of s. 206 were subsequently

complied with. I surmise that the learned resident magistrate, having written the words, deleted them when Mr. Shah for the appellant rose to submit that there was no case to answer. However, that is mere speculation, which is unnecessary. The accused was represented by Mr. Shah and it is apparent from the record that Mr. Shah did not wish the appellant to give evidence. He stated in his address at the close of the case for the defence, inter alia, "There is no need for the accused to give evidence". It is clear that had Mr. Shah desired the appellant either to give sworn evidence or an unsworn statement he would have advised him to do so. It is also abundantly clear that the appellant was aware of his rights to call witnesses, as indeed two defence witnesses were called. I am quite satisfied that the omission by the learned resident magistrate to comply with s. 206 of the Criminal Procedure Code did not in this case cause any injustice to the appellant and that he was not prejudiced thereby.

Another matter to which I must refer, although again it has not been raised in the petition of appeal, is the learned resident magistrate's failure to comply with s. 171 of the Criminal Procedure Code in that his judgment did not contain all the points for determination, his decision thereon and the reasons for his decision. He blithely dismissed Mr. Shah's submissions on the law, which were of some complexity, with the following comments:

> "Mr. Shah, amongst many other things, submitted that the goods in question were not subject to Customs control and that the removal of the labels did not amount to interference with goods.
>
> "I have given due consideration to it but it does not accord with the law for the time being in force in this country. I therefore hold that the goods were subject to Customs control and that removal of labels was an interference with the goods."

These comments fall far short of reasons for his opinion that Mr. Shah's submissions were incorrect in law. There is abundant authority for the proposition, however, that a defective judgment does not necessarily invalidate a conviction if there is sufficient material on the record to enable an appellate court to consider the appeal on its merits. See for example *Samwiri Senyange v. R.* (1) (1953), 20 E.A.C.A. 277, *Desiderio Kawunya v. R.* (2) (1953), 20 E.A.C.A. 281, and *Willy John v. R.* (3) (1956), 23 E.A.C.A. 509. In this particular case there is sufficient material on the record for this court to reach conclusions on all the matters of law not dealt with by the learned resident magistrate but raised in this appeal.

It follows that the appeal is allowed. The conviction is quashed and the sentence set aside. The appellant being at liberty on bail, no order for his release from custody is necessary.

Appeal allowed. Conviction quashed and sentence set aside.

For the appellant:
J. L. Shah, Dar-es-Salaam

For the respondent:
The Attorney-General, Tanganyika
M. G. K. Konstam (Crown Counsel, Tanganyika)

Mohanlal Pethras Shah v Queensland Insurance Company Limited
[1962] 1 EA 269 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	28 May 1962
Case Number:	49/1960
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rudd, J.

[1] Practice – Pleading – Defence – Amendment – Payment into court with admission of liability – Amendment subsequently allowed denying liability – At trial question of liability in issue – Judgment entered for defendant – Whether plaintiff entitled to judgment for amount paid into court before defence amended – Whether defence contained an admission as well as a denial of liability – Civil Procedure (*Revised*) *Rules*, 1948, *O. VI, r.* 17, *O. XXIV, r.* 1, *r. i and r.* 7 (*K.*).

Editor's Summary

The appellant sued the respondent company claiming under a policy of insurance a sum of Shs. 24,499/85 in respect of goods stolen in a burglary. The respondent company admitted the burglary but rejected the appellant's valuation of the loss and paid into court Shs. 10,000/- in satisfaction of the claim. Subsequently, the respondent company was granted leave to amend the defence by adding a paragraph alleging that at the time of the burglary there was a riot and, therefore, under the terms of the policy the company was not liable. At the hearing the issues were limited to the amount of the loss and whether there was a riot. The trial judge held that the burglary, in which seven to ten persons took part, was in the circumstances a riot, that the loss caused by the theft was thus directly occasioned by riot and that accordingly the suit must fail. On appeal it was submitted for the appellant that the amendment of the defence which introduced a denial of liability did not comply with the Civil Procedure (Revised) Rules, 1948, that the trial judge should have disregarded the amendment as incompetent and that he should have entered judgment for the appellant for at least Shs. 10,000/- paid into court with an admission of liability. It was also argued that the amendment did not alter the effect of the payment into court in satisfaction without a denial of liability which remained an admission of liability to the extent of Shs. 10,000/- and that the amendment should not have been allowed unless the company withdrew its admission of liability which it failed to do. Counsel for the respondent company submitted that the amended defence must be read as a whole as if it were the original defence, and that when so read, the amendment had the effect of changing the character of the payment into court with an admission of liability into one with a denial of liability coupled with an admission that, if the respondent company were liable, which was denied, the amount of the appellant's loss was Shs. 10,000/-.

Held –

(i) once the amendment to the defence had been made, the defence must be read as a whole as if the amendment had been incorporated from the beginning; accordingly the amended defence did not contain both an admission and a denial of liability.

(ii) the effect of the amendment was to convert the payment into court from a payment with an admission of liability into a payment with a denial of liability.

(iii) it was clear from the reply, the issues framed and the trial itself that the appellant had accepted that liability was an issue and the trial proceeded on that basis with no objection by the appellant.

Appeal dismissed.

Cases referred to in judgment:

(1) *Bonitto v. Fuerst Bros. and Co. Ltd*., [1944] 1 All E.R. 91.

(2) *Maple v. Shrewsbury* (1887), 19 Q.B.D. 463.

(3) *Chapman v. Westerby*, [1914] W.N. 64.

(4) *Hubback v. British North Borneo Company*, [1904] 2 K.B. 473.

(5) *Frazer & Haws Ltd. v. Burns* (1934), Lloyd, L.R. 216.

(6) *Williams v. Boag*, [1940] 4 All E.R. 246.

(7) *Sneade v. Wortherton Barytes and Lead Mining Company Ltd*., [1904] K.B. 295.

(8) *Warner v. Sampson*, [1959] 2 W.L.R. 109; [1959] 1 All E.R. 120.

The following judgments were read:

Judgment

Sir Ronald Sinclair P: This is an appeal from a judgment and decree of the Supreme Court of Kenya dismissing with costs a suit by the appellant against the respondent company claiming the sum of Shs. 24,499/85 representing the value of goods lost as the result of a burglary which loss, it was alleged by the appellant, was a risk covered by a policy of insurance entered into between the respondent company as insurers and the appellant as the assured.

The plaint was filed on December 24, 1958. Two burglaries are referred to in the plaint, one on June 25, 1958, and the other on August 23, 1958, but the claim is in respect only of the burglary which occurred on June 25, 1958. The original defence was filed on March 5, 1959. The material parts of this defence in relation to the burglary of June 25, 1958, read:

> "1. The defendant admits paras. 1, 2, 3, 4, 5, 8, 9 and 11 of the plaint . . .
>
> "2. In reply to para. 6 of the plaint, the defendant admits that on the 25th day of June, 1958 and on the 23rd day of August, 1958 burglaries took place at the plaintiff's premises which were insured by the defendant under the said policy referred to in the plaint but does not admit the loss of Shs. 24,499/85 in respect of the loss sustained on the 25th day of June, 1958 . . .
>
> "3. In reply to para. 7 of the plaint, the defendant does not admit the plaintiff's claim for Shs. 24,499/85 but does admit that it verbally through its Nairobi representatives and agents, agreed to pay to the plaintiff the sum of Shs. 8,000/- and therefore denies the allegation that the amount payable to the plaintiff was never clearly mentioned.
>
> "4. In reply to para. 10 of the plaint, the defendant rejects the plaintiff's claim for the sum of Shs. 24,499/85 being the alleged loss sustained by the theft on the 25th day of June, 1958 but by way of further defence pays into court the sum of Shs. 10,000/- in full and final satisfaction of the plaintiff's claim under the policy referred to in the plaint.
>
> "5. In reply to para. 12 of the plaint the defendant admits that the defendant . . . has offered to the plaintiff the sum of Shs. 8,000/- in respect of the alleged losses sustained by the plaintiff on the 25th day of June, 1958 the said sum of Shs. 8,000/- having been refused by the plaintiff".

The suit was set down for trial on October 8, 1959. On that date leave was given to amend the defence by the addition of a further paragraph (para. 6) and an order was made for a fresh hearing date to be fixed. Paragraph 6 reads:

> "6. Alternatively and without prejudice to paras. 4 and 5 of the defence the defendant denies that it is liable to pay the sum claimed or any other sum by virtue of the provisions of cl. 3(*c*) of the policy of insurance referred to in para. 3 of the plaint; the defendant denies liability on the ground that the policy does not cover loss or damage directly or indirectly arising from (inter alia) riot, and states that at the time of the alleged burglary there took place a riot within the meaning of the aforesaid condition."

According to the judge's note, the amendment was opposed by the then counsel for the appellant on the ground that it was a last-minute amendment and he had not had time to consider the law. On October 15, 1959 the appellant filed a reply in which he pleaded that there was no riot within the meaning of the condition in cl. 3(*c*) of the policy.

When the case came on for trial on May 3, 1960 the following issues were framed:

(1) Amount.

(2) Whether there was a riot.

Clause 3(*c*) of the policy of insurance referred to in para. 6 of the amended defence exempted the respondent company from liability for loss or damage directly or indirectly caused by, inter alia, riot. After hearing evidence, the trial judge held that the burglary, in which seven to ten persons took part was, in itself, in the circumstances a riot, that, therefore, the loss caused by the theft was directly occasioned by riot and that, accordingly, the suit must fail. However, he went on to consider the other issue, namely, the quantum of loss, and, after reviewing the evidence, stated that, if the riot point had not been taken, he would have been prepared to accept the appellant's evidence which was that his loss amounted to the sum claimed.

There is no appeal from the decision of the learned judge that in the circumstances of the case the burglary constituted a riot within the meaning of cl. 3(*c*) of the policy: but it is contended that the amendment of the defence by which the plea in para. 6 was added does not comply with the Civil Procedure (Revised) Rules, 1948, that the trial judge should have disregarded the amendment as incompetent and that he should have entered judgment for the appellant at least for the sum of Shs. 10,000/- for which the respondent company admitted liability in the defence.

In the defence the respondent company admits that on June 25, 1958, a burglary took place at the appellant's premises which were insured by the respondent company under the policy referred to in the plaint, denies, in effect, the loss of Shs. 24,499/85 as alleged by the appellant, but

> "by way of further defence pays into court the sum of Shs. 10,000/- in full and final satisfaction of the plaintiff's claim under the policy referred to in the plaint".

Rule 1 of O. XXVI of the Civil Procedure (Revised) Rules, 1948 provides:

> "1. Where any suit is brought to recover a debt or damages, any defendant may before or at the time of filing his defence, or at any later time by leave of the court, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may with a defence denying liability (except in suits or counterclaims for libel or slander) pay money into court which shall be subject to the provisions of r. 6: Provided that in a suit on a bond payment into court shall be admissible in respect of particular breaches only, and not of the whole suit."

Order XXVI is in substantially the same terms as O. XXII of the Rules of the

Supreme Court in England before it was amended in 1933 and English decisions relating to payment into court before that date can be followed.

It is common ground that before the defence was amended the payment into court in satisfaction without a denial of liability constituted, under the provisions of the above rule, an admission by the respondent company of liability to the extent of the Shs. 10,000/- paid in. Before the amendment the appellant had three courses open to him. First, he could have taken the money out and accepted it in full satisfaction. If he accepted it in full satisfaction within the time prescribed in r. 7 of O. XXVI he could proceed to tax and recover his costs. Secondly, he could have taken the money out and proceeded with the action. Thirdly, he could have left the money in court and still proceeded with the action. In any event he was bound to succeed to the extent of the money paid into court, though if he adopted either of the latter two courses he might suffer in costs: see *Bonitto v. Fuerst Bros. and Co. Ltd*. (1), [1944] 1 All E.R. 91. The appellant elected to leave the money in court.

Counsel for the appellant contended that the amendment did not alter the effect of the payment into court in satisfaction without a denial of liability which remained an admission of liability to the extent of Shs. 10,000/-: that the amendment introduced an inconsistency in the defence in that there was then both a denial and an admission of liability which is not permissible: that the amendment should not have been allowed unless the respondent company withdrew its admission of liability which it failed to do: that the trial judge should have disregarded the amendment by which a plea denying liability was added, and considered only the first issue as to the quantum of loss: that judgment should have been entered for the sum of Shs. 10,000/- at the least.

Counsel for the respondent company, as I understood him, submitted that the amended defence must be read as a whole as if it were the original defence: that when the amended defence is read as a whole, the amendment had the effect of changing the character of the payment into court from a payment into court which constituted an admission of liability to the extent of Shs. 10,000/- to a payment into court with a denial of liability coupled with an admission that, if the respondent company were liable, which was denied, the amount of the appellant's loss was Shs. 10,000/-: and that the trial judge was right in deciding first the issue of liability and dismissing the suit when that issue was determined in favour of the respondent company.

Rule 6 of Order XXVI provides that when a defendant pays money into court with a denial of liability, the plaintiff may within the time limited in r. 7 of the order accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, in which case he shall be entitled to have the money paid out to him, notwithstanding the defendant's denial of liability, whereupon all further proceedings in respect of such claim or cause of action, except as to costs, shall be stayed: or the plaintiff may refuse to accept the money in satisfaction and reply accordingly. If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum paid in, but proceeds with the suit, the money remains in court and is subject to the order of the court and is not to be paid out except in pursuance of an order. If the defendant succeeds in the cause of action in respect of which the money has been paid into court, the whole of the money is repaid or credited to him. In *Maple v. Shrewsbury* (2) (1887), 19 Q.B.D. 463 it was held that "subject to the order of the court" means subject to the final order of the court after the case has been tried or the defence has been withdrawn. As long as there is a defence on the record undetermined no order for payment out can be made. In the present case, the appellant could, under the provisions of r. 7, have accepted before reply the sum paid into court in satisfaction of his claim.

Inconsistent pleas may, in general, be pleaded provided they are not

embarrassing. But a payment into court with both an admission of liability and a denial of liability is embarrassing and is not permitted. In *Chapman v. Westerby* (3), [1914] W.N. 64, the defendant by his defence pleaded in para. 16

> "The defendant as to the whole action brings into court the sum of £50 and says that is enough to satisfy the plaintiffs' claims"

and in para. 17

> "In the alternative as to the whole action the defendant, while denying liability, brings into court the further sum of £150, and says that sum is sufficient to satisfy the plaintiffs' claims".

On an application by the plaintiffs to strike out the defence on the ground that it tended to prejudice and embarrass the fair trial of the action, the decision of the learned judge was as follows:

> "Warrington, J., said it was quite clear that both pleas in the defence were wholly irregular. They did not specify the causes of action in respect of which the money was paid into court. A defendant could not at one and the same time plead that he admitted the cause of action, and that he denied the cause of action. To put on record two inconsistent and wholly contradictory pleas would put the plaintiff in the position of not knowing which of the two pleas he would have to meet at the trial. Nor could he do that which was equivalent to this, make alternative payments into court in respect of two inconsistent defences. There was nothing in O. XXII, r. 1 and the following rules to justify that course. The rules offered the defendant two alternative courses, and he must elect which of the two he would adopt. He could not adopt both alternatives, as he had attempted to do in the present case. His lordship must therefore direct that para. 16 and para. 17 of the defence be struck out. The defendant could then put in such an amended defence as he might be advised, but must pay the costs of the motion."

And in *Hubback v. British North Borneo Company* (4), [1904] 2 K.B. 473, Vaughan Williams, L.J., said at p. 477 of the report:

> "Order XXII makes provision for two different things – payment into court admitting liability and payment into court with a denial of liability. If a defendant pays money into court admitting liability, then the plaintiff may in respect of that cause of action take it out at any time. If the defendant pays in with a denial of liability, the money remains in court until the action has been tried. What is sought to be done here is to make a payment on both bases, and by so doing to prevent the plaintiff from taking out any part of the money, as he would be entitled to do if the money in respect of a particular liability was paid in with an admission of liability. I can find nothing in the Judicature Acts or in the Rules to sanction that."

If a defendant pays money into court with an admission of liability there is no reason why, in a proper case, he should not be given leave to amend his defence by withdrawing the admission of liability and adding a denial of liability: see *Frazer & Haws Ltd. v. Burns* (5) (1934), Lloyd, L.R. 216, *Williams v. Boag* (6), [1940] 4 All E.R. 246 and *Bonitto v. Fuerst Bros. and Co. Ltd*. (1). In the present case the sole amendment to the original defence was the addition of para. 6 in which liability was denied, the other paragraphs remaining unamended. Does the amended defence contain both an admission of liability and a denial of liability? I do not think so. Once an amendment has been allowed, and the terms imposed have been complied with, the action continues

as though the amendment had been inserted from the beginning: *Sneade v. Wortherton Barytes and Lead Mining Company Ltd.* (7), [1904] K.B. 295. And in *Warner v. Sampson* (8), [1959] 2 W.L.R. 109 at p. 123 Hodson, L.J., said:

> "Once pleadings have been amended what stood before amendment is no longer material before the court and no longer defines the issues to be tried".

The defence, as originally filed, must, therefore, be disregarded and the amended defence must be read as a whole. One cannot stop at para. 5 and say:

> "There is no denial of liability in para. 1 to para. 5 and, therefore, by virtue of the provisions of r. 1 of O. XXVI, the payment into court constitutes an admission of liability to the extent of Shs. 10,000/-."

There is no express admission of liability in those paragraphs of the defence. There is an admission that a burglary took place and, in effect, an admission that the loss occasioned by the burglary amounted to Shs. 10,000/-. But those admissions do not constitute an express admission of liability even to the extent of Shs. 10,000/-. It is only in the absence of a denial of liability that, by virtue of the provisions of r. 1 of O. XXVI, an admission of liability to the extent of the amount paid into court was implied in the original defence. No such implication arises when there is an express denial of liability. In the present case there is a clear denial of liability in para. 6 of the defence on the ground that the burglary constituted a riot, that the loss was occasioned by the riot and that the respondent company is exempt from liability under the provisions of cl. 3(*c*) of the policy. The statement in para. 4 of the defence that the respondent company

> "by way of further defence pays into court the sum of Shs. 10,000/- in full and final satisfaction of the plaintiff's claim under the policy referred to in the plaint"

is not inconsistent with a payment into court with a denial of liability. The opening words of r. 6 of O. XXVI are:

> "When the liability of the defendant in respect of the claim or cause of action in satisfaction of which the payment into court has been made, is denied in the defence, the following rules shall apply:"

In my view the effect of the amendment was to convert the payment into court from a payment with an admission of liability to a payment with a denial of liability and there was, therefore, no inconsistency in the amended defence. On the pleadings the first issue which fell to be decided was clearly that as to liability and it is immaterial in which particular paragraph of the defence the denial of liability was made. As that issue was decided against the appellant, judgment was rightly entered for the respondent company.

Greater clarity would undoubtedly have been achieved if the defence had been amended so as to tie the payment into court to the denial of liability thus emphasizing the change in character of the payment into court, but I do not think the appellant could have been misled or embarrassed by the manner in which the amendment was made. If he was embarrassed he could have sought leave to appeal against the order or could, possibly, have applied to have such part of the defence as he considered to be embarrassing struck out or amended under O. VI, r. 17. But he did not do so and allowed the suit to proceed. Furthermore, it is clear from the reply, from the issues which were framed and from the trial itself that the appellant accepted that liability was an issue and the trial proceeded on that basis with no objection by the appellant. If it was considered that, notwithstanding the amendment, the payment into court constituted

an admission of liability so that the only issue was one of quantum, surely there would have been an immediate objection to the framing of an issue as to liability.

For those reasons I am of the opinion that the appeal fails and should be dismissed with costs.

Sir Alastair Forbes VP: I agree and have nothing to add.

Crawshaw JA: I also agree.

Appeal dismissed.

For the appellant:
Trivedi & Sons, Nairobi
J. A. Mackie-Robertson and *H. D. Trivedi*

For the respondent:
Robson, Harris & Co., Nairobi
C. W. Salter, Q.C. and *A. W. Robson*

Modern Buildings Limited v The Commissioner of Income Tax
[1962] 1 EA 275 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	22 March 1962
Case Number:	4/1961
Before:	Murphy J
Sourced by:	LawAfrica

[1] Income tax – Income – Damages – Unliquidated damages claimed for breach of contract – Damages claimed under numerous heads – Lump sum compensation accepted in full settlement of all claims – Whether payment can be apportioned between capital and income – East African Income Tax (*Management*) *Act*, 1958, *s.* 111(1)(*a*) *and* (2).

Editor's Summary

The appellants as owners of a building leased as a cinema ordered an air-conditioning plant at a cost of £7,490 whereof they paid as a deposit £1,500. When installed the plant proved quite unsatisfactory and they accordingly sued the company which had installed it for damages amounting to just under £26,000. This sum was made up of various items, the main one being for the cost of obtaining and installing another plant. The action was settled by a lump sum payment of £9,250 to the appellants. This sum was agreed between representatives of the parties concerned at an interview when they also drafted a receipt

whereby the appellants acknowledged receipt of £9,250 “as liquidated damages in full settlement of all claims” against the company which had installed the plant or their principals or associates in respect of their installation contract. Subsequently the Commissioner assessed the appellants as liable to tax on all but a small portion of the £9,250, the sum allowed being made up of the deposit, the cost of installing fans and legal costs. The appellants first appealed to the local committee which reduced the assessment and then appealed again.

Held –

(i) whilst damages received as compensation for loss of profits are taxable, where an overall sum has been agreed as compensation for several unliquidated claims for damage it is not permissible to go behind this sum and apportion it between capital and income.

McLaurin v. Federal Commissioner of Taxation, 8 A.I.T.R. 180 followed.

(ii) since the compensation could not be apportioned there was no onus of proof upon the taxpayer to show how much was not taxable.

Appeal allowed. Assessment annulled.

Cases referred to in judgment:

(1) *Burmah Steamship Co. v. The Commissioner of Inland Revenue*, 16 T.C. 67.

(2) *McLaurin v. Federal Commissioner of Taxation*, 8 A.I.T.R. 180.

(3) *Scruttons Ltd. v. Midland Silicones Ltd*., [1962] 1 All E.R. 1.

(4) *Carter v. Wadman*, 28 T.C. 41.

(5) *Tilley v. Wales*, [1943] A.C. 386; [1943] 1 All E.R. 280.

Judgment

Murphy J: This is an appeal under s. 111(2) of the East African Income Tax (Management) Act, 1958, against an amended assessment for the year of income, 1955. The assessment was reduced in consequence of a first appeal to the local committee under s. 111(1)(*a*), but in accordance with s. 111(2) the present appeal must be treated as one against the original assessment and not against the local committee's decision.

The assessment is in respect of a sum received by the appellant company in settlement of an action for damages. The basic facts are not in dispute. The appellants own a building in Dar-es-Salaam, part of which is leased to a partnership as a cinema. In 1953 the appellants contracted with Messrs. A. Baumann & Co. Ltd., for the installation of an air-conditioning plant in the cinema at a total cost of £7,490. A deposit of £1,500 was paid. When installed, the air-conditioning plant proved to be completely unsatisfactory. The appellants through their advocates instituted a suit against Baumann and Co. claiming a total of just under £26,000 as damages. This was made up of various heads, the principal item being for the "cost of obtaining and installing new refrigeration plant" which constituted about half the total claim. Part of the claim was for loss of profits, but according to the appellants' statement of fact this was not pursued because they continued to receive the same rent from the cinema owners who were unable to prove any reduction in attendance as a result of the defective plant.

The manner in which the claim was settled appears from the evidence at the hearing of this appeal of Mr. V. M. Nazerali who at the material time was the appellants' managing director and a partner in the firm which owned the cinema. I have no hesitation in accepting the whole of this witness's evidence as true. The settlement was agreed to between him personally and a Mr. Miller, representing Baumann & Co. without reference to their respective advocates. Mr. Miller offered a lump sum of £9,250 which Mr. Nazerali accepted. Between them they drafted a receipt in the following terms:

> "Received this 19th day of March, 1955, from A. Baumann & Co. Ltd. of Dar-es-Salaam the sum of £9,250 (Nine thousand two hundred and fifty pounds) as liquidated damages in full settlement of all claims which we have or may have on behalf of the Empress Cinema, Dar-es-Salaam, and/or ourselves against A. Baumann & Co. Ltd., or their principals or associates in respect of their contract for supplying and installing an air conditioning plant and apparatus for the said Empress Cinema.
>
> "We hereby release the said A. Baumann & Co. Ltd., and their principals and associates from all obligations and liabilities which were imposed upon them by the said air conditioning contract, and which we declare to be null and void as from the date hereof.
>
> Modern Buildings Ltd.
>
> (Signed)
>
>
>
> Director
>
>

Empress Cinema
Director”

The respondent assessed the appellants as liable to pay tax on the sum of £7,078. This figure is arrived at by deducting from the total compensation of £9,250, first £1,500 representing the repayment of the deposit paid to Baumann & Co.; secondly, £372, the cost of installing fans which was an item in the claim against Baumann & Co.; and thirdly £300, legal expenses. The balance of £7,078 is said by the respondent to be liable to tax as representing compensation for loss of profits.

It is of course not disputed that damages received as compensation for loss of profits are taxable. For the respondent, Mr. Summerfield relied on *Burmah Steamship Co. v. The Commissioners of Inland Revenue* (1), 16. T.C. 67, where the position is clearly stated in the opinion of Lord Clyde at p. 71:

> "Suppose some one who chartered one of the appellant's vessels breached the charter and exposed himself to a claim of damages at the appellant's instance, there could, I imagine, be no doubt that the damages recovered would properly enter the appellant's profit and loss account for the year. The reason would be that the breach of the charter was an injury inflicted on the appellant's trading, making (so to speak) a hole in the appellant's profits, and the damages recovered could not therefore be reasonably or appropriately put by the appellant – in accordance with the principles of sound commercial accounting – to any other purpose than to fill that hole. Suppose, on the other hand, that one of the appellant's vessels was negligently run down and sunk by a vessel belonging to some other ship-owner, and the appellant recovered as damages the value of the sunken vessel, I imagine that there could be no doubt that the damages so recovered could not enter the appellant's profit and loss account because the destruction of the vessel would be an injury inflicted, not on the appellant's trade, making (so to speak) a hole in them and the damages could therefore – on the same principles as before – only be used to fill *that* hole. If the damages recovered included, not only the value of the sunken vessel, but loss of trading profits pending the acquisition of a substituted vessel, I understand that a question might arise with regard to the latter constituent of the damages recovered, assuming that it was capable of separate quantification which it might easily not be. But it is not relevant to the decision of the present question to pursue that matter to a solution".

It is to be observed that this leaves open the question of what is the position when the damages are, or may be, partly compensation for loss of profits and partly to replace a capital loss. This brings me to the first and main proposition put forward by Mr. Bechgaard on behalf of the appellants in the present appeal. This is that where an overall sum has been agreed as compensation, it is not permissible to go behind this sum and analyse it into components of capital and income. In support of this proposition Mr. Bechgaard relied on an Australian case, *McLaurin v. Federal Commissioner of Taxation* (2), 8 A.I.T.R. 180. This was a full court decision of the High Court of Australia, the members of the court being Sir Owen Dixon, C.J., Fullagar, J., and Kitto, J. Mr. Bechgaard emphasised the respect which is due to a decision of a court so composed, and since hearing this appeal, I have seen the warm tribute paid to the late Fullagar, J., by Viscount Simonds at the conclusion of his opinion in *Scruttons Ltd. v. Midland Silicones Ltd*. (3), [1962] 1 All E.R. 1 at p. 9. *McLaurin's* case (2) concerned a lump sum received in settlement of a claim for compensation for damage caused by a fire to the appellant's grazing property. The appellant had issued a writ against the Commissioner for Railways on whose property the fire had started. He submitted particulars under a number of heads of the damage sustained. Negotiations for settlement ensued, the Commissioner for Railways being represented by a valuer, Mr. Cameron, who eventually offered a lump sum of £12,360 as compensation, which was

accepted. This figure had been arrived at by amending the appellant's claim item by item, but this was not communicated to the appellant. The appellant was assessed for tax on the basis that the amount received should be divided up into the amounts which had formed its components in Cameron's computation, and that the income or no-income nature of each component should be determined as if it had been separately received by the appellant in specific relation to the item of damage for which it had been allowed by Cameron. The court dealt with this as follows at p. 190 and p. 191:

> "It may be said in favour of the respondent's view that Cameron's list of items had evidently been based upon the particulars originally supplied by the appellant himself. The list adopted almost entirely the appellant's own descriptions of the items of property damaged or destroyed, and in a number of instances it conceded the actual amounts which he had claimed. No doubt it was discussed item by item during the negotiations which resulted in the settlement. But the settlement, nevertheless, was for a lump sum of damages, not composed of agreed constituents, offered and accepted in full satisfaction of the entirety of the appellant's causes of action against the Commissioner for Railways. It may be the fact, and it makes no difference if it is, that the appellant, because of the course the discussions had followed, was in a position to make a confident guess as to the amount Cameron had allowed for each item in making his recommendation to the assistant solicitor for Railways. But he was not concerned to make the guess. He had simply to weigh £12,350 against the entirety of his claim, and accept it or reject it as a whole. Obviously, to accept the lump sum was not to assent to any figure in respect of any individual item of his claim.
>
> "It is difficult in these circumstances to see how the dissection which the respondent has made can possibly be justified. All that has been urged in support of it is that the Commissioner for Railways should be considered to have paid the £12,350 as the total of the separate amounts which were allowed in Cameron's list, and that each of those amounts must be separately included in or excluded from the appellant's assessable income upon consideration of the nature of the item to which it related in the list. The submission neither accords with fact nor squares with legal principle. It does not accord with fact, for an account of the manner in which Cameron reached his total is only an account of his reasons for the recommendation he made to the assistant solicitor for Railways; and even though those reasons may have been adopted by that officer, or even by the Commissioner for Railways himself, the offer that was made was not of a total of itemized amounts, but was of a single undissected amount. And in point of law it would plainly be unsound to allow a determination of the character of a receipt in the hands of the recipient to be affected by a consideration of the uncommunicated reasoning which led the payer to agree to pay it.
>
> "It is true that in a proper case a single payment or receipt of a mixed nature may be apportioned amongst the several heads to which it relates and an income or non-income nature attributed to portions of it accordingly . . . But while it may be appropriate to follow such a course where the payment or receipt is in settlement of distinct claims of which some at least are liquidated: of *Carter v. Wadman* (1946), 28 T.C. 41; or are otherwise ascertainable by calculation: of *Tilley v. Wales*, [1943] A.C. 386; [1943] 1 All E.R. 280; it cannot be appropriate where the payment or receipt is in respect of a claim or claims for unliquidated damages only and is made or accepted under a compromise which treats it as a single, undissected amount of damages. In such a case the amount must be considered as a whole; *Du Cros v. Ryall* (1935), 19 T.C. 444, at p. 453."

Carter v. Wadman (4), 28 T.C. 41 and *Tilly v. Wales* (5), [1943] A.C. 386 both concerned service agreements and are in my view distinguishable from the present case for the reasons given in the passage quoted. It is difficult to see how the present case can be distinguished in favour of the respondent from *McLaurin's* case (2). In the present case Mr. Miller who made the offer on behalf of Baumann and Company, may or may not have calculated the amount on the basis of the individual items in the appellants' claim. But nothing is clearer than that the appellants accepted it as a lump sum and not in reference to any individual items.

For the respondent, Mr. Summerfield relied mainly on the onus of proof, which is of course on the taxpayer in all such cases. Mr. Summerfield argued that at least part of the compensation must have been for loss of profits and that the onus was on the appellants to show how much should be held to be nontaxable. With respect, this does not appear to me to be in any accordance with the law as expounded in *McLaurin's case* (2). It is conceded, as I understand it, that the law in Australia as to the onus of proof is the same as in East Africa. But in the present case the compensation received by the appellants cannot be apportioned and the question of the onus of proof does not arise except in as much as I accept Mr. Nazerali's evidence as to the manner in which the settlement was reached.

For these reasons I must uphold Mr. Bechgaard's first submission, and in view of this I do not consider that it is necessary to deal with his alternative submission, namely that if it is permissible to apportion the amount received by the appellants the whole of it must be regarded as compensation for an utterly useless capital asset. In the light of Mr. Nazerali's evidence, which, as I have said earlier, I accept, there appears to me to be considerable force in this submission but it is not necessary and it would indeed be illogical to delve into this question after holding that the sum cannot properly be apportioned.

The appeal is accordingly allowed with costs against the respondent and the assessment which is the subject of the appeal is annulled.

Appeal allowed. Assessment annulled.

For the appellant:
Al Noor Kassum & Company, Dar-es-Salaam
K. Bechgaard, Q.C., and *G. M. Pillai*

For the respondent:
The Legal Secretary, E.A. Common Services Organization
J. C. Summerfield (Deputy Legal Secretary, E.A. Common Services Organization)

Samwiri Matovu v Kulanima Kabali
[1962] 1 EA 280 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	2 April 1962
Case Number:	605/1961
Before:	Bennett J

Sourced by: LawAfrica

[1] Jurisdiction – Native law and custom – Mailo land-Agreement for sale – Price payable by instalments – Purchaser in possession – Suit by vendor for default in payment of instalments – Claim for possession and removal of caveat – Whether court can order removal of caveat – Whether Principal Court or High Court has jurisdiction – Buganda Courts Ordinance (*Cap.* 77), *s.* 11(1) (*U.*) *– The Registration of Titles Ordinance* (*Cap.* 123), *s.* 149 *and Part VII* (*U.*).

Editor's Summary

The plaintiff and the defendant, who were both Africans, had entered into a written agreement, by which the plaintiff agreed to sell to the defendant an area of mailo land for Shs. 12,000/-, whereof Shs. 7,900/- was to be paid upon execution of the agreement and the balance by instalments. After execution of the agreement the defendant entered into possession of the land and lodged a caveat against the plaintiff's title. The defendant having failed to pay all the instalments, the plaintiff filed an action claiming a declaration that the agrement was avoided and for orders for possession and removal of the caveat. It was submitted for the defendant that the suit involved a question of title to the land and by virtue of s. 11 (1) of the Buganda Courts Ordinance it must be tried by the Principal Court; further that under s. 7 the suit should be transferred to the Principal Court and that the plaintiff should have followed the procedure prescribed by s. 149 of the Registration of Titles Ordinance by summoning the defendant to show cause why the caveat should not be removed. For the plaintiff it was contended that the case did not fall within s. 11 (1) of the Buganda Courts Ordinance because it was "a case arising under part VII of the Registration of Titles Ordinance".

Held –

(i) in this suit the plaintiff was seeking to upset the defendant's equitable title and the suit was "a case involving questions of title to or any interest in land registered in the mailo register under the Registration of Titles Ordinance" within the meaning of s. 11 (1) of the Buganda Courts Ordinance.

(ii) the court could not make an order for removal of the caveat without resort to the procedure prescribed by s. 149 of the Registration of Titles Ordinance; accordingly the suit was not a case arising under Part VII of the Registration of Titles Ordinance within the meaning of s. 11 (1) of the Buganda Courts Ordinance.

Kalifani Kizza v. Evaristo Julibe, [1961] E.A. 351 (U.) distinguished.

Order that the suit be transferred to the Principal Court.

Cases referred to in judgment:

(1) *Kalifani Kizza v. Evaristo Julibe*, [1961] E.A. 351 (U.).

Judgment

Bennett J: This suit is founded upon a written agreement dated February 27, 1961, whereby the plaintiff agreed to sell to the defendant an area of mailo land of which the plaintiff is the registered proprietor, for

Shs. 12,000/-. According to the terms of the agreement Shs. 7,900/- of the purchase price was payable at the time of the execution of the agreement and the balance was to be paid by instalments. The plaintiff covenanted to execute

a transfer of the land in favour of the defendant, but it would appear that no transfer has as yet been executed.

After the execution of the agreement, the defendant entered into possession of the land and lodged a caveat against the plaintiff's title. It is alleged that the defendant has failed to pay all the instalments due under the agreement and the plaintiff claims that he is entitled to treat the agreement as at an end on repayment by him of so much of the purchase price as has been paid by the defendant. In this suit the plaintiff seeks a declaration "that the said agreement is avoided" and claims an order for possession of the land. He also claims an order that the caveat lodged by the defendant against his title be removed. Counsel for the defendant objects to the jurisdiction of this court on the grounds that the suit involves a question of title to the land and that by virtue of s. 11 (1) of the Buganda Courts Ordinance (Cap. 77) it must be tried by the Principal Court. He submits that the suit should be transferred to the Principal Court under s. 7 of the Buganda Courts Ordinance. Defendant's counsel also contends that this court cannot make an order in the present proceedings for the removal of the caveat and contends that the plaintiff should have followed the procedure prescribed by s. 149 of the Registration of Titles Ordinance (Cap. 123) by summoning the defendant to show cause why the caveat should not be removed.

It will be observed that the legal title to the land is and has, at all material times, been vested in the plaintiff, although the defendant would have an equitable title by virtue of the agreement for sale. In this suit the plaintiff is seeking to upset the defendant's equitable title, and in my opinion, the suit is

> "a case involving questions of title to or any interest in land registered in the mailo register under the Registration of Titles Ordinance"

within the meaning of s. 11 (1) of the Buganda Courts Ordinance. Indeed the plaintiff's counsel has not argued that the suit does not involve a question of title to the land but contends that the case does not fall within s. 11 (1) because it is

> "a case arising under Part VII of the said Ordinance (i.e. Registration of Titles Ordinance)".

He cited the decision of McKisack, C.J., in *Kalifani Kizza v. Evaristo Julibe* (1), [1961] E.A. 351 (U.), in which the learned Chief Justice said:

> "Since the defendant is admittedly the registered proprietor, I do not think that the plaintiff's claim against him could be sustained without reliance on this caveat. It will not suffice for him to prove that he bought the land in 1920. He will also have to show that he protected the interest he claims arising out of that purchase by invoking the machinery provided by Part VII of the Registration of Titles Ordinance. That seems to me a sufficient reason for saying that this case 'arisses under' Part VII. I do not think that the exception in s. 11 (1) of the Buganda Courts Ordinance ought to be construed as referring only to proceedings under s. 149 of the Registration of Titles Ordinance."

That case is clearly distinguishable from the instant case in that in the instant case the plaintiff is not relying upon any caveat in support of his claim. The question which arises here is whether the court can, in the present suit, make an order for the removal of the caveat without resort to the procedure prescribed by s. 149 of the Registration of Titles Ordinance. If the court can make such an order, then in my opinion the case would fall within Part VII of the Registration of Titles Ordinance and as such would be excluded from the jurisdiction of the Principal Court. If, on the other hand, the court cannot, in the present proceedings, make an order for the removal of the caveat, then, in my opinion, the suit is not "a case arising under Part VII" of the Registration of Titles

Ordinance. The Registration of Titles Ordinance of Uganda is modelled on the Australian Torrens system of land titles registration. It appears that the practice in Australia upon the hearing of applications by the caveatee to remove a caveat is not to determine questions of title: see Kerr on "The Principles of the Australlian Land Titles Torrens System", p. 491. It would thus seem that this suit was necessary to enable the plaintiff to obtain the whole of the relief which he seeks; but that is not to say that in a suit in which a declaration and an order for possession is claimed that the plaintiff can obtain an order from the court for removal of the caveat. A caveat against the title of a registered proprietor is the creation of statute and can only be lodged in the manner prescribed by s. 149 of the Registration of Titles Ordinance. In my opinion, it can only be removed in one of the ways prescribed by the Ordinance. In the instant case, if the court saw fit to grant the declaration which the plaintiff seeks and to make an order for possession in the plaintiff's favour, it would not be competent for the court to order the removal of the caveat. No authority has been cited for the proposition that the court can make orders for the lodging or removal of caveats as ancillary to its ordinary jurisdiction otherwise than in accordance with the procedure laid down by Part VII of the Registration of Titles Ordinance. If the plaintiff should succeed in obtaining a declaration and an order for possession and the defendant should fail to withdraw his caveat after judgment has been given in the plaintiff's favour, it would still be necessary for the plaintiff to summon the defendant to show cause why the caveat should not be removed in accordance with s. 149 of the Registration of Titles Ordinance. Since the court cannot, in my opinion, make an order for the removal of the caveat in the present proceedings, the suit is not a case arising under Part VII of the Registration of Titles Ordinance within the meaning of s. 11 (1) of the Buganda Courts Ordinance. This being so, the case must be tried by the Principal Court. Under s. 7 of the Buganda Courts Ordinance, I order this case to be transferred to the Principal Court. The plaintiff will pay the defendant's costs up to the date of transfer.

Order that the suit be transferred to the Principal Court.

For the plaintiff:
Manibhai Patel & Son, Kampala
M. L. Patel

For the defendant:
Binaisa, Ibingira, Lubowa & Co., Kampala
R. R. Shah and *G. L. Binaisa*

Isaka Mayambala v The Buganda Government
[1962] 1 EA 283 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	30 May 1962
Case Number:	560/1961
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Jurisdiction – Native law and custom – Mailo land – Claim for damages for breach of agreement to lease land – Whether jurisdiction is vested in Principal Court or High Court – Buganda Courts Ordinance (*Cap.* 77), *s.* 3, *s.* 7, *s.* 9(*c*) *and s.* 11 (1) (*U.*) – *Administrations* (*Incorporation*) *Ordinance* (*Cap.* 73), *s.* 3 (3) *and s.* 4 (*U.*) – *General Clauses Ordinance* (*Cap.* 1), *s.* 3 (8) (*U.*) – *Indian Contract Act*, 1872, *s.* 73 – *Uganda Order-in-Council*, 1902, *s.* 20 (*U.*) – *Africa Order-in-Council*, 1892, (*Cap.* 207), *art.* 3 (*U.*).

Editor's Summary

The plaintiff, a Muganda landlord, sued the Buganda Government for breaches of two agreements to lease premises on mailo land. The defendants, relying on s. 11 (1) of the Buganda Courts Ordinance objected that the High Court had no jurisdiction to try the suit and submitted that the suit should be trans-ferred to the Principal Court. For the plaintiff it was submitted that the High Court had jurisdiction as these were proceedings in which under s. 9(*c*) of the Buganda Courts Ordinance, an Ordinance, namely the Indian Contract Act, 1872, would have to be invoked.

Held – as there was no apparent inconsistency between s. 73 of the Indian Contract Act, 1872, and native law on the matter, the court should under s. 20 of the Uganda Order-in-Council, 1902, be guided by native law; as both parties were Africans the Principal Court was the appropriate tribunal to hear and determine the suit.

Order that the suit be transferred to the Principal Court.

Cases referred to in judgment:

(1) *Mengo Builders and Contractors Ltd. v. Kasibante*, [1958] E.A. 591 (U.).

(2) *Reuben Musanje v. Tomasi Yamulemye*, [1961] E.A. 716 (C.A.).

Judgment

Sheridan J: The plaintiff, a Muganda landlord, sues the Buganda Government for breaches of two agreements to lease premises on mailo land.

The defendants, relying on s. 11 (1) of the Buganda Courts Ordinance (Cap. 77) (hereinafter referred to as "the Ordinance") object that this court has no jurisdiction to try the suit. That sub-section gives exclusive jurisdiction to the Principal Court over cases involving questions of title to or any interest in registered mailo land. In my view these words must be read conjunctively and no such interest is raised in the present case, which is simply a claim for damages for breaches of agreements to lease land.

Mr. James, for the defendants, submits that these proceedings must be transferred to the Principal Court under s. 3 (1) and s. 7 of the Ordinance as both parties are Africans. While these proceedings are not taken under the Ordinance, the defendants or "The Kabaka's Government", to give the correct designation, is a corporate body (Legal Notice No. 158 of 1959) made under s. 3 (3) of the African Administrations (Incorporation) Ordinance (Cap. 73) which is capable of being sued under s. 4 of the same Ordinance and by virtue of the definition of "African" in the Interpretation and General Clauses

Ordinance (Cap. 1) s. 3 (8) the defendants are a corporate body of persons all of whose members are Africans – I think that I am entitled to assume this – and are deemed to be African: see *Mengo Builders and Contractors Ltd. v. Kasibante* (1), [1958] E.A. 591 (U.).

However, Mr. Dalal, for the plaintiff, submits that this court has jurisdiction as these are proceedings in which, under s. 9(*c*) of the Buganda Courts Ordinance, an Ordinance, rather the Indian Contract Act, 1872, will have to be invoked. He relied on *Reuben Musanje v. Tomasi Yamulemye* (2), [1961] E.A. 716 (C.A.) where it was held that where it is possible that the provisions of an Ordinance may be invoked it is the duty of the defendant, if he desires the transfer of a case to the Principal Court under s. 7 of the Buganda Courts Ordinance to satisfy the High Court that such provisions will not be invoked on the facts of the case and that until this is done the High Court cannot be satisfied that the case is one in which the Buganda Court has jurisdiction. Previous to this decision I had been under the impression that the words in s. 9(*c*)

> "no court shall have jurisdiction in any proceedings . . . taken under any Ordinance or any English or Indian law in force in the Protectorate"

limited the power of transfer to a case where such provision was raised on the pleadings. As it is I read the judgment of the Court of Appeal as being limited to proceedings being taken by the plaintiff under an Ordinance. Otherwise a defendant could frustrate almost any attempt to bring proceedings in the Principal Court. With respect to the judgment in the case cited above it seems to me that it is unduly wide in that it is difficult to envisage a case, except perhaps a dispute as to bride price, in which it is not impossible to invoke some Ordinance or the English common law; if this provision were applied literally the jurisdiction of the Principal Court would be severely abridged.

However I think there is an answer to this. Section 20 of the Uganda Order-in-Council, 1902 – which is an overriding enactment – provides:

> "20. In all cases, civil and criminal, to which natives are parties, every court (*a*) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order-in-Council or Ordinance, or any regulation or rule made under any Order-in-Council or Ordinance; and (*b*) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

While Mr. Dalal submits that the Indian Contract Act will be invoked, if only on the question of damages as provided for by s. 73 of the Act, he has failed to satisfy me that the native law on this matter is inconsistent with the section of the Act, which is made applicable in the Protectorate by art. 3 of the Africa Order-in-Council, 1892 (Cap. 207). Accordingly I think that I should be guided by the native law which I understand to be that in Buganda the Principal Court shall have full jurisdiction in suits between Africans – s. 3 of the Ordinance confirms art. 11 of the Uganda Agreement, 1900, which, in effect, gives statutory form to the then existing native law and as both parties are Africans, I rule that the Principal Court is the appropriate tribunal to hear and determine this suit and I make the order of transfer.

Order that the suit be transferred to the Principal Court.

For the plaintiff:
Haque, Dalal & Singh, Kampala
S. Dalal

For the defendant:

Hunter & Greig, Kampala
A. I. James

Pirani Properties & Agencies Ltd v Tajdin Kara

[1962] 1 EA 285 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	17 April 1962
Case Number:	745/1961
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Hire-purchase – Guarantee given for performance of agreement by hirer – Guarantee for payment of instalments and due performance – Indemnity against loss or damage – Guarantee not to be affected by time given – Default in payment of instalments – Possession of goods resumed and subsequent sale – Claim for arrears of instalments and damages against guarantor – Whether owner entitled to damages as well as arrears of instalments – Indian Contract Act, 1872, *s.* 73 *and s.* 74.

Editor's Summary

The defendant sold three vehicles to the plaintiffs and guaranteed payment of all moneys due on hire-purchase agreements between the plaintiffs and three hirers. The guarantee provided that the defendant's liability should not be affected by time given to the hirer and that the guarantee should cover any loss or damage suffered by the plaintiffs by any breach of the hire-purchase agreement. The hirers having defaulted in payment of their instalments the vehicles were seized and resold. The vehicles were in such bad condition that they were sold as scrap. The plaintiffs then sued the defendant for the instalments unpaid and for loss or damage. It was submitted that the plaintiffs were not entitled to claim damages on the grounds inter alia that the plaintiffs had sued upon the guarantees for punctual payment and payment of arrears and not upon the indemnities against loss or damage.

Held –

(i) when damages are claimed in a plaint it is the duty of the court, if the contract is broken, to award reasonable compensation under s. 74 of the Indian Contract Act, 1872.

Credit Finance Corporation Ltd. v. Harcharan Singh Ranbutta, [1961] E.A. 231 (C.A.) distinguished.

(ii) the defendant, as guarantor, was not in any more favoured position than the hirers and as the damages claimed flowed from the breaches of the agreements the plaintiffs were entitled to claim damages.

(iii) the hire-purchase agreements were indivisible and the plaintiffs had sued under the agreements which contained indemnities as well as guarantees and not under guarantees alone as such.

Judgment for the plaintiffs.

Cases referred to in judgment:

(1) *Credit Finance Corporation Ltd. v. Harcharan Singh Ranbutta*, [1961] E.A. 231 (C.A.).

(2) *Guaranty Discount Company Ltd. v. Oliver Lawrence Ward*, [1961] E.A. 285 (C.A.).

(3) *Yeoman Credit Ltd. v. Waragowski*, [1961] 3 All E.R. 145.

(4) *National Industrial Credit* (*E.A.*) *Ltd. v. T.S. Saggu & Co. Ltd*., Uganda High Court Civil Case No. 546 of 1961 (unreported).

Judgment

Sheridan J: On May 6, 1959, the plaintiffs purchased three motor vehicles from the defendant for Shs. 13,000/-, on the understanding that they would be the subject of hire-purchase agreements with three Africans, the due performance of which was to be guaranteed by the defendant. On May 11, the three agreements and three guarantees (exhibits B and C) were

signed. The agreements are in the usual form and the guarantees with the registered number of the vehicle and the name of the hirer differing in each case read as follows:

"(COPY)

GUARANTEE

(P.1).

To Messrs. Pirani Properties & Agencies Ltd.,

P.O. Box 1196,

Kampala.

Dated this 11th day of May, 1959.

In consideration of your hiring the vehicle Registered No.

to at my/our request I/We guarantee the punctual payment to you of all moneys due to be made by the Hirer under the Hire-Purchase Agreement, and the due performance and observed. I/We undertake to indemnify you against all loss and damage resulting to you from any breach of the Hirer of such terms and conditions. I/We further agree to pay you on demand any moneys which have become due under the Hire-Purchase Agreement but have not been paid to you by the Hirer; and that your rights under this Guarantee shall not be prejudiced by your granting any time or other indulgence to the Hirer or by any variation in any of the terms of the Hire-Purchase Agreement.

Full name of the Guarantor: Mr. Tajdin Kara.

Address: P.O. Box 1658, Kampala.

Signed by the Guarantor:

in the presence of:

Sgd.....

11.5.59.

Shs. 1/-

Uganda Revenue Stamp Affixed."

The hirers soon fell into arrears on their instalments and after due notices and warnings to the defendant (Exhibits D, E, F, H, J and L) the vehicles were seized and repossessed. They were in such a bad condition that they could be sold only as scrap. The defendant was warned of the position before the sales (exhibits G, I and K). The financial aspect of the plaintiff's claim, which is not disputed, is set out in annexure "SA1" to the plaint. It is made up of (*a*) Shs. 2,238/- arrears of instalments due on seizure and (*b*) Shs. 5,854/-, losses or damages apart from instalments due at the date of seizure. The agreed issues are:

(1) Were any notices given to the defendant?

(2) Did the time allowed to the hirers discharge the defendant from his guarantees?

(3) Is the defendant liable for damages?

Mr. Ponda, for the defendant, conceded the first issue when the copies of the letters were produced; he must also lose the second issue in view of the saving provision contained in the last sentence of the guarantee. In support of his contention on the third issue, he relies on *Credit Finance Corporation Ltd. v. Harcharan Singh Ranbutta* (1), [1961] E.A. 231 (C.A.), but that case can be distinguished on the ground that there the plaint did not contain a claim for damages for breach of contract as was explained in

Guaranty Discount Company

Ltd. v. Oliver Lawrence Ward (2), [1961] E.A. 285 (C.A.). Where damages are claimed it is the duty of the court, if a contract is broken, to award reasonable compensation under s. 74 of the Indian Contract Act. Section 73 provides for compensation for loss or damage caused to the plaintiff which naturally arose from the breach or which the parties knew, when they made the contract, to be likely to result from the breach of it. In *Yeoman Credit Ltd. v. Waragowski* (3), [1961] 3 All E.R. 145 it was held that in the case of a hirer's breach by not paying the instalments the owners remedy was not merely for the recovery of money not paid but lay in damages for the breach of the contract. The defendant, as guarantor, is not in any more favoured position than the hirers. The damages claimed flow from the breach. I find for the plaintiffs on the third issue.

Finally, although it was not pleaded or included in the agreed issues, Mr. Ponda sought to split up the guarantees into guarantees and indemnities and submitted that the plaintiffs had only sued for the guarantees of punctual payments and payments of arrears under the agreements and not for indemnities against loss or damage. If this point were now open to the defendant, which, in my view, it is not, the answer would be that the plaintiffs sued under the agreements which contain indemnities as well as guarantees and not under guarantees alone as such. I would say that the documents are indivisible as may be inferred from my judgment in *National Industrial Credit* (*E.A.*) *Ltd. v. T.S. Saggu & Co. Ltd* (4), Uganda High Court Civil Case No. 546 of 1961 (unreported).

In the result there will be judgment for the plaintiffs for Shs. 8,092/- with interest and costs.

Judgment for the plaintiffs.

For the plaintiff:
Ishani & Ishani, Kampala
A. Ishani

For the defendant:
Shaukat Virji Dophtary & Co., Kampala
V. N. Ponda

Bhagwanji Raja v Swaran Singh s/o Hari Singh
[1962] 1 EA 288 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 May 1962
Case Number:	12/1961
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – MacDuff, J.

[1] Arbitration – Reference under order of court – Award – Remission for further consideration – Findings of arbitrators insufficient to leave only questions of law for decision of court – Whether remission justified – Civil Procedure (*Revised*) *Rules,* 1948, *O. XLV, r.* 1, *r.* 12, *r.* 14, *r.* 15 (*K.*) – *Arbitration Act,* 1950, *s.* 4 – *Eastern African Court of Appeal Rules,* 1954, *r.* 65 – *Gold Coast Supreme Court Ordinance,* 1876, *O. LII.*

[2] Arbitration – Award – Validity – Order specifying time by which award should be filed in court – Order not stating date by which award should be made – Whether award invalid – Civil Procedure (*Revised*) *Rules,* 1948, *O. XLV, r.* 3 (1) (*K.*) – *Indian Code of Civil Procedure,* 1882, *s.* 508.

Editor's Summary

The respondent sued the appellant for accounts in respect of certain transactions between the parties, of which each of the parties gave a very different version. Subsequently in February, 1957, an order was made by consent referring the matter in dispute to two arbitrators. Their award made on August 7 and filed in court on August 8, 1958, declared that the respondent was entitled to Shs. 26,947/50 with interest and one-third of the taxed costs of the suit. The appellant then applied for the award to be set aside or remitted for further consideration. The judge ordered that the award be remitted for reconsideration and for a finding upon the appellant's liability to account, how that account should be taken and only if the parties so agreed, to take the account themselves; that each party should bear his own costs of the application, that the costs of the arbitration should be subject to the arbitrators' recommendation as to amount and payment on their amended award. The appellant by leave appealed from this order when it was submitted on his behalf that as the arbitrators had not found for the respondent on the facts set out in his plaint, the judge should have varied the award and dismissed the suit with costs or should have ordered that the arbitration be superseded. The appellant also objected to the judge's order as to costs and contended that, as the consent order had fixed a time for filing the award but not for making it, the award was bad.

Held –

(i) the order of the court, by specifying the time within which the award should be filed, effectively limited the time for making it.

(ii) the findings of the arbitrators as to the precise extent of the appellant's obligation to the respondent were insufficient and obscure and failed to leave for decision by the court only questions of law and accordingly the judge was right in remitting the award for further consideration.

(iii) the judge had erred in principle in ordering each party to bear his own costs of the motion to set aside the award and the proper order in the case was that the appellant's costs of the motion should be paid by the respondent.

Order that the appeal be dismissed subject to variation of the judge's order as to the costs of the motion to set aside the award.

Cases referred to in judgment:

(1) *Bhagat Singh v. Ramanlal P. Chauhan and others* (1956), 23 E.A.C.A. 178.

(2) *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar and Another* (1891), 18 I.A. 55.

(3) *Arumugam Chetti v. Arunachalam Chetti* (1899), 22 Mad. 22.

(4) *Re Carlisle, Clegg v. Clegg* (1890), 44 Ch. D. 200.

(5) *Barnes v. Youngs*, [1898] 1 Ch. 414.

(6) *Yamike Kweku v. Annor Adjaye*, [1926] A.C. 755.

(7) *Reid, Hewitt & Co. v. Joseph* [1918] A.C. 717.

The following judgments were read:

Judgment

Sir Alastair Forbes VP: This is an appeal from a "judgment" and order of the Supreme Court of Kenya dated October 31, 1960, whereby an award in an arbitration under order of the court under O. XLV of the Civil Procedure (Revised) Rules, 1948 (hereinafter referred to as "O. XLV"), was remitted to the arbitrators for reconsideration. In passing, it may be noted that the decision of the learned judge of the Supreme Court, though headed "Judgment", is not a decision on which a decree may be based and is therefore technically not a "judgment" (*Bhagat Singh v. Ramanlal P. Chauhan and Others* (1) (1956), 23 E.A.C.A. 178). The error of description is, however, of no significance since leave to appeal was granted and a formal order was duly extracted, and for convenience I will continue to refer to the decision as the judgment.

The respondent (the original plaintiff) is a Sikh merchant who at the material time was carrying on business in Nairobi as a transport contractor and building material supplier. The appellant (the original defendant) is an Asian merchant and partner in the firm of Devraj Hirji & Co., which carried on a finance business in Nairobi, including the provision of banking facilities. In June, 1955, the respondent filed a plaint against the appellant alleging:

(i) that the respondent, before leaving for India in January, 1952, verbally agreed with the appellant that the latter should act as his (the respondent's) "agent in the management of" the respondent's business, and that in pursuance of this agreement the respondent by power of attorney dated December 15, 1951, gave the appellant power to carry on the said business;

(ii) that the appellant carried on the said business as the respondent's agent and attorney;

(iii) that on the respondent's return from India in April, 1953, he discovered that his two vehicles used in his business had been worn out, that the business showed great loss, and that the business had incurred a debt of Shs. 20,000/-;

(iv) that the respondent asked the appellant for accounts, but the appellant failed to render proper and true accounts, only furnishing certain accounts in the name of Devraj Hirji & Co. "which are incomplete in that they showed the amount of certain debit entries, aggregating about Shs. 41,478/11 but no other information and/or explanation in relation thereto, and no vouchers to support the same"; and

(v) that the appellant as agent for the respondent had during 1952 executed certain transport contracts and supplied building materials to customers and received moneys for the respondent, but had not rendered full and true accounts of such transactions;

and the respondent claimed:

"(*a*) To have a full and true account of all business transacted and all moneys received and paid by the defendant on behalf of the plaintiff in the latter's absence from the Colony;

(*b*) Payment of the amount found due upon taking of such accounts;

(*c*) Damages;

(*d*) Costs of this suit;

(*e*) Interest at court rates on the amount found due payable to the plaintiff; and

(*f*) Any other relief or relieves as the court may deem fit."

The appellant's defence was a denial that he (the appellant) had agreed to undertake the management of the respondent's business or had in any way done so. The appellant alleged that the respondent's power of attorney was only delivered to him after the respondent's departure for India, that he was not previously aware of its terms, and that he had expressly declined to look after the respondent's business. He alleged that it was understood between the respondent and himself that the respondent's son-in-law, Naranjan Singh, would manage the business assisted by the respondent's young son, Gurdev Singh, and that it was arranged:

"(*b*) That the defendant would receive all moneys or cheques of the said business brought to him by the said Naranjan Singh and that the defendant should make available to the said Naranjan Singh moneys required by him for or in connection with the conduct of the said business.

(*c*) That the accounts of such receipts and disbursements would be kept, as had previously been done between the firm of Devraj Hirji & Co. (in which defendant is and was at all material times a partner) and the plaintiff i.e. when the plaintiff was in Kenya, in the books of Devraj Hirji & Co., and a duplicate of such entries made in a book to be retained with the said Naranjan Singh and Gurdev Singh."

The appellant alleged that in pursuance of this arrangement he

"received moneys and cheques of the said business brought to him by the said Naranjan Singh and he paid to the said Naranjan Singh moneys and gave to him cheques drawn in favour of various persons on the representation of the said Naranjan Singh that such moneys and cheques were required for and in connection with the said business";

that entries in respect of these transactions were duly made in the account books of Devraj Hirji & Co. and copied into a duplicate book retained by Naranjan Singh, the latter constituting regular and continuous accounts of the transactions; that he was under no obligation to furnish vouchers; and that he had in fact furnished all such accounts as he was liable to furnish.

In February, 1957, a joint application was made to the court under r. 1 of O. XLV, and on March 18, 1957, the following consent order was made:

"By Consent it is Ordered:

"1. That the matter in dispute arising in this suit and more particularly set out in the pleadings be referred to the arbitration of (i) Mr. Chanan Singh, advocate and (ii) Mr. A. P. Shah, advocate, both of Nairobi.

"2. That the said arbitrators do file their award within six weeks from the date of service of this order upon them.

"3. That the costs of this application be costs in the cause."

In the judgment from which this appeal arises it is stated that the time fixed in the order of reference was subsequently extended to August 13, 1958. A copy of the order extending time is not included in the record, but the extension of time is not contested. The arbitrators made their award on August 7, 1958,

and it was filed in court on August 8, 1958. By the award it was declared that the plaintiff/respondent was entitled to receive from the defendant/appellant a sum of Shs. 26,947/50 with interest thereon at court rates, and one-third of the taxed costs of the suit. The arbitrators' fees were fixed at Shs. 3,000/-, to be paid as to one-third by the plaintiff/respondent, and as to two-thirds by the defendant/appellant.

On August 28, 1958, the appellant moved the court under r. 12, r. 14 and r. 15 of O. XLV that:

> "1. The award filed on the 8th day of August, 1958, pursuant to O. XLV, r. 15, be set aside.
>
> "2. *Alternatively* the court may pursuant to O. XLV, r. 14, remit the award to arbitrators for reconsideration upon such terms it thinks fit.
>
> "3. *In the further alternative*, the court may, pursuant to O. XLV, r. 12, make an order correcting the award.
>
> "*And* that the costs of this application be provided for."

Upon this application it was ordered, on October 31, 1960:

> "(1) that the award is remitted to the arbitrators for reconsideration and for a finding on the defendant's liability to account to the plaintiff and a further finding as to the basis on which such account shall be taken, and only if the parties so agree, to take the account themselves;
>
> (2) that each party do bear his own costs of this application;
>
> (3) that the costs of the arbitration will be subject to the arbitrators' recommendation as to the amount and payment of those fees on their amended award;
>
> (4) that leave to appeal be and is hereby granted."

The appellant now appeals against this order.

It may be mentioned here that the respondent sought leave under r. 65 of the Rules of this court to argue a cross-appeal, contending that the arbitrators' award ought not to have been remitted for reconsideration. The application to file the cross-appeal was not made within the time limited by sub-r. (1) of r. 65. We were not satisfied that any reasonable excuse for the delay involved had been shown, or that refusal of the application would result in injustice to the respondent. We were therefore of opinion that sufficient cause for extension of time had not been shown, and we refused the application with costs, which we assessed at Shs. 210/-.

Various grounds were argued in support of the motion to set aside the award which have not been pursued in this court. On the appeal the appellant's principal contention, as set out in his memorandum of appeal, is that the learned judge ought, on the arbitration findings, to have varied the award and dismissed the suit with costs. The relevant paragraphs of the memorandum of appeal are paras. 2, 3, 4 and 5, of which it will be sufficient to set out para. 5, which is as follows:

> "5. The arbitrators having found the appellant had not acted either as manager of the respondent's business, or as his attorney, the case was one of modification of the award within O. XLV, r. 14(*a*), and for a consequent dismissal of the suit with costs, inclusive of costs of and incurred before the arbitrators."

I understood Mr. Khanna, who appeared for the appellant, to submit that, if the court did not consider the suit should be dismissed with costs as prayed, at the least the award should be superseded under r. 15 of O. XLV and the trial

allowed to proceed, and that the learned judge's order should be varied accordingly. Paragraph 6 of the memorandum of appeal contains an alternative ground in support of this latter submission, and reads as follows:

> "6. Should the foregoing grounds of appeal be not accepted, further and in the alternative, the appellant will contend, no time having been fixed by the reference for the 'making' of the award, any award made on such a reference was bad."

A subsidiary ground of appeal relates to the learned judge's order as to costs. This is ground 1 of the memorandum of appeal, which is as follows:

> "1. There was complete success in the final result on the part of the appellant (who asked for either setting aside or remittal of the award but not both), to entitle him to costs below, regardless of the ground or grounds on which he did so succeed, and such grounds were not 'issues' within the meaning of s. 27 of the Civil Procedure Ordinance first proviso."

It will be convenient to dispose of ground 6 of the memorandum of appeal at once. The appellant's contention is based on r. 3 (1) of O. XLV which reads:

> "3.(1) The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order."

Paragraph 2 of the order of reference, which is set out above, requires the arbitrators to "file" their award within the time limited by the order. Mr. Khanna's argument for the appellant was that "filing" the award is not the same as "making" the award; that the rule requires that time must be limited for the "making" of the award; and that the rule must be strictly complied with. He relied on dicta of the Privy Council in *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar and Another* (2) (1891), 18 I.A. 55.

I accept that the making of an award is not the same thing as the filing of an award, and that under r. 3 (1) of O. XLV the time to be fixed is the time within which an award is to be made. In my opinion, however, the order made in the instant case, that the award be "filed" by a given date, is a sufficient compliance with r. 3 (1), though an indirect one. It is clear that the award cannot be "filed" until it is "made", so that the order in fact effectively limits the time for making the order to the time specified for filing. This view, as it seems to me, is not in conflict with the view expressed by their lordships of the Privy Council in the *Singh v. Kuar* case (2). Their lordships were there considering s. 508 of the Indian Civil Procedure Code which was then in force, the relevant terms of which were similar to those of r. 3 of O. XLV, though the expression used in s. 508 was "delivery" and not "making". However, it would appear that "delivery" was construed as meaning "making" (Mulla, Code of Civil Procedure (10th Edn.), p. 1262). Their lordships said:

> "By s. 508 it is laid down that the court shall by order refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the delivery of the award and specify such time in the order. In this case the order of reference made by the court does not specify, directly, any time. It merely fixes a date for the hearing of the case by the court, which is not in strict compliance with the terms of the section, though it might be sufficient."

I stress the words "though it might be sufficient", when all that was fixed in that case was the date for the hearing of the case in court. Their lordships, however, did not decide the point at issue here, since orders enlarging time

were made which fixed the time for making the award, and their lordships held that these at least were a compliance with the terms of the section. I derive some support for the view I take from the case of *Arumugam Chetti v. Arunachalam Chetti* (3) (1899), 22 Mad. 22. There the order of reference required the arbitrator "to deliver your award in writing to this court" on or before a specified date. This, in effect, was a requirement to file the award by the specified date. The award was completed within the time fixed but was not filed in court till two days after the specified date. It was held that the award was not invalid, completion by the specified date being sufficient. It is clear that, while the main point at issue was whether the filing of the award after the date specified invalidated the award, the court regarded the order as a perfectly good order fixing the time for the making of the award.

I would accordingly hold that there is no substance in this ground of appeal, which is purely technical.

I have already mentioned that various matters were argued before the learned judge in support of the application to set aside the award which were dismissed by him and have not been pursued in this court. These, as appears from the learned judge's judgment, were: (*a*) that the award had not been made within the time limited; (*b*) that the arbitrators were guilty of misconduct in (i) fixing the fees payable to them and making payment of the fees a condition precedent of the release of the award; (ii) failing to file depositions and documents with their award; and (*c*) that the award was unstamped. Having disposed of these matters the learned judge then turned to the grounds on which he concluded the award ought to be remitted to the arbitrators. This part of the judgment, which is the part to which the appeal relates, reads as follows:

> "The next ground argued was that the arbitrators made a fundamental mistake as to the subject of the dispute between the parties. In support of this a number of points were taken, which in effect amounted to allegations of misconception of fact and law. In respect of this ground I think that all I need refer to is the arbitrators' terms of reference. The order requires that:
>
> '(1) the matter in dispute arising in this suit and more particularly set out in the pleadings be referred to the arbitration of etc.'
>
> On the pleadings there were certain matters of difference between the parties that required decision before the question of liability to render accounts arose, for example:
>
> (1) Was there agreement that the defendant should act as manager of the plaintiff's business?
>
> (2) Did the plaintiff in pursuance of such agreement give to the defendant the power of attorney?
>
> (3) If so did the defendant carry on the plaintiff's business as his agent and attorney?
>
> (4) If not what was the position of the defendant?
>
> On the answers to these questions would depend not only the liability of the defendant to account but also the type of account. If the answers to questions 1, 2 and 3 were in the negative consideration would require to be given to whether such account as the defendant did give, if he did give it, was a true and proper account. This again would depend on defendant's authority to make payments in cash to the persons he did. As far as I can ascertain from the award there was no finding on any of the real issues as to liability of the defendant. For that reason alone the award could not stand.

> "The order of reference, as I understand it, requires that the arbitrators decide whether the plaintiff was entitled to an account, and if so whether a true and proper account had been rendered him. Following such a decision the usual order would be an order for the taking of accounts. It would appear that the arbitrators purported to actually take such accounts themselves. I am unable to find anywhere any actual agreement between the parties to the award that they should do so with the result that in my view the arbitrators went outside their terms of reference. It would appear however from the amount of evidence adduced in respect of accounts and the arguments addressed to the same matter by counsel that they may have assumed some such agreement.
>
> "For the above reasons it appears to me that this award comes within the orbit of r. 14(*a*) of the order. The award is remitted to the arbitrators for reconsideration and for a finding on the defendant's liability to account to the plaintiff and a further finding as to the basis on which such account shall be taken, and only if the parties so agree, to take the account themselves."

Mr. Khanna supported the learned judge's conclusion that the arbitrators went outside their terms of reference in themselves purporting to take the accounts between the parties. This part of the learned judge's decision is not in issue on the appeal and I express no view on it. Mr. Khanna, however, contended that the learned judge, in posing the issues which he said arose on the pleadings and required decision, had overlooked the findings which had been made by the arbitrators. He argued that on the findings of fact made by the arbitrators these questions had been or could be answered; that the facts found by the arbitrators established that the only relationship between the parties was that of banker and customer; that as banker the appellant was not an accounting party; and that therefore the learned judge ought to have corrected the award by setting aside the finding that the appellant should pay the respondent Shs. 26,947/50 and substituting a finding that the suit be dismissed with costs. Alternatively, Mr. Khanna argued that the award should be set aside and an order made superseding the arbitration, contending, inter alia, that it was unfair to remit the matter to the same arbitrators who would be prejudiced against the appellant.

So far as Mr. Khanna's contention that the award ought to have been corrected is concerned. I do not think that it was competent for the learned judge to do so even if the arbitrators' findings were to the effect suggested by Mr. Khanna. Mr. Khanna argued that the only question left for decision was a purely legal one as to the relationship of the parties on the facts found and that this should have been answered by the learned judge himself; he referred to Halsbury's Laws of England (3rd Edn.) Vol. 2, p. 27; *Re Carlisle, Clegg v. Clegg* (4) (1890), 44 Ch. D. 200; and *Barnes v. Youngs* (5), [1898] 1 Ch. 414. The passagage in Halsbury referred to by Mr. Khanna, which is supported by the cases cited, reads:

> "Now however, since an arbitrator can be compelled to state in the form of a special case for the opinion of the High Court any question of law arising in the course of the reference, it would seem that, where the only question in dispute is a question of law, the court would be disposed to refuse a stay, at least if the arbitration agreement was in general terms and of future disputes, since it would be idle to remit to the arbitrator a question which the arbitrator in his turn would have to submit to the court."

That passage, however, and the cases cited, refer to an application for a stay of proceedings under s. 4 of the English Arbitration Act, 1950 (originally s. 4 of the Arbitration Act, 1889). I do not think it has any application to the powers

of the court under O. XLV, which are governed by r. 12, r. 14 and r. 15. These read as follows:

> "12. The court may, by order, modify or correct an award:
>
> (*a*) where it appears that a part of the award is upon a matter not referred to arbitration, and such part can be separated form the other part and does not affect the decision on the matter referred; or
>
> (*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or
>
> (*c*) where the award contains a clerical mistake or an error arising from an accidental slip or omission.
>
> "13
>
> "14. The court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire upon such terms as it thinks fit:
>
> (*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;
>
> (*b*) where the award is so indefinite as to be incapable of execution;
>
> (*c*) where an objection to the legality of the award is apparent upon the face of it.
>
> "15(1) An award remitted under para. 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, namely:
>
> (*a*) corruption or misconduct of the arbitrator or umpire;
>
> (*b*) either party having been found guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire;
>
> (*c*) the award having been made after the issue of an order by the court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the court, or being otherwise invalid.
>
> "(2) Where an award becomes void, or is set aside under sub-r. (1), the court shall make an order superseding the arbitration, and in such case shall proceed with the suit.
>
> "Proceedings under this rule shall be by motion with notice."

Neither r. 12 nor r. 14(*a*) appear to authorise the correction contended for by Mr. Khanna, even if the findings of the arbitrators would otherwise justify it.

However, I do not think that, in fact, the arbitrators' findings go as far as Mr. Khanna submitted they did. The arbitrators said:

> "The plaintiff's claim is under three heads. First, he asks for the taking of general accounts and judgment for money found due. Secondly, he alleges (in para. 10 of the plaint) that the defendant 'executed certain transport contracts and supplied building materials to customers' and that he has not accounted for moneys received for these contracts executed and materials supplied. No evidence of any sort was offered in support of this allegation; nor was this claim abandoned until the time of summing-up by the plaintiff's advocate. Thirdly, the plaintiff claims damages for, we believe, mismanagement of the business and consequential loss of business

> and damage to lorries as alleged in para. 7 of the plaint. The evidence in support of this particular allegation is not, in our view, sufficient to sustain a claim for damages and the claim was not pressed in the summing-up."

These findings, it is true, dispose of the respondent's claim for damages both in respect of the alleged transport contracts and supply of building materials mentioned in para. 10 of the plaint, and in respect of alleged mismanagement of the business. But clearly the learned judge did not regard these as undecided issues. The arbitrators also state that the respondent accepted as correct the figure of receipts shown as credited to the respondent's business in the accounts which the appellant did produce; that, as regards payments shown in those accounts, the respondent did not challenge the correctness of payments made by cheque; and that the dispute between the parties centred round the payments alleged by the appellant to have been made in cash, in respect of which it was alleged that the accounts were inadequate and unsupported by vouchers. In order to decide this issue, it was certainly necessary to answer the questions posed by the learned judge in the passage from his judgment set out above. Mr. Khanna contended that the arbitrators had answered these questions and found that the relationship between the parties was that of banker and customer. The relevant passages in the award are as follows:

> "The power of attorney is very wide in wording but there is dispute between parties as to whether the defendant undertook to 'manage' the business as a manager would do. Suffice it to say that there is no evidence to the effect that the defendant did any 'management' of the actual day-to-day business. It is clear, however, from para. 5 of the power of attorney (reading: 'to receive and pay out moneys and to give and receive valid receipts for all such moneys received or paid'), from para. 4(*b*) of the written statement of defence, and from the evidence adduced before us that the defendant undertook at least to receive and pay moneys on account of the plaintiff's business. The defendant is therefore liable to account for all moneys received and paid out.
>
>
>
> In any case we consider it was the duty of the defendant in the circumstances of this case (i) not to part with the plaintiff's moneys without ensuring that they were to be used for the business of the plaintiff and (ii) to obtain proper receipts and vouchers.
>
> "We do not accept the contention of the defence that the defendant's duty in regard to payments-out was limited to handing over money to Naranjan Singh without seeing to its ultimate application. In fact he admits in para. 4(*b*) of the written statement of defence that he agreed to pay moneys – to Naranjan Singh – 'for or in connection with the conduct of the said business'. Merely paying money to Naranjan Singh was insufficient: the defendant was bound to see that it was used for the purposes of the plaintiff's business.
>
>
>
> "The defendant's firm does banking business of the type described above and it has chosen to adopt the procedure we have described. Whatever the firm's position may be in relation to moneys deposited or withdrawn by its own customers, we consider the defendant accepted more onerous duties by agreeing to act as the agent of a businessman absent from the country. It was his duty to satisfy himself that moneys were paid to persons to whom they were due by the business of his absent principal."

I certainly do not read these passages as a finding that the relationship between

the parties was merely that of banker and customer. The arbitrators appear to have considered that the appellant's duty extended to some form of financial supervision over the respondent's business. But in the absence of a finding as to what was the agreement between the parties, the precise extent of the obligation they contemplated is obscure. There is a question whether a limited obligation such as was contemplated by the arbitrators would fall within the pleadings. The pleadings in the plaint do appear to be directed primarily to an allegation of an agreement to manage the respondent's business in the full sense of the word "manage"; but I think they are wide enough to cover some more restricted form of "management", such as some form of financial supervision. But a decision is required as to the nature of the agreement between the parties. I think this is what the learned judge had in mind in posing questions 1, 2 and 4 in his judgment. Until the nature of the agreement between the parties is known, it is impossible to say what accounts, if any, the appellant was liable to render. So far as the third question posed by the learned judge is concerned, there is, of course, a definite finding by the arbitrators that the appellant did not do any "management of the actual day-to-day business"; but if the agreement was for the appellant to exercise some more modified degree of supervision over the respondent's business, it would be necessary to ascertain whether he, in fact, did so. I agree with the learned judge that these are matters which should be answered by the arbitrators in order to ascertain the appellant's liability to account to the respondent, and the basis on which such an account should be taken. I do not think the findings as they stand leave merely a question of law for decision which could be dealt with by the learned judge, assuming he had the power to do so.

Mr. Khanna's alternative contention, that there should be an order superseding the arbitration, was founded on the submissions:

(*a*) that the learned judge was of the view that there was an error of law on the face of the record, and that the award must therefore be set aside;

(*b*) that the arbitrators had misconducted themselves within the meaning of r. 15(1)(*a*) of O. XLV because –

(i) they failed to decide or appreciate what the true relationship was; and

(ii) they had misunderstood the scope of the reference on the subject matter in dispute; and

(*c*) that it was undesirable that the matter should go back before the same arbitrators.

Mr. Khanna's submissions were based on English decisions relating to the English Arbitration Acts, in particular to decisions summarised in Halsbury's Laws of England (3rd Edn.), Vol. 2, p. 57, para. 126 as to the scope of the English provision (s. 23 (2) of the Arbitration Act, 1950) that an award may be set aside where an arbitrator "has misconducted himself or the proceedings". It is there stated inter alia:

> "Thus misconduct occurs if the arbitrator . . . fails to decide all the matters which were referred to him; if by his award he purports to decide matters which have not in fact been included in the agreement of reference; if the award . . . is on its face erroneous in matter of law . . ."

From these, Mr. Khanna argued that there had been misconduct by the arbitrators in the instant case, and that the matter fell within r. 15 of O. XLV. He conceded that setting aside was not the only order possible, but contended

that it was the appropriate order to make here. He queried whether there was power to remit where there is an error of law on the face of the award.

In so far as there is any discretion as to which order should be made, I am not satisfied that any good cause has been shown for interference with the decision of the learned judge. But in any case I do not think the English cases apply to an arbitration under O. XLV without qualification. In *Yamike Kweku v. Annor Adjaye* (6), [1926] A.C. 755, the Privy Council considered O. LII of the Supreme Court Ordinance, 1876, of the Gold Coast which, as appears from their lordships' judgment, corresponds to O. XLV. In the order for arbitration no time had been fixed for "delivery" of the award as was required by the rule corresponding to r. 3 of O. XLV. At p. 759 of the report their lordships said:

> "It appears to their lordships that the omission from the recited order made under O. LII of the above-mentioned Ordinance of any indication of the time when it is to be made is such a defect, apparent upon the face of the award, as would prima facie make it bad and liable upon proper proceedings being taken to be set aside. But r. 12(*c*) of this same O. LII protects the award from being so dealt with. It provides that if an objection to the legality of the award is apparent upon its face the court can remit it for reconsideration by the arbitrator or umpire upon such terms as it may think proper, and then by r. 13 enacts, as complementary to the preceding rule, that an award shall not be liable to be set aside except on the ground of perverseness or misconduct of the arbitrators. The effect of these two rules necessarily is, in their lordship' view, that an award cannot be set aside merely for an illegality appearing on the face of it, where that illegality does not amount to perverseness or to misconduct of the arbitrator."

Rule 14 of O. XLV refers expressly to the determination by the arbitrators of any matter not referred to arbitration, and to the failure of the arbitrators to determine any matter referred to arbitration, as well as to objection to the legality of the award apparent on the face of it, as grounds for remission of an award for reconsideration. It appears to me that as these matters are dealt with in r. 14, they would not, in themselves alone, amount to misconduct within para. (*a*) of r. 15 (1). This view appears consistent with the view taken by the courts in India as to what acts amounted to misconduct in an arbitrator under the corresponding provision in the Indian Civil Procedure Rules (i.e. para. 15 of Schedule II), which are summarised in Mulla's Code of Civil Procedure (10th Edn.), at p. 1273.

It follows from what I have said that I think the learned judge was right to make the order remitting the award

> "for reconsideration and for a finding on the defendant's liability to account to the plaintiff and a further finding as to the basis on which such account shall be taken."

It remains to consider the learned judge's order as to costs, which is the subject of the first ground of appeal. The learned judge's order was:

> "In view of the fact that applicant failed on four issues and succeeded on one, I think this is a proper case where each party pay his own costs on this application and I so order.
>
> "As to the costs of the arbitration the award being referred back for reconsideration, the arbitrators' costs are still at large. They will still be required `to recommend the amount of and payment of those fees' on their amended award."

Costs are a matter in the discretion of the court and this court will not interfere unless satisfied that the lower court acted on a wrong principle. The proviso to sub-s. (1) of s. 27 of the Civil Procedure Ordinance (Cap. 5) provides that:

> "the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

The reason given by the learned judge here for his order is that the appellant "failed on four issues and succeeded on one". I have already mentioned the grounds advanced by the appellant in support of his motion to have the award set aside on which he failed. With respect to the learned judge, I feel bound to agree with Mr. Khanna that these grounds are not "issues" within the meaning of the proviso to s. 27. In *Reid, Hewitt & Co. v. Joseph* (7), [1918] A.C. 717 at p. 742 Viscount Haldane, in relation to a similar provision in the English rules of court then in force, defined an issue within the meaning of the rule as

> "an issue which has a direct and definite event in defeating the claim to judgment in whole or in part."

I do not think the grounds on which the appellant failed fall within this definition. I therefore think that the learned judge erred in principle in ordering each party to pay his own costs of the motion to set aside the award on the ground that the appellant had failed on four "issues" while succeeding on one. I think the order should be varied by deleting para. (2) and substituting an order that the defendant's costs of the motion be paid by the plaintiff. Both parties were represented by two counsel on the hearing of the motion, and I think there should be a certificate for two counsel.

Mr. Khanna also asked that the arbitrators be ordered to refund the fees paid to them by the appellant or that the respondent be ordered to make good this amount to the appellant. This does not appear to be raised in the memorandum of appeal, and in any case, as the arbitrators were not before the court either on the motion to set aside the award or on appeal, I do not think such an order should be made against them. The learned judge's order as to costs of the arbitration appears to me adequate, and I would not interfere with it.

In the result, I would dismiss the appeal except in so far as I have indicated that I think the order as to costs of the motion to set aside the award should be varied. As regards costs of the appeal, the appellant has succeeded on the question of costs only. I would order that the appellant pay four-fifths of the respondent's costs of the appeal.

Sir Ronald Sinclair P: I agree and have nothing to add. The appeal is dismissed except that for para. 2 of the order appealed from there will be substituted the following:

> "(2) that the defendant's costs of this application shall be paid by the plaintiff and be certified to include the costs of two counsel."

The appellant will pay four-fifths of the respondent's costs of the appeal.

Crawshaw JA: I also agree.

Order that the appeal be dismissed subject to variation of the judge's order as to costs of the motion to set aside the award.

For the appellant:
D. N. & *R. N. Khanna*, Nairobi

For the respondent:

Bryan O'Donovan, Q.C., V. N. Markanday and *S. M. Akram*, Nairobi

Mrs V W Nehra v the Commissioner for Transport
[1962] 1 EA 300 (HCU)

Division:	HM High Court of Uganda at Jinja
Date of judgment:	21 May 1962
Case Number:	111/1961
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Railway – Bailment of luggage – Trunk deposited by passenger for carriage – Passenger breaking journey – Arrival of trunk at destination before arrival of passenger – Trunk kept in luggage office – Passenger claiming trunk more than twenty-four hours after its arrival – Trunk lost – Whether liability of railway is as carrier or warehouseman – East African Railways & Harbours Administration Act (*Cap*. 3, *Laws of the East Africa High Commission, Revised Edition*, 1951), *s*. 32, *s*. 35, *s*. 36, *s*. 50 – *Civil Procedure Ordinance* (*Cap*. 6), *s*. 11 (7) (*U*.) – *Civil Procedure Rules*, *O*. 24, *r*. 3 (*U*.).

Editor's Summary

On November 8, 1960, the plaintiff bought a railway ticket from Jinja to Mombasa and went by train as far as Nairobi, where she broke her journey. On November 11, she continued her journey by train from Nairobi to Mombasa, arriving there on November 12, 1960. The plaintiff's trunk was put in the van of the train by which she travelled from Jinja and a luggage ticket for it was issued to her. The trunk was not removed at Nairobi and continued by the van to Mombasa, arriving there on November 10. The plaintiff had made no declaration as to the contents or value of the trunk and after arriving at Mombasa on November 12, she returned to the station to collect her trunk, when she was informed that the trunk was not there or not available for delivery. She returned on November 14, and was then informed that the trunk was lost. On November 15, the plaintiff made a statement to a railway police officer to whom she gave details of the contents of the trunk. Subsequently, she sued the defendant as the railway authority and in her plaint set out details of the contents of the trunk which included gold ornaments and watches which she had not mentioned to the police officer. The defendant admitted the trunk was lost whilst in railway custody but claimed that it was lost after arrival at Mombasa and not in transit, that his liability was limited to Shs. 100/- or, alternatively, to Shs. 500/- and made no admissions as to the nature and value of the contents. At the trial there was evidence accepted by the judge that the trunk had reached Mombasa. The plaintiff's husband gave evidence which supported his wife's claim as set out in her plaint, but the details of the contents differed substantially from those given to the railway on November 15, 1960.

Held –

(i) the plaintiff had failed to prove that the trunk contained any gold ornaments or watches.

(ii) by virtue of para. 109 (2) of the Tariff Book published under s. 50 of the East African Railways

and Harbours Administration Act (Cap. 3, Laws of the East Africa High Commission (Revised Edition) 1951) and by s. 36 of the Act the defendant's liability was limited to Shs. 100/- since the plaintiff did not go to collect her trunk within twenty-four hours of its arrival at Mombasa; the Act distinguishes between liability as a carrier and as a warehouseman and the liability in this case was that of a warehouseman.

Judgment for the plaintiff for Shs. 100/-.

Cases referred to in judgment:

(1) *Parker v. South Eastern Railway* (1877), 2 C.P.D. 416.

Judgment

Sir Audley McKisack CJ: This is a claim by a railway passenger in respect of the loss of her trunk. The amount claimed, being the alleged value of the trunk and its contents, is Shs. 11,100/-. The defendant, who is the authority responsible for the administration of the railway, admits that the trunk was lost, but relies on the following defences. Firstly, that there was no declaration of the value of the contents of the trunk, so that his liability is limited to Shs. 100/- (see para. 120 (4) of the Railway Tariff Book); secondly, that some of the contents of the trunk were things specified in the Third Schedule to the Railways and Harbours Administration Act (Cap 3, Revised Edition, 1951, of the Laws of the High Commission), and consequently liability is limited by s. 32 of that Act to Shs. 500/-; thirdly, the nature and value of the alleged contents of the trunk are disputed.

The plaintiff travelled on a train from Jinja on November 8, 1960, having bought a ticket to Mombasa (where she intended to catch a ship). She broke her journey at Nairobi on November 9, and left Nairobi by train on November 11, arriving at Mombasa on November 12. The trunk was put in the luggage van of the train at Jinja on November 8, having been booked at the station, and a luggage ticket was issued for it to the plaintiff. No declaration was made when the trunk was booked concerning its contents, and no extra charges were paid in respect of any of the contents. The trunk and its contents were not insured for the journey. On the day she arrived at Mombasa, November 12, the plaintiff went back to the station at about 2 p.m. to collect her trunk, but was informed that it was not there, or that it was not available for delivery. She was told to come back again. She did so on November 14, and was then informed that the trunk was lost. On November 15, she made a statement (exhibit “E”) to a railway police officer about the trunk and its contents.

Although the defendant admits that the trunk was lost while in railway custody, he maintains that it was lost after its arrival at Mombasa station. This question is of importance in relation to the railway’s liability, as will appear hereafter. A clerk in the employ of the railway at Mombasa has testified that he remembers a green trunk from Jinja lying in the luggage office on November 12. The trunk which is the subject of this suit was a green one (see exhibit “E”), but, seeing that this witness must constantly handle a great many trunks, I would not have placed much reliance on his evidence of the arrival at Mombasa station of the trunk in question were it not for a statement which this witness made to a railway police officer (see exhibit “F”) on November 16, 1960, in which he also refers to this particular trunk. I think that there is sufficient evidence to satisfy me that the trunk was lost after its arrival at Mombasa by the train which reached there on November 10, and not while en route to Mombasa.

The luggage ticket which was issued to the plaintiff for the trunk has disappeared at some point subsequent to the discovery that the trunk was lost, but it is not disputed that a ticket was issued for the trunk and that its number was noted when the plaintiff made a statement to the railway police officer.

The next question is whether the plaintiff has proved the nature and value of the contents of the trunk as alleged in the plaint. These particulars differ substantially from the information given to the police by the plaintiff on November 15 (exhibit “E”). Of the items which occur both in that statement and in the plaint, the value is, in nearly all cases, considerably higher in the plaint. The plaintiff’s husband gave evidence in support of the items in the plaint, and said that it was he who had bought them all and his wife would not have any proper idea of what most of them would cost. Both he and the plaintiff say that the trunk contained gold ornaments valued at Shs. 3,900/-, and two watches which the husband values at

Shs. 450/-. Neither the gold ornaments nor the watches appear in the list of contents contained in the plaintiff's statement to the police (exhibit "E"). The plaintiff maintains that

she did tell the police officer about these items, whereas the police officer, as well as the railway clerk who acted as an interpreter for the occasion, maintain not only that she did not mention them but also that she was specifically asked if there was any jewellery in the trunk and that she replied in the negative. I appreciate that she may have been very upset and worried at the time she made her statement, but even so it is highly improbable that she would have forgotten to mention these valuable items when she was able to give a list of the other property. Nor do I think it at all probable that the police officer would have deliberately omitted the ornaments and watches if she did mention them to him. The police statement includes eleven items and their value, as described to the police officer by the plaintiff. This suggests that the questioning was through and the plaintiff was capable of giving adequate answers. It is true that an interpreter was used, and that the plaintiff's language is one with which he was not very familiar. Nevertheless the interpretation cannot have been so very bad, if one looks at the material which the police officer was able to record.

I am not satisfied that the plaintiff has established that the trunk did contain any gold ornaments or watches. As regards the value of the other items, I accept that the plaintiff herself might not be very certain what they had cost, and that she may not have been able to remember all the contents at the time (e.g., the shirts which appear in the plaint but not in her statement to the police). I think that the values in the plaint are exaggerated, though it is difficult to say to what extent. The total value of the lost property as set out in her statement to the police is Shs. 3,735/-. The value in the plaint, after deleting the ornaments and watches, is Shs. 6,750/-. I think a fair estimate of the true value is Shs. 5,000/-. This includes the camera, the value of which I put at Shs. 600/-.

I now turn to the defences on which the defendant relies. As regards the limitation of liability for "Third Schedule articles" prescribed by s. 32 of the Act, this becomes of relatively little importance by reason of my having found that there were no gold ornaments or watches in the trunk. The only other Third Schedule article in the trunk was the camera, which I have just mentioned. By virtue of s. 32 and s. 35, proviso (*b*)(i), the Commissioner's liability is restricted to Shs. 500/- in respect of any Third Schedule article or articles in a package. Consequently, if this section is applicable, the plaintiff cannot recover more than Shs. 500/- for the camera.

But there is the question of the further limitation of liability arising from para. 109 (2) of the Tariff Book (published under s. 50 of the Act), which is as follows:

> "(2) Luggage not delivered within twenty-four hours of arrival at destination will be warehoused subject to the conditions and charges applicable to cloakrooms."

And in the section of the Tariff Book dealing with cloakrooms (defined as

> "Any place provided by the administration in connection with the transport services as a facility for the temporary deposit of goods by passengers and other persons"),

there is the following provision –

> "120 (4) The liability of the administration for any loss . . . of any goods deposited in cloakrooms shall not in any case exceed Shs. 100/-, unless at the time of such deposit the person depositing the goods declared that the value thereof exceeded that amount and paid [certain additional charges]."

From the evidence to which I have referred I think it has been sufficiently established that the plaintiff, who had broken her journey at Nairobi for two

days, did not go to collect her trunk within twenty-four hours of its arrival at Mombasa. Consequently, if these provisions in the Tariff Book are applicable, it seems that the defendant's liability for the trunk is limited to Shs. 100/-, no declaration of its contents having been made at any stage. The defendant tendered Shs. 100/- (and more) before the institution of the suit, but the tender was rejected.

The facts which I have found dispose of the plaintiff's contention that the defence has failed to prove the facts necessary to make para. 109 (2) of the Tariff Book applicable, that is to say, the facts that the trunk arrived at its destination, that it was not delivered within twenty-four hours of arrival, and that it was warehoused.

It is further argued by Mr. Phadke that the conditions set out in the Tariff Book are not binding on the plaintiff, since they did not form part of the contract between her and the defendant. The luggage ticket issued to her was not put in evidence. And, although the specimen ticket (exhibit "D.1") does state that the luggage is carried subject to the conditions stated in the Tariff Book, this statement takes the form of an unobtrusive footnote in minute print. Mr. Phadke relied on *Parker v. South Eastern Railway* (1) (1877), 2 C.P.D. 416 and other authorities on "ticket cases".

I do not, however, find it necessary to consider that question, since, on the facts as I have found them, the defendant's liability is determined by provisions in the Railways and Harbours Act itself, and the conditions contained in the Tariff Book are irrelevant.

The Act distinguishes between the Commissioner's liability as a carrier and his liability as a warehouseman, his liability in the former capacity being more extensive than in the latter. As warehouseman he is liable for loss, misdelivery, detention or damage only where it has been caused by want of reasonable foresight and care on the part of the Commissioner or any of his employees; see s. 35 of the Act. This section applies to goods –

> "(1) delivered to, or in the custody of, the Administration otherwise than for the purposes of carriage;'
>
> "(2) accepted by the Administration for carriage, where such loss, misdelivery, detention or damage occurs otherwise than while the goods are in transit."

In the instant case the trunk had been accepted for carriage but was lost after it had ceased to be in transit and had been put in the cloakroom. Section 35 relates to "goods", but that expression is defined by s. 2 to include luggage.

Section 39 provides that in proceedings against the Commissioner for compensation under certain sections, including s. 35, it shall not be necessary for the plaintiff to prove how the loss, etc. was caused.

Section 36 deals with limitation of the Commissioner's liability for loss of goods deposited in a cloakroom. This provision is in the same terms as para. 120 (4) of the Tariff Book to which I have already referred, and on which the Commissioner has founded one line of defence. The section also defines "cloak-room" in the same terms as those of para. 120 (1) of the Tariff Book. In this matter, therefore, it seems that the Tariff Book is merely reproducing – presumably for convenience – a provision as to limitation of liability already prescribed by the Act itself and is not creating any new condition or limitation.

Section 36 applies, in my view, to the liability for loss of the plaintiff's trunk. It had not been claimed by the plaintiff on its arrival at Mombasa station, but only after a substantial interval (more than twenty-four hours). The railway employees put the trunk, on the day of its arrival, in a cloakroom, which was clearly a proper course to take seeing that it had not been claimed on arrival.

I do not think it material to the application of s. 36 that the plaintiff, being

absent at the time the trunk was deposited in the cloakroom, was thereby unable to make the declaration of value referred to in the section. Her inability to make the declaration stemmed from her own voluntary act in breaking her journey and arriving at Mombasa two days later than the trunk.

Section 36 limits the Commissioner's liability to Shs. 100/-, and that is all, therefore, that the plaintiff is entitled to recover. There was no payment by the defendant into court (see O. 24, r. 3). There will be judgment for the plaintiff for Shs. 100/-, but, by virtue of s. 11 (7) of the Civil Procedure Ordinance, she is not entitled to any costs; and, since the plaintiff has failed to a substantial degree on the issues of the contents and value of the lost property and the extent of the defendant's liability, I order her to pay three-fourths of the defendant's costs.

Judgment for the plaintiff for Shs. 100/-.

For the plaintiff:
Visana, Raichura & Singh, Kampala
Y. V. Phadke

For the defendant:
The Legal Secretary, EA Common Services Organization
G. C. Thornton (Senior Assistant Legal Secretary, E. A. Common Services Organization)

Flora d/o Ayuya Agoya v Danieri Kasigwa
[1962] 1 EA 304 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	1 June 1962
Case Number:	908/1961
Before:	Bennett J
Sourced by:	LawAfrica

[1] Jurisdiction – African parties – High Court action for damages for personal injuries – Whether Principal Court has jurisdiction – Buganda Courts Ordinance (*Cap.* 77), *s.* 7 (*U.*).

Editor's Summary

The plaintiff, an infant, suing by her next friend, claimed damages for personal injuries sustained when negligently run down by the defendant's motor car. The defence was a denial of negligence and that the collision was due to inevitable accident, but there was no allegation of contributory negligence on the part of the plaintiff. The defendant applied under s. 7 of the Buganda Courts Ordinance for transfer of the suit to the Principal Court for trial and the plaintiff opposed the application on the grounds inter alia that

the plaintiff was suing by her next friend under O. 29, r. 1 of the Civil Procedure Rules, so that the suit was brought under an Ordinance; and that s. 104 of the Traffic Ordinance, which imposes upon insurers a duty to satisfy judgments against persons insured in respect of third party risks, would be invoked.

Held –

(i) that the plaintiff had found it necessary to invoke the Civil Procedure Rules dealing with suits by infants did not mean that the suit was "taken under any Ordinance" within the meaning of s. 9 of the Buganda Courts Ordinance, since these words do not relate to the matters of procedure.

(ii) so far as the parties to this suit were concerned s. 104 of the Traffic Ordinance was res inter alios.

(iii) the provisions of an Ordinance could not properly be invoked by either party if the suit were to proceed to trail in the High Court and since the Principal Court had jurisdiction to hear the suit it should be transferred to that court.

Order that the suit be transferred to the Principal Court.

Cases referred to in judgment:

(1) *Reuben Musanje v. Tomasi Yamulemye*, [1961] E.A. 716 (C.A.).

Judgment

Bennett J: This is an application by the defendant under s. 7 of the Buganda Courts Ordinance (Cap. 77), for an order transferring the case to the Principal Court for trial. The plaintiff, an infant, suing by her next friend, claims damages for personal injuries sustained when she was allegedly run down by the defendant's motor car. As appears from the plaint, the claim is founded upon alleged negligence of the defendant. The defence to the claim is a denial of negligence and an averment that the collision was due to inevitable accident; but there is no allegation of contributory negligence on the part of the plaintiff.

The defendant's advocate relies upon the judgment of the Court of Appeal for Eastern Africa in *Reuben Musanje v. Tomasi Yamulemye* (1), [1961] E.A. 716 (C.A.). To quote from the judgment of the learned Vice-President at p. 724:

> "It is clear from the provisions of s. 20 [Uganda Order-in-Council, 1902] that the English common law, in its application to Uganda in cases to which natives are parties, is subject to native law (except in so far as such native law may be repugnant to justice or morality); but native law is subject, inter alia, to the provisions of any Ordinance. In these circumstances, where a case between Africans in Buganda purports to be `taken under' English common law, if the cause of action is known to native law, it is the native law which is to be applied. Whatever the form, the case in substance is, as held in *Mutyaba's* case, a case under native law. On the other hand, since an Ordinance overrides native law in cases of inconsistency, where a case is taken under the provisions of an Ordinance, those provisions prevail and must be applied, and there need be no reference to native law on the subject."

The plaintiff's advocate has resisted the application on four main grounds. First, it is said that the plaintiff is suing by a next friend under O. 29, r. 1, so that the suit is brought under an Ordinance. For the purpose of this argument the word "Ordinance" is to be construed as including subsidiary legislation having regard to the definition of "Ordinance" in s. 2 of the Interpretation and General Causes Ordinance (Cap. 1).

In my judgment, the fact that the plaintiff has found it necessary to invoke the provisions of the Civil Procedure Rules dealing with suits by infants does not mean that the suit is "taken under any Ordinance" within the meaning of s. 9 of the Buganda Courts Ordinance, since these words do not relate to matters of procedure. If the words "taken under any Ordinance" were to be construed as including procedural matters, all suits instituted in the High Court would fall within s. 9 since every plaint filed in the High Court must conform with the requirements of Civil Procedure Rules relating to pleadings.

Secondly, it is said that this case in which damages for personal injuries are claimed, is distinguishable from *Musanje's* case (1), in which the claim was for damage to a motor vehicle. This appears to me to be a distinction without a difference, since whether the claim is for damages for personal injuries or for injury to property, the claim is founded upon common law.

Thirdly, it is contended that the cause of action in the instant case is unknown to native customary law which does not conform to common law principles relating to the measure of damages and to the defence of inevitable accident. This argument ignores the passage which I have cited from the judgment of the learned Vice-President in *Musanje's* case (1), and is unacceptable.

Finally, it is contended that the provisions of s. 104 of the Traffic Ordinance will be invoked. This section imposes upon insurers a duty to satisfy judgments against persons insured in respect of third party risks. So far as the parties to this suit are concerned s. 104 of the Traffic Ordinance is res inter alios, and the argument is insubstantial.

As has already been observed, contributory negligence has not been pleaded, and I am satisfied after a perusal of the pleadings that the provisions of an Ordinance could not properly be invoked by either party if the suit were to proceed to trial in the High Court. I therefore hold that the Principal Court has jurisdiction. The case will accordingly be transferred to that court. The next friend will pay the defendant's costs of this application.

Order that the suit be transferred to the Principal Court.

For the plaintiff:
Korde & Esmail, Kampala
K. G. Korde

For the respondent:
J. S. Shah, Kampala
J. J. Shah

Pirbhai Lalji & Sons Ltd v Hassanali Devji
[1962] 1 EA 306 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	19 June 1962
Case Number:	269/1962
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Practice – Service of summons – Attempts made to serve summons on defendant at house without success – Service effected on defendant's wife – Insufficient evidence that defendant could not be found – Whether service of summons effective – Civil Procedure Rules, O. 5, *r.* 14 (*U.*).

[2] Judgment – Ex parte judgment in default of appearance – Judgment entered on last day of time allowed for appearance – Application to set aside judgment – Whether judgment entered prematurely – Civil Procedure Rules, O. 33, *r.* 3 (*U.*).

Editor's Summary

A clerk of the plaintiff's advocate made several attempts on April 26 and April 27, 1962, to serve a

summons upon the defendant at his house but each time the defendant was not at home. On April 27, the summons was served on the defendant's wife under O. 5, r. 4 of the Civil Procedure Rules. The plaintiff's advocate applied for entry of judgment in default of appearance at 2.40 p.m. on May 7, on which day judgment was accordingly entered by the deputy registrar. On an application to set aside the judgment, the grounds were that entry of judgment on May 7, was premature and that service of the summons on the defendant's wife was not effective.

Held –

(i) it was still open to the defendant to enter an appearance on the date on which the judgement was entered and accordingly the entry of judgment was premature.

(ii) no proper or sufficient inquiry was made as to the defendant's whereabouts or whether the defendant could not really be found; accordingly service on the defendant's wife was not effective.

Order that the judgment be set aside. Unconditional leave to appear and defend granted.

Case referred to in judgment:

(1) *Auto Spares Co. Ltd. v. J. J. Mehta*, Uganda High Court Civil Case No. 191 of 1948 (unreported).

(2) *Erukana Kavuma v. Mehta*, [1960] E.A. 305 (U.).

Judgment

Sir Audley McKisack CJ: Judgment was entered for the plaintiff in this suit on May 7, 1962. The suit was filed under the summary procedure provided for in O. 33 of the Civil Procedure Rules, and judgment was entered by the deputy registrar in default of an application for leave to defend. The defendant now seeks to have the judgment set aside under O.33, r. 11, and asks for leave to defend the suit.

The application is made on two grounds; firstly, that entry of judgment on May 7, was premature and, secondly, that service of the summons on the defendant was not effective.

As to the first point, a summons under O. 33 requires the defendant's application for leave to defend to be made within ten days from the service of the summons (see the form No. 4 in appendix "A"). In the instant case the last day for applying for leave to defend was May 7. Rule 3 of O.33 provides that, in default of such application by the defendant within the period fixed by the summons, the plaintiff shall be entitled to a decree for the sum claimed. It was not clear to me how the judgment came to be entered on the last day of the period allowed to the defendant for making his application, and I have therefore made inquiries of the registry. Before judgment is entered under O.33, the plaintiff is required to file an affidavit of service, on which a fee of Shs.6/-is payable, and it is the practice for the plaintiff's advocate to make a written request to the court for judgment to be entered by reason of the fact that the defendant has failed within the prescribed time to apply for leave to defend (but no fee is payable in respect of this written request). In the instant case an affidavit of service was duly filed on May 7 at 2.40 p.m. (as shown by a note made in the registry), and at the same time the registry received from the plaintiff's advocate a written request for entry of judgment. This request includes the following statement –

> "The time within which the application for leave to appear and defend the suit should have been made has expired and no such application has been made to this Honourable Court."

That statement is dated May 7, on which date it was still open to the defendant to apply for leave to defend.

It is contended, however, that, as the prescribed hours for paying in fees to the cashier in the registry end at 3 p.m. each day, and as a fee is payable on an application for leave to defend, such an application cannot be made after 3 p.m. on the last day of the ten-day period allowed to a defendant for making that application; and, provided the plaintiff has paid the necessary Shs.6/-fee for filing the affidavit of service (which was done in the instant case), he is entitled to have judgment entered in his favour at 3 o'clock, or at any time thereafter until the registry closes, on the last day of the ten-day period (or, of course, on a subsequent day).

It appears that the registry has acceded to this practice by reason of a decision by Ainley, J., in *Auto Spares Co. Ltd. v. J. J. Mehta* (1), Uganda High Court Civil Case No. 191 of 1948 (unreported). In that case Ainley, J., pointed out that an application is not effectively made unless the requisite fee is paid thereon; consequently, an application for leave to defend must be made before the cashier's office in the registry closes on the last day of the ten-day period allowed to the defendant to make an application for

leave to defend.

I respectfully agree with that proposition, but it does not appear to me to be any authority for the practice of entering judgment on the last day of the ten-day period, and still less for a premature application by a plaintiff before the cashier's office has closed on that day (as was done in the instant case). Neither O.33, nor the prescribed form of summons under that order, contains any reference to the registry's working hours. Rule 3 simply speaks of "the period allowed by the summons", and the summons speaks simply of "ten days". Consequently, it is only when the ten-day period has expired that the plaintiff is entitled to his judgment. The position, then, as I see it is that, although the defendant must make his application for leave to defend before the cashier's office closes on the tenth day, the plaintiff is not entitled to have judgment entered before the following day; and it is only after the time at which the cashier's office has closed on the tenth day, and after he has ascertained that no application has been made by the defendant up to that time, that he can properly sign a request for judgment to be entered on the following day.

I accordingly hold that the entry of judgment in the instant case was premature. As to the second ground for this application (the question whether service of the summons was effective), the affidavit of service by a clerk of the plaintiff's advocate is to the effect that he went to the defendant's house on April 26 at 4 p.m. and found the defendant away; he went there again on April 27 at 8 a.m., and again found that the defendant was not at home; at noon on April 27, he returned there, and again found that the defendant was not there; he returned once more at 1.45 p.m. on the same day and, as the defendant was still not there, he served the summons on the defendant's wife, whom he found in the defendant's house.

Order 5, r.14 is as follows –

> "Where in any suit the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him."

It is on this provision for serving a member of the family that the plaintiff relies. Mr. Vyas, for the defendant, however, argues that this is not a case where "the defendant cannot be found", since he was merely out of the house on the several occasions when the process server called. In *Erukana Kavuma v. Mehta* (2), [1960] E.A. 305 (U.), I dealt with the question whether a defendant's wife was properly served with a summons under O.5, r. 14. The circumstances in that case were that the defendant was away from Uganda and, when the process server was told that he was in India, he thereupon served the summons on the defendant's wife. In holding that the service was not effective I made the following observations (at p. 306) –

> "This seems to me a most inadequate ground for saying that the defendant could not be found. The affidavit does not reveal whether or not any inquiry was made about the defendant's address in India, or whether it was expected that the defendant would return to Uganda from India, and if so, when. The attempt to find the defendant appears to me to have been most perfunctory. I cannot regard absence from Uganda, without any information about the defendant's address (if he has one) in the country to which he has gone, or whether or not he can be found there, and without any information as to the expected length of his absence, or as to when he had left Uganda, as being sufficient grounds for saying that a defendant 'cannot be found'."

In the instant case also I think that no proper inquiry was made as to the defendant's whereabouts, and the process sever does not appear to have taken any sufficient steps to establish that the defendant could not be found. All

that his affidavit shows is that the defendant was away from his house on the several occasions when the process server called there on two consecutive days. I accordingly hold that service on the defendant's wife was not effective.

Finally, I have to consider whether it is reasonable to set aside the decree, since r. 11 of O.33 provides that this shall only be done "if it seems reasonable to the court so to do". The plaint in this suit claims Shs. 2,429/-, being the balance outstanding for goods sold and delivered to the plaintiff during the years 1955 and 1956. The account annexed to the plaint shows that the last day on which goods were supplied to the defendant was March 26, 1956. The plaint was filed on April 24, 1962, but the plaint avers that the claim was not barred by limitation, since there was an acknowledgment by the defendant in the form of a part payment made on May 10, 1956. An affidavit by the defendant contains a general denial of the facts alleged in the plaint and avers that the claim is statute-barred.

In all the circumstances of this case I am quite satisfied that the judgment ought to be set aside and the defendant be given unconditional leave to appear and defend, and I so order. The defendant will have fourteen days from the date of this order within which to file a defence. The plaintiff will pay the costs of this application.

Order that the judgment be set aside. Unconditional leave to appear and defend granted.

For the plaintiff:
Ishani & Ishani, Kampala
A. Ishani

For the defendant:
M.P. Vyas

Ezera Kyabanamaizi and others v R
[1962] 1 EA 309 (CAK)

Division:	Court of Appeal at Kampala
Date of ruling:	14 April 1962
Case Number:	150/1961
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from	H.M. High Court of Uganda – Jones, J.

[1] Evidence – Accomplice evidence – Admissibility – Statements by co-accused not made on oath – Effect and value – Evidence Ordinance, s. 28 (*U.*).

[2] Practice – Statements by co-accused – Extra-judicial statements – Admissibility – Trial within a trial – Procedure to be followed by trial judge – Effect of irregularities and misdirections not resulting in

miscarriage of justice – Criminal Procedure Code (*Cap*.24), *s.* 347 (*U*.) – *Indian Evidence Act*, 1872, *s*.30 – *Indian Penal Code*, *s.* 34 – *Penal Code*, *s.* 16, *s.* 22 *and s.* 273 (*U*.) – *Evidence* (*Statements to Police Officers*) (*No*.2) *Rules*, 1955 (*U*.) – *The Judges' Rules*, *r.* 2.

Editor's Summary

On the night of March 27, 1961, some Africans broke into the house in which the deceased, Tebesigwa, was living with her husband, her son and another small boy. Tebesigwa, her husband and the small boy were killed and property stolen. The six appellants and three others were subsequently charged with the murder of Tebesigwa. The case against the accused consisted of evidence given by three persons who had been members of the gang which went to rob and who were, therefore, accomplices, statements made by the accused to the police, at the preliminary inquiry and at the trial, and factual evidence of the robbery, the injuries suffered by the victims, the property stolen which was subsequently recovered, and other matters tending to connect the individual

accused with the robbery. At the trial the judge did not follow the directions given in *Kinyori s/o Karuditu v. R.* (1956), 23 E.A.C.A. 480 at p. 482 that where an extra-judicial statement is challenged by an accused person any submission or evidence bearing upon its admissibility and the ruling of the judge thereon should be given in the absence of the assessors and that the defence has the right to cross-examine Crown witnesses again in the presence of the assessors as to the circumstances in which the statement was made. In his judgment the judge also used statements made by the accused not only against the person making the statement, but also against the other accused and he appeared to include such statements in references in his judgment to "accomplice evidence", though none of the appellants gave evidence either at the preliminary inquiry or at the trial. In the result the six appellants were convicted of murder but the three other accused were acquitted. The main issues on appeal were (*a*) whether the murder of the deceased was committed in prosecution of a common purpose by the gang which broke into the house, and was a probable consequence of the prosecution of that purpose and (*b*) whether the individual appellants had been shown to have been members of that gang sharing the common purpose.

Held –

(i) the trial judge ought to have ascertained as soon as the statement of the third appellant was mentioned whether there was going to be an objection to it; however, no prejudice to this appellant resulted as the statement was eventually admitted in evidence. *Kinyori s/o Karuditu v. R.* (1956), 23 E.A.C.A. 480 followed.

(ii) as the objection to the statement was in part based on allegations of threats and beating, the trial judge should have ensured that the appellant was aware of his right to have the evidence that the statement had been improperly obtained repeated in the presence of the assessors

Kinyori s/o Karuditu v. R. (1956), 23 E.A.C.A. 480 followed.

(iii) it was wrong and improper of defence counsel to make a charge against the police or against any other witness by way of defence unless he intended to call his client to give evidence to support the charge.

O'Neill and Ackers v. R., 34 Cr. App. R. 108 applied.

(iv) the statements of the appellants were not "accomplice evidence" as they were not on oath; consequently, at best they could only be "taken into consideration" in terms of s. 28 of the Evidence Ordinance, against a co-accused and used only to supplement an otherwise substantial case against him; they could never be the basis for a conviction, as, on a proper direction, accomplice evidence could; and further such a statement could not be considered at all against a co-accused unless there was a full admission of guilt in it.

(v) the trial judge rightly rejected allegations in the statements of the appellants, other than the first appellant, that they were forced by the latter to assist in the robbery, and the allegations of compulsion fell far short of bringing the appellants or any of them within s. 16 of the Penal Code.

(vi) the members of the gang were clearly prepared to use force to achieve their object and, in view of the lethal nature of the weapons carried, it was inescapable that the murder of one or more occupants of the house "was probable consequence" of the prosecution of the common purpose of committing armed robbery.

(vii) the trial judge was not entitled, in view of s.22 of the Penal Code, to consider whether the killing of the deceased took place "in furtherance" of the robbery in the sense that the robbery was "complete" when the deceased was murdered.

Abdi Ali and Others v. R. (1956), 23 E.A.C.A. 573 distinguished.

(viii) there was independent evidence tending to show that the individual appellants were in fact active members of the gang.

(ix) the court was satisfied that the irregularities which had occurred and the misdirections of the judge in relation to statements made by co-accused persons, did not result in any miscarriage of justice and were therefore curable under s. 347 of the Criminal Procedure Code.

Appeal dismissed.

Case referred to in judgment:

(1) *Kinyori s/o Karuditu v. R.* (1956), 23 E.A.C.A. 480.

(2) *O'Neill and Ackers v. R.*, 34 Cr. App. R. 108.

(3) *Muthige v. R.* (1954), 21 E.A.C.A. 267.

(4) *Abdi Ali and Others v. R.* (1956), 23 E.A.C.A. 573.

(5) *Bassan and Another v. R.*, [1961] E.A. 521 (C.A.).

Judgment

Sir Alastair Forbes VP, read the following judgment of the court: The six appellants, together with three other persons, were charged before the High Court of Uganda sitting at Mbale with the murder, on or about March 27, 1961, at Kabuna village in the Bukedi district of the Eastern Province, of one Tebesigwa w/o Enosi Nyango. The six appellants were convicted, the other three co-accused being acquitted. Medical evidence indicated that the fourth appellant, Kolyanga s/o Nekemiya, might have been under the age of eighteen years when the offence was committed, and he was accordingly sentenced to be detained during the Governor's pleasure under s. 297 (1) of the Criminal Procedure Code. The remaining five appellants were sentenced to death. All the appellants now appeal to this court against their conviction.

On the night of March 27, 1961, the house in Kabuna village in which Tebesigwa (hereinafter referred to as "the deceased") was living with her husband, Enosi Nyango, their young son Muzei, aged six years, and another small boy, Lasto Lupiya, was attacked and broken into by a gang of robbers. Enosi, Lasto and the deceased were killed and property was stolen. Muzei was beaten, but was then apparently hidden by a member of the gang and survived. The deceased suffered five severe cut wounds, three of them on the head, cutting through the bone; and the medical evidence was to the effect that any one of four of these wounds could have been fatal. There can be no doubt that the killing of the deceased was murder, and the learned trial judge so found.

The case against the appellants consisted of evidence given by three persons who had been members of the gang which went to rob Enosi, and who were therefore accomplices; statements made by the different appellants to the police, at the preliminary inquiry, and at the trial; and factual evidence of the robbery, injuries suffered by the victims, property stolen and subsequently recovered, and other matters tending to connect individual appellants with the robbery. Although there was a considerable body of evidence against the appellants, we think that there were certain unsatisfactory features about the trial and the treatment of the evidence by the learned judge which necessitates a careful scrutiny of the case against each appellant. Before the convictions can be allowed to stand we must be satisfied that the irregularities which we think occurred have not in fact occasioned a failure of justice (Criminal Procedure Code (Cap. 24) s. 347).

In the first place two general matters may be mentioned. The first is in regard to the procedure for consideration of the admissibility in evidence of statements made by accused persons where such admissibility is contested. The proper practice was stated in detail by this court in *Kinyori s/o Karuditu v. R.* (1) (1956), 23 E.A.C.A. 480 at p. 482 as follows:

> "For the avoidance of doubt we now summarize the proper procedure at a trial with assessors when the defence desires to dispute the admissibility of any extra-judicial statement, or part thereof, made by the accused either in writing or orally. This same procedure applies equally, of course, to a trial with a jury. If the defence is aware before the commencement of the trial that such an issue will arise the prosecution should then be informed of that fact. The latter will therefore refrain from referring in the presence of the assessors to the statement concerned, or even to the allegation that any such statement was made, unless and until it has been ruled admissible. When the stage is reached at which the issue must be tried the defence should mention to the court that a point of law arises and submit that the assessors be asked to retire. It is important that that should be done before any witness is allowed to testify in any respect which might suggest to the assessors that the accused had made the extra-judicial statement. For example, an interpreter who acted as such at the alleged making of the statement should not enter the witness-box until after the assessors have retired. The assessors having left the court the Crown, upon whom the burden rests of proving the statement to be admissible, will call its witnesses, followed by any evidence or statement from the dock which the defence elects to tender or make. The judge having then delivered his ruling, the assessors will return. If the statement has been held to be admissible the Crown witness to whom it was made will then produce it and put it in if it is in writing, or will testify as to what was said if it was oral. The defence will be entitled, and the judge should make sure that the defence is aware of its right, again to cross-examine that Crown witness as to the circumstances in which the statement was made and to have recalled for similar cross-examination the interpreter and any other Crown witness who has given evidence on the issue in the absence of the assessors. Both in the absence and again in the presence of the assessors the normal right to re-examine will arise out of any such cross-examination. When the time comes for the defence to present its case on the general issue, if the accused elects either to testify or to make a statement from the dock thereon he will be entitled also to speak again to any questionable circumstances which he alleges attended the making of his extra-judicial statement and to affirm or to reaffirm any repudiation or retraction upon which he seeks to rely. Indeed, if the accused desires to be heard in his defence either in the witness-box or from the dock he will not be obliged to testify in chief or to speak, as the case may be, to anything more than the matters touching on the issue of admissibility; but, once he elects to testify, however much he then restricts his evidence-in-chief he will be liable to cross-examination not only to credit but also at large upon every matter in issue at the trial. The accused will also be entitled to recall and again to examine any witness of his who spoke to the issue in the assessors' absence, and to examine any other defence witness thereon.
>
> "The broad principle underlying that procedure is that the accused is entitled to present, not merely to the judge but also to the assessors, the whole of his case relating to the alleged extra-judicial statement; for the judge's ruling that it is admissible in evidence is not the end of the matter; it still remains for both judge and assessors individually (or, where there is a jury, for the jurors) to assess the value or weight of any admission or confession thereby disclosed and also the accused is still at liberty to try to persuade them that he has good reason to retract or to repudiate the statement concerned or any part of it."

We stress two passages in this extract from the judgment in *Kinyori's* case (1), namely:

> "It is important that that [i.e. that the assessors retire] should be done before any witness is allowed to testify in any respect which might suggest to the assessors that the accused had made the extra-judicial statement."

and

> "The defence will be entitled, and the judge should make sure that the defence is aware of its right, again to cross-examine that Crown witness as to the circumstances in which the statement was made and to have recalled for similar cross-examination the interpreter and any other Crown witness who has given evidence on the issue in the absence of the assessors."

In the instant case neither of these directions appears to have been observed. For instance, in the case of a statement alleged to have been made by the third appellant, Kosia, to Sub-Inspector Yoweri Musoke on April 6, 1961, some two pages of evidence relating to the taking of the statement was taken and recorded in the presence of the assessors before it occurred to the learned judge to say:

> "Before we go further if there is going to be any objection to this statement I would like to know";

and only then did the appellant's advocate intimate that there was going to be an objection. Since the objection was based in part on allegations of threats and beating the appellant's advocate must have been aware from the start of the trial that he was going to contest the admissibility of the statement, and the fault was primarily his. Nevertheless, the learned judge ought, in our opinion, to have ascertained as soon as the statement was mentioned, whether there was going to be an objection to it. In the event the statement was admitted in evidence so no prejudice to the appellant resulted; but in a case where a statement is rejected the position might be very different. After this statement had been ruled admissible, the assessors were recalled and the statement was put in evidence. At no stage thereafter was Sub-Inspector Musoke cross-examined by the appellant's advocate as to the manner in which the statement was taken, nor did the appellant in his unsworn statement make any allegation that it had been improperly obtained. It may be that the appellant's advocate did not wish to persist in the allegation that the statement had been improperly obtained; but the learned judge ought to have ensured that he was aware of his right to have the evidence repeated in the presence of the assessors.

There is one further matter in relation to this statement that we would mention. As we have said, the admissibility of the statement was contested, inter alia, on the ground that it had been obtained by threats or beating, and cross-examination of Sub-Inspector Musoke was directed to this aspect of the matter. The appellant, however, did not give evidence or make an unsworn statement in support of these allegations during the "trial within a trial"; nor did he mention it in his subsequent unsworn statement. It is true that, whether inadvertently or not we do not know, the matter was not pursued in cross-examination of Sub-Inspector Musoke in the presence of the assessors; but the appellant's advocate did not withdraw the suggestion of improper conduct he had put forward in cross-examination during the "trial within a trial". Since it has happened in other cases that suggestions of improper conduct on the part of the police in obtaining statements have been made in cross-examination of police officers, which the accused person has not supported by evidence, we think it proper to draw attention to the remarks of the Court of Criminal Appeal in England in *O'Neill and Ackers v. R.* (2), 34 Cr. App. R.108 at p.110, with which we respectfully agree:

> "However, what the court desires to call attention to is this: having

> suggested this in cross-examination to the police, and having repeated the suggestion before the jury, counsel did not call his client to support what he had been instructed to say, and the court has no hesitation in saying that that is not the proper practice. It is one thing to cross-examine a witness about credit, in which case one is bound by the answer of the witness. It is quite wrong and improper conduct on the part of counsel to make a charge against the police or against any other witness by way of defence – because, of course, it would have been a defence if the statements which were the principal evidence against the applicants had been extracted from them by improper means – if he does not intend to call his client to give evidence to support the charge.
>
> "In this case, a violent attack was made on the police. It was suggested that they had done improper things, and indeed, Ackers repeats that suggestion in his notice of appeal. The applicants had the opportunity of going into the box at the trial and explaining and supporting what they had instructed their counsel to say. They did not dare to go into the box, and, therefore, counsel, who knew that they were not going into the box, ought not to have made these suggestions against the police. It is one thing to cross-examine properly and temperately with regard to credit, though it is very dangerous to do so unless you have material on which to cross-examine, and with which you can confront the witness. It is, however, entirely wrong to make such suggestions as were made in this case, namely that the police beat the prisoners until they made confessions, and then, when there is the chance for the prisoners to substantiate what has been said by going into the box, for counsel not to call them. The court hopes that notice will be taken of this, and that counsel will refrain, if they do not intend to call their clients, from making charges which, if true, form a defence but which, if there is nothing to support them, ought not to be pursued."

The second general matter to which we would refer is the use made by the learned judge of statements made by the various appellants, not only against the person making the statement, but also against the other appellants. He appears to have included such statements made by co-accused in references in his judgment to "accomplice evidence". None of the appellants gave evidence on oath either at the preliminary inquiry or at the trial. Had they done so at the trial their evidence on oath could properly have been taken into account as accomplice evidence. Their statements not on oath, however, are not "accomplice evidence". The authority for taking such statements into account at all against co-accused is s. 28 of the Evidence Ordinance (Cap.9), which is in identical terms with s.30 of the Indian Evidence Act. The section, omitting the illustrations, reads as follows:

> "28. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession.
>
> "Explanation. –'Offence', as used in this section, includes the abetment of, or attempt to commit, the offence."

At best such statements can only be "taken into consideration" against a co-accused and used only to supplement an otherwise substantial case against an accused person; *Muthige v. R.* (3) (1954),21 E.A.C.A.267. They can never be the basis for a conviction, as, on a proper direction, accomplice evidence can. Further, a statement cannot be considered at all against a co-accused unless there has

been a full admission of guilt in the statement. We think the law is correctly stated in the following passage from Sarkar on Evidence (10th Edn.) at p.295:

> "It is abundantly clear from the relevant cases on the point, that in order that the statement of an accused may be taken into consideration against his co-accused tried jointly for the same offence, it must implicate himself substantially to the same extent as others, and must expose himself to the same risk along with the fellow-prisoners; otherwise the confession cannot be taken into consideration under this section. If the statement implicates him as fully as the others or in a greater degree, it is then only that it can afford a sort of safeguard for truth. If the statement criminates the maker partially or in a lesser degree, or throws the main burden of the blame on others, it cannot be used against his co-accused. Statements however criminating made in self-exculpation or in mitigation of guilt are self-serving statements and are not admissible. A statement falling short of actual admission of guilt would be a mere inculpatory admission and not a confession at all within the meaning of s. 30. All that section requires is that it must be a 'confession' and that the statement of the confessing prisoner must implicate himself *substantially to the same extent* as it implicates the others.
>
> "It appears that the real test is not whether the confessing accused ascribes to himself a major or minor part in the crime, but whether when implicating his co-accused he gives a full and true account of the crime and unreservedly confesses his own share of the guilt, i.e., implicates him as fully and substantially as his co-accused. It may be that the part assigned to him was not a leading or major one, but in any case there must be a confession to the fullest extent of whatever part he took in the commission of the crime. It is in this sense that the confession must 'affect them both equally'. It is only a statement of this kind that can be said to implicate the confessing accused 'substantially to the same extent' as it implicates the others. When there is no full and complete confession of his own guilt and the part taken by him in the crime, but an embroidered story spun out with the object of clearing himself or reducing his own guilt at the expense of others, it is nothing but an explanation of an exculpatory nature or a self-serving statement."

In the instant case the majority of the statements made at various times by the different appellants, while, no doubt, gravely incriminatory, were obviously intended to be exculpatory or to throw the main blame on another. Where this was the case we do not think they could be used at all as against persons other than the maker. It will be necessary to consider in the case of each appellent whether and to what extent any statement of a co-appellant was improperly used against him.

As it seems to us, in the circumstances of this case the essential issues that had to be determined were (1) whether the murder of the deceased was committed in the prosecution of a common purpose by the gang which broke into Enosi's house, and was a probable consequence of the prosecution of that purpose (s.22 of the Penal Code) and (2) whether the individual appellants have been shown to have been members of that gang sharing the common purpose.

Section 22 of the Penal Code (Cap.22) reads as follows:

> "22. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence."

The learned judge duly considered this section. He held that the appellants had a common intent to rob; that they went voluntarily and without compulsion; that they were armed with sticks, a panga, an axe, a knife, a wire whip and a pickaxe; and (citing a passage from the judgment of this court in *Abdi Ali and Others v. R.* (4) (1956), 23 E.A.C.A. 573) that the offence of murder was one which they must have known to be likely to be committed in the prosecution of their common object. In reaching this conclusion the learned judge considered and rejected, we think rightly, allegations in statements of the appellants, other than the first appellant Ezera, that they were forced by the first appellant to assist in the robbery. The allegations of compulsion fell far short of bringing the appellants or any of them within s. 16 of the Penal Code. The learned judge does not specifically refer to the evidence on which he relies for his conclusions on this issue, but we are satisfied that there was overwhelming evidence to support it. On the question of common intention, apart from the evidence of the accomplices who were called for the Crown there can be no doubt at all that an armed robbery was carried out as a result of which three people were murdered. The medical evidence of the injuries suffered by the three victims and the boy Muzei shows that the gang must have had a variety of weapons, some of which certainly were of a lethal nature. This fully supports the evidence of the accomplices as to the weapons carried by members of the gang. The members of the gang were clearly prepared to use force to achieve their object, and in view of the lethal nature of the weapons carried we think it inescapable that the murder of one or more occupants of the house "was a probable consequence" of the prosecution of the common purpose of committing armed robbery. The learned judge went on to consider whether the killing of the deceased took place "in furtherance" of the robbery; and for this purpose considered whether the robbery was "complete", in the sense that all the property stolen had been removed from the house, when the deceased was murdered. In so doing he took into account generally statements made by some of the appellants. We have already indicated that he was not entitled to do so as against persons other than the maker of a statement. The submission which led the learned judge to consider the matter in this light was based on the judgment in *Abdi Ali's case* (4). That case, however, related to s.34 of the Indian Penal Code, which is not in the same terms as s.22 of the Uganda Penal Code. Section 34 relates to a criminal act "done by several persons, in furtherance of the common intention of all"; in s. 22 of the Uganda Penal Code the material words are "in the prosecution of such purpose an offence is committed" of such a nature that it was a probable consequence of the purpose. It is to be noted that under s.273 of the Uganda Penal Code robbery with violence includes personal violence offered immediately after the time of the robbery. We think the evidence is clear that the killing of the deceased took place in the prosecution of a common purpose which was, at the least, robbery with violence. In the circumstances of the case we think that this would be so even if the deceased was in fact killed immediately after the last stolen article was removed from the house. But in any case, the defence submission that the robbery was complete when the deceased was killed depended upon the isolated passage in the evidence of P.W. 16, Amulamu, quoted by the learned judge in his judgment. In fact, however, Amulamu's evidence, read as a whole, does not support that proposition. He said that before the first appellant struck her with a panga the deceased said, "Do not kill me. Let me show you where the money is"; and that after he had killed her the first appellant picked up a small box and came out with it. The killing so described may have been unnecessary and wanton but it was nonetheless, in our opinion, one in the prosecution of the common intention of robbery. The learned judge found that he could not rely on Amulamu's evidence but, even if it was accepted, it provides no adequate support for the submission of counsel

for the defence. On the basis of its non-acceptance the remaining evidence for the Crown is sufficient to establish that the killing took place in the prosecution of the robbery and no claim that such was not the case was made in any of the appellant's statements. Although the learned judge's consideration of the submission made to him was open to criticism we think that on the whole of the evidence no other conclusion was possible than that the deceased was killed in the prosecution of the common purpose of the gang.

We turn now to consider the identification of the individual appellants as active members of the gang. As we have already mentioned, the prosecution called three members of the gang who admitted taking part in the robbery, namely P.W. 16, Amulamu Norya, P.W. 17, Ibrahimu Musenyente, and P.W. 20, Silvesti Mwase, as Crown witnesses. These witnesses each named each of the appellants as members of the gang. The learned judge correctly directed himself that these witnesses were accomplices, that their evidence must be treated with extreme care, that he must look for corroboration of their evidence, and that the evidence of one accomplice does not corroborate that of another. He duly took into account discrepancies between their stories; but does not, unfortunately, state to what extent he regarded them as witnesses of truth, except that he did say, in relation to the question of the point at which the deceased was killed, that he could not rely on the evidence of P.W. 16, Amulamu. It is to be inferred that, apart from the general picture of the raid given by these witnesses, he was not prepared to accept the details of their evidence without express corroboration. He said:

> "There were three main witnesses for the prosecution – all accomplices – P. 16, P. 17 and P. 20, P. 17 was the cousin of A. 1. There were many discrepancies in their evidence as to who carried what from the house, what instruments each carried, and who killed whom. Except and in so far as they could be corroborated by independent evidence, their evidence on details must be treated with the greatest reserve. One thing does, however, emerge quite clearly from their evidence and statements, that the movements of the party as described above was correct, also the account of the robbery and killings."

As we have indicated, we agree with the learned judge that in view of the nature of the raid it is to be inferred that the participants had the common intent to carry out robbery with violence, that murder was committed in the prosecution of that purpose, and that murder was a probable consequence of the prosecution of that purpose. In the circumstances, all the members of the gang are equally guilty of the murder, and the details as to the individual or individuals who actually inflicted the wounds on the deceased are of comparatively minor importance. What is necessary before the accomplices' identification of the appellants as active members of the gang can be accepted is independent evidence tending to show that the individual appellants were in fact active members of the gang. We think the learned judge duly appreciated this, and he reviewed the evidence against each of the appellants which he considered could amount to corroboration. With respect, however, it is not always clear how much of this evidence he accepts as corroboration.

In the case of the first appellant, Ezera, the learned judge referred to four statements which he had made, up to and including his unsworn statement at the trial. Of these, the appellant's original statement made to Acting Asst. Suptd. Mulabi on arrest, and his statement at the trial, are denials of having taken part in the robbery; and his statement at the preliminary inquiry also appears to be a denial of participation. His fourth statement, however, is one of some importance, as the learned judge appreciated. This statement was somewhat unusual, in that it was made to Asst. Suptd. Lines during the time the preliminary inquiry was in progress, the appellant having expressly asked

to see Mr. Lines. He was duly cautioned before making the statement. The statement amounted to a full confession to having taken part in the robbery and murders, the appellant saying, inter alia, "We all who were present cut all the occupants dead". The admissibility of this statement in evidence was challenged, not on the ground that it had not been made or had been improperly obtained (the appellant's advocate stated that the appellant admitted making the statement), but on the ground that it would be unfair to put in evidence a statement recorded by a police officer during the course of the preliminary inquiry. The learned judge, rightly in our view in view of the circumstances in which the statement was made, rejected this contention. It is perfectly clear that the statement was entirely voluntary, and was therefore properly admitted in evidence. The appellant in court, however, retracted this confession, at least by implication, and the learned judge properly treated it as a retracted confession. He therefore looked for corroboration of this confession as well as of the evidence of the accomplices. The learned judge did not, however, consider the extent to which, if at all, this confession could itself amount to corroboration of the evidence of the accomplices. This court has held that a retracted statement, whether a confession or not, may in a proper case amount to corroboration of accomplice evidence (*Bassan and Another v. R.* (5), [1961] E.A. 521 (C.A.) at p. 530). In considering whether a retracted statement can amount to corroboration of accomplice evidence, the circumstances in which it was made must be considered, and the reason given for retraction is an important relevant factor. In the instant case the statement to Mr. Lines was made after the appellant had heard statements of his co-accused put in evidence which sought to throw the blame primarily on him as leader of the gang, and in some cases asserted that he had forced other members to accompany the gang. The day after making the statement he said in his unsworn statement at the preliminary inquiry:

> "After hearing the rest of the accused and their witnesses everybody is mentioning my name and for that reason I had to mention what I made in my statement yesterday to convince the Government that what the witnesses say is not true. I am surprised to hear the people with whom I was not in the party at that time mentioning my name. Some of them saying that I had a panga and some that I had an axe.
>
> "How could a single person have called all these people to join me in the party. Some of these accused say that I went to them one, two or three days before this but they refused. If this is true why did they not report. The Government has put a police station at Budaka. Why did they not go there and report. That is all."

At the trial the appellant, again in an unsworn statement, denying complicity in the murder, said inter alia:

> "Because they had told that official that it was I that did all these murders and therefore in my confession to Mr. Lines I also said what they did."

In these two statements he appears to be alleging that he made an untrue confession because the other accused persons had been placing him as the leader of the gang. This is the only reason he gives for retraction of the confession. The allegation, as a reason for making an untrue confession, is far from convincing. We think, in the circumstances of this case, the appellant's confession to Mr. Lines, notwithstanding the retraction, can properly be regarded as corroboration, and indeed, strong corroboration, of the accomplice evidence.

In passing we would remark that the first appellant's confession to Mr. Lines

was in fact a full confession which could properly be "taken into account" against the other appellants under s. 28 of the Evidence Ordinance.

The learned judge, however, apparently did not appreciate that this statement could afford corroboration. He reviewed the other evidence in the case which, he considered, could be regarded as corroboration against the first appellant. With respect, this part of the learned judge's judgment is not very satisfactory. He begins by saying:

> "To a man all the accused say he was the leader and perpetrator of the deed."

It is not clear whether this is comment or is viewed as corroborative evidence, but in either case we do not consider the allegations of the other appellants were admissible at all against the first appellant. We will refer to the specific statements later, but all were in the nature of exculpatory statements, and we have already indicated our view that as such they do not fall within s. 28 of the Evidence Ordinance.

The learned judge then refers to allegations (he does not say by whom, but in fact two of the accomplices who gave evidence for the Crown made the allegation) that the first appellant's clothes were covered with blood. In view of the wounds inflicted on the three victims it is in any case a reasonable inference that the assailants' clothes were likely to have had blood splashed on them. The learned judge then considered the evidence that the appellant was seen washing his clothes early on the morning after the murder. It is to be inferred that he considers this amounts to some corroboration of the evidence that the appellant was a member of the gang, though he does not indicate what weight he attaches to this evidence. Bearing in mind that the accepted evidence is that the appellant was seen washing the clothes, alleged by two of the accomplices to be those worn by him at the time of the murder, at 9 o'clock on the morning after the murder, that is March 27, and not, as he alleged in one statement, that he washed the clothes the previous evening and merely put them out to dry on the morning of March 27, we think that this evidence of the washing of the clothes can properly be regarded as some corroboration tending to support the identification of the appellant as a member of the gang. It is, however, not very strong, and had it stood alone it could hardly have been regarded as sufficient corroboration.

The next items of evidence the learned judge referred to as corroboration were the finding under the appellant's mother's bed of a freshly scoured panga, and the finding of an axe with traces of blood on the blade in a disused granary in his compound. Here again it is to be inferred that the learned judge regarded these matters as providing some corroboration of the evidence connecting the appellant with the crime, though he does not indicate what weight he attaches to them. In the absence of some explanation – and there was none – we think the evidence of the finding of the freshly scoured panga and axe can be regarded as in some degree corroborative, though of no very great weight.

The learned judge referred finally in his review of the corroborative evidence existing against the first appellant to two boxes which, it was established, had been stolen from Enosi's home in the robbery. These were later found in the vicinity of the appellant's house. The learned judge held that the finding of one of these boxes (which was found at the back of the appellant's house in the shamba of one Kapusi) was inconclusive; but, though again he does not expressly say so or indicate the weight to be attached to it, he appears to accept the finding of the other box (which was hidden beyond a path in front of the appellant's house) as providing some corroboration of the appellant's connection with the murder. The places where the boxes were hidden were pointed out to the police by the fifth appellant, Dipo; and the first appellant alleged they had been planted there by Dipo. In view of Dipo's connection

with the robbery we think little weight can be attached to the finding of the boxes.

The learned judge then rejects the first appellant's alibi, which was unsupported, and says: "I find he was present, led the expedition, and killed Tebesigwa". This was, in effect, an acceptance of the evidence given by the accomplices. Presumably the learned judge based this acceptance on the somewhat weak corroborative evidence mentioned above; and he also appears to have treated the statements made by the other appellants as providing corroboration. We think the taking of those statements into account was a misdirection, and we have been concerned whether the conviction ought to be set aside because of it, as the learned judge might not have reached the same conclusion on the other corroborative evidence alone. We think we are entitled to take into account the statement made by the appellant to Asst. Suptd. Lines which as we have indicated, we think could properly be regarded as corroboration, and strong corroboration, of the accomplice evidence. The learned judge, as we have remarked, evidently did not appreciate this. Had he done so and taken it into account we think he must inevitably have reached the conclusion he did quite apart from the statements made by the other appellants. We accordingly think the learned judge's misdirection occasioned no miscarriage of justice and is curable under s. 347 of the Criminal Procedure Code. The first appellant's appeal is accordingly dismissed.

The case against the second appellant, Sisye, depended, in addition to the accomplice evidence, on two statements made by him to the police, and on the finding of a bicycle, stolen in the robbery, near his house. As we have indicated, the confession of the first appellant made to Mr. Lines may also properly be taken into account against him, though as we have indicated earlier in this judgment, the weight to be given to any such confession as against a co-accused is small. In the two statements made to the police this appellant admitted being one of the gang which raided Enosi's house, but alleged he had been forced by the first appellant by threats to join the gang, and that he had nothing to do with the actual murders. These statements, though gravely incriminatory, are not, in our view, full confessions to the offence charged, being obviously intended to be exculpatory, and so are not to be taken into account against any of the other appellants under s. 28 of the Evidence Ordinance. In statements not on oath made at the preliminary inquiry and the trial the second appellant impliedly retracted his statements to the police, alleging that he was drunk and spent the night of the murder at his home.

The admissibility in evidence of the first statement made by this appellant, made to Sub-Inspector Musoke on April 6, was contested, inter alia, on the ground that it was obtained by force, the appellant alleging that he had been beaten by the police. The learned judge rejected this allegation and we see no reason to differ. As in the case of the third appellant, to whose first statement we have already referred, no subsequent cross-examination was directed to this aspect of the matter; and the comments we make hereafter in regard to the stage at which a caution was administered when the third appellant was making his statement apply in the case of this statement made by this appellant also. However, since the appellant repeated the gist of this statement upon formal charge and caution, and no objection is taken to the admissibility of the later statement, these considerations are not of practical importance.

As in the case of the first appellant the learned judge has wrongly taken into account as against this appellant the statements made by other appellants, though, as we have indicated, he was entitled to have regard to the confession of the first appellant. He has not made it clear what evidence he regards as corroboration, but it is to be assumed that he did not regard the appellant's retracted statements as admissible for purposes of corroboration of the accomplice evidence. The appellant gave no reason for the retraction of his statements

which are retracted by implication only, though in the "trial within a trial" the appellant had said he was beaten by the police. This, however, does not apply to the statement on charge and caution. As in the case of the first appellant, we think the statements do provide corroboration of the evidence given by the accomplices. The finding of the stolen bicycle sixty yards from his house was somewhat equivocal in view of the fact that it was also only a matter of eighty-three yards from the house of the sixth appellant, Kiriya. As in the case of the first appellant, we think that if the learned judge had appreciated the effect of the appellant's retracted statements as corroboration of the accomplices' evidence, he must have reached the conclusion that the second appellant was a member of the gang quite independently of the statements made by the other appellants. The second appellant's appeal is accordingly also dismissed.

So far as the third appellant, Kosia, is concerned, the evidence of the three accomplices that he was a member of the gang is fully corroborated by his own statement in court, and by his earlier statements which were not retracted. The admissibility of his first statement to Sub-Inspector Musoke was contested, and we have already commented on certain aspects of this statement. There is also another aspect on which we would comment. The facts in relation to the taking of the first statement recorded from this appellant were that he was at the time a suspect, but there was no evidence against him at that stage. He was not in custody though he had spent the previous night at a rest house attached to the police station. He was being questioned by Sub-Inspector Musoke, and made the statement in answer to these questions; but at a certain stage in the statement Sub-Inspector Musoke administered a caution. It was contended that the taking of the statement did not comply with the provisions of the Evidence (Statements to Police Officers) (No. 2) Rules, 1955. The learned judge, in the course of his ruling, said:

> "The Statements to Police Officers Rules deal with the procedure to be followed when police officers are *investigating* a crime; and secondly the procedure to be followed when a man is a prisoner. A man is only a *prisoner* (1) when he has been charged with an offence; (2) when he is under arrest by any proper authority with powers of arrest and detention, or (3) is in the lawful custody of any authority.
>
> "That has been laid down under Rule 2.
>
> "It appears to me from the Rules, the Sub-Inspector, as none of the three heads of s. 2 have been or were applicable, could have asked this man questions until the end of this statement. But once the accused had made some sort of statement which indicated to the Sub-Inspector that he was implicated in these events, he immediately stopped him and he cautioned him.
>
> "At that moment it appeared that he was no longer a suspected person. There is no provision in the law which says that the accused at that moment must be charged. There would appear to be a gap in our Rules. Sub-Inspector Musoke followed the provisions of the Judges' Rules in England where it is laid down (Rule 2) that where a police officer decides to charge a person he shall immediately caution the witness. That is exactly what the Sub-Inspector did in this particular instance, which appears to me proper as there is a gap in our Rules."

We respectfully agree with the learned judge that r. 2 of the Judges' Rules ought to be observed by police officers investigating crime in Uganda notwithstanding the existence of the Evidence (Statements to Police Officers) (No. 2) Rules, 1955. The rule reads as follows:

> "2. Whenever a police officer has made up his mind to charge a person

> with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be."

While we think the law which the learned judge applied was correct, we are somewhat critical of the learned judge's finding that the caution was administered at the right time. On a perusal of the statement it seems to us that the appellant had begun to incriminate himself substantially earlier in the statement than the point at which the Sub-Inspector administered the caution. The point, however, has no practical importance as the statement has not been retracted, and the appellant has since repeated the gist of it.

The third appellant, in fact, substantially repeated his statement both at the preliminary inquiry and at the trial. These statements amount to a full confession to the robbery. They are also, in our view, conclusive on the charge of murder. They do not, however, purport to be a confession to the murder, and for this reason we think that they ought not to have been taken into account as against the other appellants. We think the third appellant was properly convicted, and his appeal is dismissed.

The fourth appellant, Kolyanga, did not make a statement at the trial or give evidence. At the preliminary inquiry he made a statement admitting his presence with the gang though disclaiming knowledge of the murders. He had made an earlier statement to the same effect. These statements were not retracted. For the same reason as in the case of the previous appellant we do not think his statements were admissible as against the other appellants, but as against himself they provide ample corroboration for the accomplice evidence that he was a member of the gang. His appeal is also dismissed.

The fifth appellant, Akisoferi Dipo, is in a somewhat different position from the others. At the trial he stated that he adhered to the statement he had made at the preliminary inquiry. In that statement, and in an earlier one made to the police, he admitted taking part in the robbery. It appears that he had been a police informer, and in this case endeavored to align himself on the side of the police by assisting in the investigation. He showed where the boxes and bicycle stolen in the robbery were hidden. He alleged he was compelled to go on the raid by threats to kill him made by the first appellant – a reason his statements are not admissible as against the other appellants. It is quite clear, however, that he was an active member of the gang. He alleges, however, and this is confirmed by the evidence of one of the accomplices, that it was he who saved the boy Muzei by hiding him. We have considered whether it could be said that he had dissociated himself from the murders, but are fully satisfied that he did not do so. The act of saving Muzei is to his credit, but we are satisfied that he was equally guilty with other members of the gang of the murder of the deceased, and was properly convicted. His appeal is dismissed.

The position of the sixth appellant, Kiriya, is very similar to that of the fourth appellant. He made a statement at the preliminary inquiry admitting his presence with the gang, though seeking to exculpate himself from the murders. This statement he did not retract, and it is ample corroboration of the accomplice evidence that he was a member of the gang. We think he also was properly convicted and his appeal also is dismissed.

In the result we are, as we have indicated, satisfied that irregularities which occurred, and misdirections of the learned judge in relation to statements made by co-accused persons, have not resulted in any miscarriage of justice and are therefore curable under s. 347 of the Criminal Procedure Code, and the appeals of all the appellants are dismissed.

Appeal dismissed.

The first, second, third, fifth and sixth appellants appeared in person. The fourth appellant did not appear

and was not represented.

For the respondent:
The Attorney-General, Uganda
A.M. Long (Crown Counsel, Uganda)

Babubhai Ratanji Mulji v Principal Immigration Officer
[1962] 1 EA 323 (HCT)

Division:	High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	30 April 1962
Case Number:	170/1962
Before:	Weston J
Sourced by:	LawAfrica

[1] Immigration – Appeal from decision of Principal Immigration Officer – Application for entry permit under Class A (ii) *of s.* 9 (1) *of Immigration Ordinance – Application made before repeal of Class A* (ii) *– Whether appellant's accrued right preserved – Immigration Ordinance, s.* 9 (1) *and* (5) (T.) *– Immigration* (*Exemption and Amendment*) *and Aliens Ordinance*, 1961, *Schedule, Part I, item* 4 (*T.*) *– Interpretation and General Clauses Ordinance, s.* 10(2)(*c*) *and* (*e*) (*T.*).

Editor's Summary

On November 15, 1961, the appellant applied to the Principal Immigration Officer for an entry permit under Class A (ii) of s. 9 (1) of the Immigration Ordinance. On that date the appellant was qualified for such a permit as he was not a prohibited immigrant and was a person in possession of a document entitling him to reside permanently in Kenya issued to him by the appropriate authority of that territory who could show that he was resident in Kenya on August 1, 1948. On November 29, 1961, the Principal Immigration Officer asked the immigration authorities in Kenya whether the appellant was in fact a resident in Kenya on August 1, 1948, and whether there was anything known to the detriment of the applicant that might class him as a prohibited immigrant. On December 21, 1961, a reply favourable to the appellant was received, but with effect from December 9, 1961, by item 4 of Part I of the Schedule to the Immigration (Exemption and Amendment) and Aliens Ordinance, 1961, Class A (ii) of s. 9 (1) of the Immigration Ordinance was deleted and the Principal Immigration Officer wrote to the appellant on December 27, 1961, refusing his application. On appeal to the High Court under sub-s. (5) of s. 9 of the Ordinance the appellant contended that an absolute right to an entry permit under Class A (ii) accrued to him on November 15, 1961, that there was nothing in the legislation of December 9, 1961, from which it could be inferred that the legislature intended to interfere with accrued rights to such permits, and consequently the appellant's right was preserved by s. 10(2)(*c*) and (*e*) of the Interpretation and General Clauses Ordinance. The sole issue at the hearing was whether the appellant had an accrued right to an entry permit under Class A (ii) before that class had been deleted by the repealing legislation.

Held –

(i) under the Ordinance it is not incumbent upon the Principal Immigration Officer to take any active step before the right to an entry permit under any of the items in Class A arises.

(ii) the appellant's right to an entry permit accrued on November 15, 1961, and on December 9, 1961, such right was saved by s. 10(2)(*c*) of the Interpretation and General Clauses Ordinance; consequently the Principal Immigration Officer's investigation in respect of such right in so far as it continued after December 9, 1961, properly continued by virtue of s. 10(2)(*e*) ibid.

(iii) the Principal Immigration Officer was wrong in law in refusing to issue the appellant with an entry permit as soon after December 21, 1961, as his administrative arrangements permitted.

(iv) the condition imposed by s. 9 (1) of the Immigration Ordinance that an applicant must satisfy the Principal Immigration Officer was of acquisition of the right.

Appeal allowed. Order to the Principal Immigration Officer to issue an entry permit to the appellant.

Cases referred to in judgment:

(1) *Director of Public Works and Another v. Ho Po Sang and Others*, [1961] 2 All E.R. 721.

(2) *Hamilton Gell v. White*, [1922] 2 K.B. 422.

Judgment

Weston J: This is an appeal under sub-s. (5) of s. 9 of the Immigration Ordinance, the appellant being an applicant aggrieved by a decision of the Principal Immigration Officer refusing him an entry permit under Class A (ii) of sub-s. (1) of that section, which reads as follows:

> "Any person other than a prohibited immigrant who satisfies the Principal Immigration Officer that he belongs to any of the following classes shall be entitled to receive an entry permit:
>
> Class A
>
> (i)
>
> (ii) a person who is in possession of a document entitling him to reside permanently in any of the other East African territories issued to him by the appropriate authority of that territory, and who can show either that he was resident in any one of such territories on the first day of August, 1948, or that he is the child of any such resident."

It is not in dispute that on November 15, 1961, the Principal Immigration Officer received an application in due form claiming an entry permit under Class A (ii) from the appellant, who on that date was not a prohibited immigrant and was a person in possession of a document entitling him to reside permanently in Kenya issued to him by the appropriate authority of that territory who could show that he was resident in Kenya on August 1, 1948.

On November 29, 1961, the Principal Immigration Officer

> "wrote to the immigration authorities in Kenya to ascertain whether
>
> (*a*) the applicant was in fact a resident in Kenya on August 1, 1948, and
>
> (*b*) there was anything known to the detriment of the applicant which might class the applicant as a prohibited immigrant",

and on December 21, 1961

> "a reply favourable to the applicant was received from the Kenya Immigration Authorities".

But with effect from December 9, 1961, by item 4 of Part I of the Schedule to the Immigration (Exemption and Amendment) and Aliens Ordinance, 1961, Class A (ii) of sub-s. (1) of s. 9 of the Immigration Ordinance was deleted therefrom. Accordingly, despite the "reply favourable to the applicant" received by the Principal Immigration Officer from the Kenya authorities on December 21, 1961, the Principal Immigration Officer wrote to the appellant on December 27, 1961, refusing his application and informing him that permits under Class A (ii) were

> "not now issued vide Part I of the Schedule to the Immigration (Exemption and Amendment) and Aliens Ordinance of 1961, item 4".

Mr. Raichada, for the appellant, argues that an absolute right to an entry

permit under Class A (ii) accrued to his client on November 15, 1961, that there is nothing in the legislation of December 9, 1961, which could be construed as interfering or from which it could be inferred that the legislature intended to interfere with accrued rights to such permits, and that consequently the appellant's right was preserved by s. 10(2)(*c*) and (*e*) of the Interpretation and General Clauses Ordinance, the relevant words being:

> "Where an Ordinance repeals any other enactment, then, unless the contrary intention appears, the repeal shall not:
>
>
>
> (*c*) affect any right . . . accrued . . . under any enactment so repealed; or,
>
>
>
> (*e*) affect any investigation . . . in respect of any such right . . . aforesaid; and any such investigation . . . may be continued . . . as if the repealing Ordinance had not been passed."

Mr. Taylor, for the Principal Immigration Officer, submits that this argument is based on a fallacy, namely, that any right accrued to the appellant on November 15, 1961. The appellant, learned Crown Counsel contends, would, but for the repealing legislation of December 9, 1961, have acquired a right to an entry permit Class A (ii) on December 21, 1961, for it was on that date that the Principal Immigration Officer was in fact satisfied that the appellant was not a prohibited immigrant and possessed the necessary qualifications. By that date however the class had been deleted from the Immigration Ordinance, and the Principal Immigration Officer was therefore justified in refusing to grant an entry permit under a provision which was no longer part of the statute.

The single issue then, in this appeal, is this – did the appellant have an accrued right to an entry permit under Class A (ii) before that class had ceased to be, that is, before December 9, 1961, or not. Learned Crown Counsel concedes that if he did have, this appeal must be allowed.

To this issue, therefore, I now turn.

The statute does not make it incumbent upon the Principal Immigration Officer to take any active step before the right to an entry permit under any of the items in Class A arises. His is merely the passive role of being satisfied in every proper case by such active steps as the statute makes it incumbent upon the applicant for any such permit to take in order to make good his claim to it. As I read it, the word "satisfies" in the context under consideration relates immediately to the steps to be taken by the applicant, and since it is used transitively, only ultimately and in due course to the state of mind of the Principal Immigration Officer. Now when on November 15, 1961, the appellant put before the Principal Immigration Officer an application in proper form for an entry permit under Class A (ii) he undoubtedly did all that he was by law required to do to assert his right to and to obtain such entry permit. And since, as we have seen, he possessed all the necessary qualifications, it was undoubtedly an absolute right and he thereby set in train a process – a purely administrative, or perhaps better, mechanical process – the inevitable end product of which was the entry permit for which he had applied. Without disrespect, once the appellant had lodged his application with the Principal Immigration Officer that official had no more control over the outcome than a slot machine once the required coin has been inserted into it. But this is only to say, and to say indeed in the words of the statute, that the appellant satisfied the Principal Immigration Officer that he was entitled to an entry permit under Class A (ii) on November 15, 1961, and it seems to me irrelevant for the purpose of fixing the time when the appellant satisfied the Principal

Immigration Officer that he was entitled to such a permit that in fact it was not until December 21, 1961, that the Principal Immigration Officer was in a position to acknowledge that he was satisfied.

I am not prepared to construe s. 9 (1) A (ii) of the Immigration Ordinance as if it read:

> "Any person shall be entitled to an entry permit if and when the Principal Immigration Officer is satisfied that such person:
>
> (*a*) is not a prohibited immigrant, and
>
> (*b*) is in possession . . . etc. etc."

The legislature has not, in its wisdom, made any such provision.

Accordingly, I hold that the appellant's right to an entry permit accrued on November 15, 1961, and that on December 9, 1961, such right was saved by s. 10(2)(*c*) of the Interpretation and General Clauses Ordinance. I hold further and consequentially that the Principal Immigration Officer's investigation in respect of such right in so far as it continued after December 9, 1961, properly continued by virtue of s. 10(2)(*e*) of the same Ordinance. The Principal Immigration Officer was wrong in law in refusing to issue the appellant with an entry permit under Class A (ii) of s. 9 (1) of the Immigration Ordinance as soon after December 21, 1961, as his administrative arrangements permitted, and I order that he now do so.

I am fortified in the conclusion I have reached by the illuminating advice given by the Privy Council in the recent case of *Director of Public Works and Another v. Ho Po Sang and Others* (1), [1961] 2 All E.R. 721.

The facts of that case were complex and I do not think there is any need to set them out here. It will suffice to say that the decision turned on the view which their lordships took of the effect of s. 10 of the Interpretation Ordinance of Hong Kong – derived, like s. 10 of the Interpretation and General Clauses Ordinance, from s. 38 of the Interpretation Act, 1889 – on a continuing transaction which had been interrupted by the enactment of repealing legislation. Their lordships held that since that transaction was one which when it was entered into before the repealing legislation might only, not must necessarily, have resulted in the acquisition of a right, there was at the date of such repealing legislation no accrued right which was saved by the provision of Hong Kong law corresponding to s. 10(2)(*c*) of the Interpretation and General Clauses Ordinance. Nor did it affect their lordships' view that the transaction in question had after the repealing legislation in fact continued and resulted in what but for the repealing legislation would undoubtedly have been a right. Furthermore, since there was no accrued right, although the repealing legislation did not invalidate any step taken before it came into force yet such legislation rendered all such steps abortive for it destroyed the prospect of such steps leading to the acquisition of a right.

I think it hardly necessary to revert to my somewhat unflattering slot machine simile to emphasise the distinction between the facts of the Hong Kong case and those with which I have to deal here. But in this connection it is instructive to read the passage in which their lordships distinguished the case with which they were concerned and the case of *Hamilton Gell v. White* (2), [1922] 2 K.B. 422 which their lordships cited as "an example of an accrued right". Lord Morris of Borth-Y-Gest (at p. 733) said:

> "*Hamilton Gell v. White* furnishes an example of an accrued right, and the facts are in contrast with the facts in the present case. In that case, the landlord of an agricultural holding gave his tenant notice to quit; he gave it because he wished to sell. The tenant then became entitled to compensation on the terms and subject to the conditions of s. 11 of the Agricultural Holdings Act, 1908. The tenant duly complied with one

> condition. He duly gave notice of his intention to claim compensation. Another condition was that he should make his claim within three months of quitting. But, before the time for him to quit arrived, s. 11 was repealed. He did, nevertheless, make his claim within three months of quitting. It was held that his claim could proceed, and that he could recover compensation under s. 11. He had an accrued right which resulted from the fact of the landlord having given a notice to quit in view of a sale. The conditions imposed by s. 11 were conditions not of the acquisition of the right but of its enforcement. As he had an accrued right, it was preserved by the operation of the Interpretation Act, 1889, and, further, as he had an accrued right, the repeal did not affect the investigation in respect of that right. The investigation was by arbitration. Scrutton, L.J., said:
>
> > 'In the course of that arbitration he would no doubt have to prove that that right in fact existed, that is to say that the notice to quit was given in view of a sale, and he would also have to prove the measure of his loss. But he was entitled to have that investigation, which had been begun, continue, for s. 38 expressly provides that the investigation shall not be affected by the repeal'.
>
> The difference between that case and the present is that, in that case, a right existed and the investigation, which was unaffected, was an investigation in respect of it; whereas in the present case no right existed or had accrued, and the intended investigation which had not taken place before the time of the repeal (i.e., the consideration by the Governor-in-Council) was an investigation in order to decide whether a right should or should not be given. It was not itself a right or privilege which was preserved by the Interpretation Ordinance."

And as in *Hamilton Gell v. White*, so in this case. The condition imposed by s. 9 (1) of the Immigration Ordinance that an applicant must satisfy the Principal Immigration Officer is the condition of the acquisition of the right. The corollary that the Principal Immigration Officer must be satisfied by the applicant is, in the words of Lord Morris Of Borth-Y-Gest, quoting those of Scrutton, L.J. (at p. 430 of the report of *Hamilton Gell v. White* (2)), a condition "not of the acquisition of the right but of its enforcement".

Appeal allowed. Order to the Principal Immigration Officer to issue an entry permit to the appellant.

For the appellant:
R. N. Raichada, Dar-es-Salaam

For the respondent:
The Attorney-General, Tanganyika
A. E. Taylor (Crown Counsel, Tanganyika)

Buike Estate Coffee Ltd and Two others v S Lutabi and another
[1962] 1 EA 328 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	15 June 1962
Case Number:	700/1961
Before:	Bennett J
Sourced by:	LawAfrica

[1] Company – Proceedings by – Resolution purporting to elect new directors – Action in the name of the company authorised by former directors challenging validity of resolution – Preliminary objection at trial – Objection that plaintiffs' advocate had no authority from company to institute the suit – Whether objection can be taken at trial.

[2] Pleading – Misjoinder of parties and misjoinder of causes of action – Objection to joining claim for other relief with claim for possession of a coffee factory – Whether leave must be obtained – Civil Procedure Rules, O. 1, *r.* 1, *O.* 2, *r.* 2 *and r.* 3 (*U.*) *– Rules of the Supreme Court, O. XVI, r.* 1.

Editor's Summary

The plaintiff company, and the second and third plaintiffs, who claimed to be two of its directors, sought a declaration that a resolution whereby the then directors including the second and third plaintiffs were removed and the two defendants and two other persons (not parties to the suit) were elected directors was null and void; a declaration that the second and third plaintiffs and those other two persons were the directors of the company; possession of a coffee factory belonging to the company and an injunction restraining the defendants from depriving them of their right to manage the factory. The main issue in the action was whether the resolution removing directors and electing others was valid, but at the hearing counsel for the defendants took two preliminary objections in point of law. The first was that the plaintiffs' advocate had acted without authority in instituting proceedings in the name of the company since he had not been authorised to institute the suit by the two defendants and their co-directors, who it was contended were the lawful directors. The second objection was that there had been a misjoinder of parties and of causes of action in defiance of the provisions of O. 1, r. 1 and O. 2, r. 2 and r. 3 and that the plaintiffs were not entitled to join claims for other relief with a claim for possession of the coffee factory.

Held –

(i) the question whether the plaintiffs' advocate had been duly authorised to sue would depend upon the court's finding who were the lawful directors; this could only be determined after evidence had been heard; at this stage of the suit want of authority to sue did not plainly appear and therefore the suit would not be stuck out.

(ii) the right to relief existing in all three plaintiffs, if proved by evidence, arose out of the same transaction, namely, an invalid resolution of the company which purported to oust the lawful directors and accordingly there had been no misjoinder of parties and no misjoinder of causes of action.

(iii) the court's leave ought to have been obtained to join the other causes of action with a claim for possession of the company's coffee factory, but, as leave had now been applied for, leave would be given.

Preliminary objections overruled. Suit to proceed to hearing.

Cases referred to in judgment:

(1) *John Shaw & Sons Ltd. v. Shaw*, [1935] 2 K.B. 113.

(2) *Danish Mercantile Co. Ltd. v. Beaumont*, [1951] Ch. 680; [1951] 1 All E.R. 925.

(3) *Stroud v. Lawson*, [1898] 2 Q.B. 44.

(4) *Yowana Kahere and Others v. Lunyo Estates Ltd*., [1959] E.A. 319 (U.).

(5) *Lloyd v. Great Western Dairies Ltd*., [1907] 2 K.B. 727.

Judgment

Bennett J: In this suit the plaintiff company and the second and third plaintiffs, who claim to be two of its directors, seek a declaration that a resolution whereby the two defendants and two other persons (not parties to the suit) were elected directors is null and void; a declaration that the second and third plaintiffs and two other persons (not parties to the suit) are the directors of the company; possession of a coffee factory belonging to the company; an injunction to restrain the defendants from depriving the plaintiffs of their right to manage the coffee factory, and other relief which it is unnecessary to specify at this stage.

The claim arises out of certain events which occurred at a general meeting of the company held on July 26, 1961. It is alleged in the plaint that at this meeting some of the shareholders purported to hold a separate meeting at which an invalid resolution was passed removing from office the then directors of the company, including the second and third plaintiffs. It is alleged that at this meeting four other shareholders, including the two defendants, were elected directors, contrary to the provisions of the Companies Ordinance and the Articles of Association. The main issue to be determined at the trial is whether or not the resolution removing the former directors and electing others in their stead, is valid.

When the case was called on for hearing Mr. Dholakia, for the defendants, took two preliminary objections in point of law. The first was that the plaintiffs' advocate had acted without authority in instituting proceedings in the name of the company. It was said that he had not been authorised to institute the suit by the two defendants and their co-directors, whom it was contended, are the lawful directors. Want of authority to institute the suit is not pleaded in the written statement of defence and the plaintiffs' advocate has had no notice of the objection. Moreover, the objection is one that should have been raised before the hearing by an interlocutory application to strike out the suit. To quote from the judgment of Roche, L.J., in *John Shaw & Sons Ltd. v. Shaw* (1), [1935] 2 K.B. 113 at p. 147:

> "As to the preliminary question whether the plaintiff company was properly before the court, that is to say, whether the action was instituted and carried on with its authority, I have arrived at the same result as Greer, L.J., but for different reasons, which I propose briefly to state.
>
> "I agree with both the lords justices as to the result of the decided cases and particularly of the *Daimler* case and of the *Russian Commercial Bank* case. The principles to be derived from them are that such an objection to a right to sue as is here taken should be taken not at the trial but by an interlocutory motion or summons; that if such procedure is not adopted the court need not, and ordinarily should not, entertain such an objection at the trial as if it were a defence. If it were otherwise, then for reasons pointed out by Warrington, J., in *Richmond v. Branson*, the position of the court would be well nigh intolerable. Nevertheless, as appears from the decision in the *Daimler* case, if want of capacity or authority to sue plainly appears at any stage the court may then strike out the action."

In the instant case the question as to whether or not the plaintiffs' advocate has been duly authorised to sue will depend upon the court's finding as to who are the lawful directors. That is a matter which can only be determined after evidence has been heard. In my judgment, want of authority to sue does not plainly appear at the present stage of the suit, and the suit ought not to be struck out at this juncture. If it should hereafter appear that the plaintiffs' advocate has not been duly authorised by the lawful directors (whoever they

may be) to institute proceedings on behalf of the company, the advocate can be ordered to pay the costs of the suit personally: See the judgment of Jenkins, L.J., in *Danish Mercantile Co. Ltd. v. Beaumont* (2), [1951] Ch. 680 at p. 682.

Mr. Dholakia's second objection is that there has been a misjoinder of parties and a misjoinder of causes of action in defiance of the provisions of O. 1, r. 1, and O. 2, r. 2 and r. 3. It is also said that the plaintiffs are not entitled to join claims for other reliefs with a claim for possession of the coffee factory.

Order 1, r. 1, of the Uganda Civil Procedure Rules reads:

> "All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate suits any common question of law or fact would arise."

In commenting on the corresponding English rule (O. XVI, r. 1, of the Rules of the Supreme Court) Chitty, J., said in *Stroud v. Lawson* (3), [1898] 2 Q.B. 44 at p. 52:

> "It is necessary that both these conditions should be fulfilled, that is to say, that the right to relief alleged to exist in each plaintiff should be in respect of or arising out of the same transaction, and also that there should be a common question of fact or law, in order that the case may be within the rule."

In the instant case the right to relief existing in all three plaintiffs, if proved by evidence, arises out of the same transaction, namely, an invalid resolution of the company which purported to oust the lawful directors and to replace them by usurpers. Moreover, if the three plaintiffs were to bring separate suits, common questions of law and fact would arise.

Order 2, r. 2, authorises the joinder of several causes of action by different plaintiffs having claims against the same defendant or defendants jointly in which the plaintiffs are jointly interested. Here again, on the assumption that the plaintiffs can prove the allegations made in their plaint, they have a joint interest in the causes of action. I am not impressed by Mr. Dholakia's argument that the company is only interested in the preservation of its property, while the only complaint of the other plaintiffs is that they have been removed from the board of directors. As shareholders in the company the second and third plaintiffs have a pecuniary interest in the preservation of the company's property. Likewise the company itself has a very real interest in seeing that its business is managed by a lawfully constituted board of directors and not by interlopers. In my judgment there has been no misjoinder of parties and no misjoinder of causes of action, and this case is clearly distinguishable on the facts from *Yowana Kahere and Others v. Lunyo Estates Ltd*. (4), [1959] E.A. 319 (U.) which was relied upon by Mr. Dholakia.

The defendants are on firmer ground in objecting to the joinder of other causes of action with a claim for possession of the company's coffee factory. It is plain that the other causes of action which have been joined with the claim for possession do not fall within any of the categories of claim specified in O. 2, r. 3, which it is permissible to join with a suit for recovery of possession of immoveable property without leave of the court. The court's leave ought therefore to have been obtained. Mr. Kazzora, for the plaintiffs, has asked me to give the necessary leave. In my opinion this is clearly a case in which leave should be given, first, in order to avoid a multiplicity of suits, and secondly, because the claim for possession will hinge upon the question whether or not the defendants have been validly elected as directors. That leave can be

given in proper cases after the institution of the suit was decided in *Lloyd v. Great Western Dairies Ltd*. (5), [1907] 2 K.B. 727. I therefore give the necessary leave.

Both preliminary objections taken on behalf of the defendants fail, and the suit will proceed to hearing on a date to be fixed.

The defendants will pay the plaintiffs' costs thrown away by the adjournment which was necessary to enable the court to give a considered ruling, in any event.

Preliminary objections overruled. Suit to proceed to hearing.

For the plaintiffs:
J. W. R. Kazzora, Kampala

For the defendants:
Parekhji & Co., Kampala
B. D. Dholakia

Mrs E Makumbi and another v Puran Singh Ghana and another
[1962] 1 EA 331 (HCU)

Division:	HM High Court of Uganda
Date of judgment:	14 June 1962
Case Number:	639/1959
Before:	Bennett J
Sourced by:	LawAfrica

[1] Easement – Right of way – Track over land leading to motor road – Track only road of access to adjoining plots – Track long used by adjoining plot owners – Track obstructed by owner of land – Whether track a public footpath – Civil Procedure Ordinance, s. 63 (*U.*).

Editor's Summary

The two plaintiffs sought an injunction to restrain the first defendant from obstructing a road of access to their houses which traversed the defendant's plot. The land over which the road ran was mailo land, the second defendant was the registered owner and the first defendant was lessee. The plaintiffs as owners of plots adjoining the land over which the road ran had erected substantial houses on them. At the trial the first defendant admitted in evidence that there was a tract which traversed his plot on its way to the motor road nearby and it was common ground that prior to 1958 the two plaintiffs had used this tract to obtain access to their plots which had no road frontage. In 1958 on the instructions of the first defendant a wire fence was erected round the first defendant's plot thereby obstructing this track and rendering it

impossible for the plaintiffs to use it. Consequently, they had to walk through the grounds of Mengo Prison in order to obtain access to their houses and were unable to take motor vehicles there as they had done in the past. In their plaint the plaintiffs claimed, as an easement, a right of way for foot-passengers and vehicles over the first defendant's plot to their respective plots but at the hearing leave was granted to amend the plaint to enable the plaintiffs to allege a public right of way over the first defendant's plot. The defendants denied that the track was a public footpath and contended that the obstruction of a public way amounted to a public nuisance and that the Attorney-General should have been joined under sub-s. (1) of s. 63 of the Civil Procedure Ordinance.

Held –

(i) there was a track as alleged by the plaintiffs which crossed the land now let to the first defendant and successive owners of that land had acquiesced in its use as a footpath by members of the public.

(ii) there was insufficient evidence that the track was ever used extensively by rickshaws or motor vehicles and therefore a dedication of the track as a carriage-way could not be inferred.

(iii) section 63 of the Civil Procedure Ordinance was an enabling section and the right of individuals who were injuriously affected by a public nuisance to claim damages or other relief was unaffected.

(iv) the plaintiffs had proved the existence of a public footpath and were entitled to damages for the inconvenience which they had suffered.

Judgment for Shs. 2,500/- damages for each plaintiff. Order for an injunction restraining the first defendant from obstructing the footpath.

Cases referred to in judgment:

(1) *Rangeley v. Midland Railway Co.* (1867), L.R. 3 Ch. App. 306.

(2) *Attorney-General v. Mambule,* [1959] E.A. 665 (C.A.).

Judgment

Bennett J: In this suit the two plaintiffs seek an injunction to restrain the first defendant from obstructing a road. They also claim damages from the first defendant.

The land on which the road is said to exist is situated at Mengo. It is mailo land of which the second defendant is the registered proprietor and of which the first defendant is a lessee for forty-nine years, as from 1955. The plaintiffs are owners of adjoining plots and have erected substantial houses on their plots. The plot of the first plaintiff is contiguous to the plot let to the first defendant (hereinafter called the first defendant's plot).

The first defendant has admitted in evidence that there was a track which traversed his plot on its way to the motor road leading to the Mengo Social Centre.

It is common ground that prior to 1958 the two plaintiffs used this track to obtain access to their plots which had no road frontage. In 1958 one Kantilal, on the instructions of the first defendant, erected a wire fence round the first defendant's plot thereby obstructing this track, and rendering it impossible for the two plaintiffs to use it. The two plaintiffs were constrained to walk through the grounds of Mengo Prison in order to obtain access to their houses, and were unable to take motor vehicles to their houses as they had been accustomed to do in the past. Since the first plaintiff's house had been leased to European tenants the consequences of being unable to take motor vehicle to the house were serious, and the rental value of both houses was undoubtedly injuriously affected.

In their original plaint the plaintiffs claimed, as an easement, a right of way for foot-passengers and vehicles over the first defendant's plot to their respective plots. After the plaintiffs and their witnesses had given evidence, leave was granted for the plaint to be amended to enable the plaintiffs to allege a public right of way over the first defendant's plot. Paragraph 4 of the plaint, as amended, contains this averment:

> "There was a road (hereinafter referred to as the access road) leading from the Kabaka's palace and passing through the first defendant's land, thus serving the plaintiff's lands and was extending as far down to the well,

> which road was also used by the general public with or without vehicles, and at all times of day and night as a customary easement without any interference whatsoever by anyone."

The reference to "easement" is unfortunate since an easement enjoyed by the public at large is unknown to the law.

In *Rangeley v. Midland Railway Co.* (1) (1867), L.R. 3 Ch. App. 306 at p. 311, Lord Cairns, L.J., said:

> "There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement; it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing . . ."

However defective may be the plaintiff's pleading, I am satisfied that the defendants have not been misled since the hearing was adjourned by consent on February 8, 1962, for the express purpose of enabling the plaintiffs to plead that there was a public right of way over the track.

The evidence called on behalf of the plaintiffs tends to establish that there had been a track leading from the Kabaka's palace to what is now the road to the social centre, from the early years of the present century. The plaintiffs claim that this track was not merely a footway but that it was also a carriageway and that it was used by the public at large.

There is no evidence that the track was ever maintained as a road either by the Public Works Department or by the Buganda Government, or that it had been declared a road reserve, so that the Roads Ordinance, Cap. 165, would not have applied to it. The Roads Ordinance, consisting as it does of seven sections and concerned, as it is, with a very limited aspect of highway law, is not, in my opinion, exhaustive of the law of highways in Uganda. Recourse must be had to s. 15 of the Uganda Order-in-Council, 1902, and to the common law of England so far as circumstances admit. In *Attorney-General v. Mambule* (2), [1959] E.A. 665 (C.A.), Sir Kenneth O'Connor, P., expressed the opinion that there are obvious difficulties in the way of importing the doctrine of the common law making highways repairable by the inhabitants of the parish, but I can find nothing in the judgment to support the view that the common law relating to highways is generally inapplicable in Uganda.

According to English law a highway can only be created by statute, or by dedication to the public and acceptance: See 19 Halsbury's Laws of England (3rd Edn.), para. 60. In the instant case there is no evidence of any express dedication of the land for use as a carriage-way or footpath either by the existing owners or by their predecessors in title. The question of substance to be determined in this suit is whether there is sufficient evidence from which a dedication by the predecessors in title of the present owners can be inferred.

The evidence upon which the plaintiffs rely is evidence of long user of the track by members of the public. To quote from Pratt and Mackenzie on Law of Highways (19th Edn.), p. 28:

> "The use and enjoyment from which it (dedication) can be inferred must be use and enjoyment as of right known to the owner and acquiesced in by him . . . User by the public over land belonging to a non-resident owner is less cogent evidence of dedication than where the user is necessarily brought to his personal knowledge . . . The length of time during which the user must exist in order to raise the presumption varies with circumstances. In a case mentioned by Lord Kenyon, C.J., a period of six years was held sufficient. Where a new street, which was neither paved nor lighted, had been used as a public road for four or five years, the court thought the jury were warranted in presuming that it was used with the full assent of the owners of the soil . . .
>
> "The presumption arising from long uninterrupted user of a way by the public is so strong as to dispense with all inquiry into the actual intention of the owner of the soil, and it is not even material to inquire who the owner of the soil was."

It is common ground that the plaintiffs and the second defendant derive title to their respective plots from the late L. H. Mbazira. Paulo Saku, who is now fifty-five years of age and is the younger brother of the late Mbazira, said in evidence:

> "There used to be a road which passed through the plaintiffs' plots. We used it to go to the well and to get to our shambas. It was wide enough for a lorry to pass. It was an earth track. I can remember this road in 1908 when I was a child. I was told by my father that the road had been there since the time of Kabaka Mwanga. It went through my father's land. The road passed through our land and went as far as what is now the Old Budonian's Club. It started at the Lubiri (palace). Most of the land from the Lubiri to the Old Budonian's Club used to belong to my father . . . Even in 1908 the road was wide enough for vehicles but was only in use as a footpath. It was a public footpath. In 1938 there were no houses in the area as there are now except the Mengo prison. I did not see vehicles using it before 1938, but the public used it as a footpath and the prisoners used it to go to the well to draw water. I first saw vehicles using it in or about 1942 . . . All the land through which it passed belonged to my father. My father allowed the public to use the road. He died about 1920."

This witness said that the road is still there but is obstructed by a wire fence. This is obviously a reference to the fence erected by Kantilal on the instructions of the first defendant.

Another witness, Samweri Musisi, who is now forty-four years of age, said that he remembered a road which passed through the first defendant's plot and ended at the Kabaka's palace. It was there when he was a schoolboy. He used it himself as a footway up to 1958 and saw prisoners using it to go to the well. It was also used by motor vehicles.

Katalina Namusisi, the sister of Paulo Saku, who claims to have been born in the reign of Kabaka Mwanga (died 1903), testified that she remembered a road which started at the palace. She said it was used by rickshaws and foot-passengers, and that it passed through the first defendant's plot.

Another witness, Efraimu Salongo, testified that he remembered a road which traversed the first defendant's plot and that it was used by motor vehicles as long ago as 1930. On the other hand the second defendant, who did not give me the impression of being an untruthful witness, has testified that when he purchased his land in 1946 he saw no road or path over the land or that portion of it which he subsequently let to the first defendant. The second defendant did not enter an appearance or defend the suit, but gave evidence as a witness for the first defendant.

The plaintiffs' witnesses, to whose evidence I have alluded, impressed me as being disinterested and worthy of credit. I am satisfied that there was a track leading from the palace to what is now the Old Budonian's Club, and that it crossed the land now let to the first defendant. There is, however, no sufficient evidence that it was ever used extensively by rickshaws or motor vehicles. No plans or survey maps have been produced on which the track is shown either as a road or as a footpath. It is not marked on the plan, exhibit A. It was a mere grass or earth track and had never been made up so that it cannot have been suitable for use by motor vehicle. It was so inconspicuous that the second defendant failed to notice it when he inspected his land at the time of purchasing it in 1946. In my judgment, the occasional user of the track by rickshaws and motor vehicles is insufficient evidence from which to infer a dedication of the track as a carriage-way. On a balance of probabilities, I am satisfied that successive owners of the soil had acquiesced in its use as a footpath by members of the public. The extent of the public right, as regards the mode of using the way, is a question of fact: See Pratt and Mackenzie on Law

of Highways (19th Edn.), p. 35. The plaintiffs have succeeded in establishing that the track is a public footpath, but not that it is a public carriage-way.

On behalf of the defendants it has been contended that the obstruction of a public way amounts to a public nuisance, and that the Attorney-General should have been made a party to the proceedings having regard to sub-s. (1) of s. 63 of the Civil Procedure Ordinance. Sub-section (1) must be read with sub-s. (2) and my interpretation of s. 63 is that it is an enabling section and that the right of individuals who are injuriously affected by a public nuisance to claim damages or other relief is unaffected.

The fact that the plaintiffs have only succeeded in establishing that the track is a public footpath must materially affect the damages to which they are entitled, since it is plain from their evidence that any pecuniary loss which they may have sustained stemmed from deprivation of the use of the track as a carriageway. They are, however, entitled to damages for the inconvenience which they have suffered.

I assess damages in the sum of Shs. 2,500/- for each plaintiff. There will be judgment for the plaintiffs for that sum. There will be an injunction restraining the first defendant from obstructing the footpath. The first defendant is ordered to pay the costs of both plaintiffs.

Judgment for Shs. 2,500/- *damages for each plaintiff Order for an injunction restraining the first defendant from obstructing the footpath.*

For the plaintiffs:
Kiwanuka & Co., Kampala
A. W. K. Mukasa

For the defendants:
Jobunputtra & Pandya, Kampala
M. Jobunputtra

The second defendant did not enter appearance in his own right.

Hagod Jack Simonian v S K Johar and others
[1962] 1 EA 336 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 May 1962
Case Number:	90/1961
Before:	Sir Alastair Forbes VP, Sir Trevor Gould and Crawshaw, JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Mayers, J

[1] Practice – Pleading – Amendment – Plaint amended after defence filed – Application in chambers to disallow amended plaint in whole or in part – Action dismissed with leave to bring fresh suit – Jurisdiction to dismiss on summons in chambers – Grounds on which amendments to pleadings should be allowed – Civil Procedure (*Revised*) *Rules*, 1948, *O. VI, r.* 15, *r.* 17, *r.* 18, *r.* 19, *r.* 21, *r.* 23, *r.* 25 *and r.* 30, *O. XIX, r.* 17, *r.* 21 *and r.* 29, *O. L, r.* 1 *and r.* 8 (*K.*) *– Rules of the Supreme Court, O. XXVIII, r.* 1 *and r.* 2 *– Bills of Exchange Ordinance* (*Cap.* 291), *s.* 45 *and s.* 49 (*K.*).

Editor's Summary

The appellant filed a plaint claiming Shs. 50,000/- on a promissory note made by the first respondent and endorsed by the second and third respondents. Each respondent filed a defence. The appellant then amended his plaint under O. 6, r. 19 of the Civil Procedure (Revised) Rules, 1948, to which all the respondents objected and each took out a chamber summons under O. VI, r. 17, r. 21 and r. 29 asking that the amended plaint be disallowed either wholly or, at least, specified paragraphs thereof. Under r. 29 the court may order, inter alia, that the suit be dismissed but this relief was not sought by the respondents, nor could it have been sought by a chamber summons, as under r. 29 it must be made by a motion. The judge purporting to act under r. 21 dismissed the suit with liberty to bring a fresh suit against the respondents in respect of all causes of action alleged in the amended plaint. On appeal the grounds of appeal were that the judge had no jurisdiction to make the order he did; that the amendments to the plaint could properly have been incorporated in a reply to the defences but that the amendments to the plaint were necessary within the meaning of O. VI, r. 18, and that the judge erred in not confirming the amended plaint.

Held –

(i) Order VI, r. 21 of the Civil Procedure (Revised) Rules, 1948 only enables the court to disallow amendments or impose terms on their admission, and does not enable the court to dismiss the suit; accordingly the judge had no express jurisdiction to dismiss the suit, nor to invoke r. 29 as the application was by chamber summons and not by motion as required.

(ii) although the amended plaint raised new causes of action these were not of a different character from or foreign to or inconsistent with the original cause of action but stemmed from the same transaction which was the loan of money to the first respondent.

(iii) no injustice would have been caused to the respondents by allowing the amendments to the plaint and the amended pleadings in defence would be no more onerous than pleading to a new suit.

Appeal allowed. Order that the suit proceed on the plaint as amended.

Cases referred to in judgment:

(1) *Eastern Bakery v. Castelino*, [1958] E.A. 461 (C.A.).

(2) *G. L. Baker Ltd. v. Medway Building and Supplies Ltd.*, [1958] 3 All E.R. 540.

(3) *Ma Shwe Mya v. Maung Mo Hnaung* (1921), 48 I.A. 214.

(4) *B. Gopalakrishnamurthi v. D. S. Rao* (1950), 37 A.I.R. Mad. 32.

(5) *Marshall v. London Passenger Transport Board*, [1936] 3 All E.R. 83.

(6) *Attorney-General v. West Ham Corporation* (1910), 74 J.P. 196.

(7) *Sarafalli Mahomadali v. M. Jechandbhai and Others* (1933), 57 Bom. 802.

(8) *Sadasuk Janki Das v. Sir Kishan Pershad* (1918), 48 Cal. 663.

The following judgements were read:

Judgment

Crawshaw JA: The appellant filed a plaint to which each respondent as defendant in the suit filed a separate written statement of defence. The appellant thereupon filed an amended plaint as he was entitled to do under O. VI, r. 19. The respondents took exception to the amendments and each took out a chamber summons asking that the amended plaint as a whole, or at least specified paragraphs thereof, be disallowed. Each respondent was separately represented, and the applications were heard together; after hearing argument the learned judge made the following order:

> "Suit to be dismissed with costs – including costs of this application. Plaintiff to be at liberty to bring a fresh suit against either defendant in respect of all causes of action alleged in amended plaint."

The appellant has appealed against that order on the following grounds:

> "The learned judge erred in dismissing the entire suit of the appellant on the hearing of an application by way of chamber summons by the respondents not to allow the appellant to amend the plaint and he had no jurisdiction so to do and further that he erred in not confirming the amended plaint filed by the plaintiff."

The body of the original plaint reads as follows:

> "1. The plaintiff claims against the first defendant as maker of a promissory note dated November 13, 1960, in the sum of Shs. 50,000/-, payable thirty days after date to the second defendant or order which promissory note was endorsed over by the second defendant to the third defendant and endorsed by the third defendant to the plaintiff.
>
> "2. The said promissory note was unpaid when presented for payment by the plaintiff to the first defendant on due date.
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> "3. The plaintiff claims against the second and third defendants as endorsers of the said promissory note.
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> "4. Due notice of dishonour was given by the plaintiff to the second and third defendants.
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> "5. The cause of action is within the jurisdiction of this honourable court.
>
> "6. Wherefore the plaintiff prays for judgment against the defendants jointly and/or severally for:
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> (*a*) Shillings 50,000/-;
>
> (*b*) Costs;
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> (*c*) Interest on the principal amount and on costs at court rates."

The first respondent (being the first defendant) in his written statement admitted having drawn the promissory note but denied that it had been presented

for payment as alleged or at all and claimed to be discharged by virtue of s. 45 of the Bills of Exchange Ordinance (Cap. 291 – hereinafter referred to as "the Ordinance"). Paragraph 3 of his written statement reads,

> "Save as herein expressly admitted the first defendant denies each and every allegation set forth in the plaint."

The second respondent (being the second defendant) in his written statement admitted having endorsed the promissory note in favour of the third respondent (being the third defendant) but denied having received notice of dishonour. If a copy letter he received from the appellant's advocate dated January 14, 1961, could be said to constitute notice, then, he said it was not given within a reasonable time. Anyway he claimed to be discharged by virtue of the provisions of s. 48 and s. 49 of the Ordinance. His final paragraph was similar to para. 3 of the first respondent's written statement.

The third respondent in his written statement admitted having endorsed the promissory note to the appellant but, denying liability, contended that there was no consideration for the endorsement. He also denied having received notice of dishonour, but if a copy letter he received dated January 14, 1961 (one presumes it was a copy of the same letter referred to by the second respondent) constituted notice then, he said, it was not given within a reasonable time. He also claimed to be dishcarged under s. 48 and 49 of the Ordinance. His fifth paragrpah was a general non-admission of the allegations in the plaint.

In general, the original plaint would appear to have set out the appellant's claims on the promissory note with sufficient particularity, and I do not think it has been suggested otherwise; in fact it was, as I understood it, part of the argument of Mr. Khanna, who represented all the respondents before us, that the issues on the original pleadings were clear and that therefore no amendment was necessary. In his amended plaint the appellant apparently seeks to answer the defences of the respondents and, with reference to the history of the transaction, to broaden the scope of his claim by adding alternative and additional causes of action based on that transaction as a whole.

The amendments to the plaint are substantial and may be summarised as follows, with reference to the paragraphs of the amended plaint:

(*a*) so far as the first defendant is concerned –

- (i) that notice of dishonour was dispensed with by law (para. 5);
- (ii) in the alternative that notice of dishonour was waived by a promise to pay (para. 6);
- (iii) the introduction of a new cause of action for money lent, based on the alleged original loan, as an alternative to the claim on the promissory note which was the security for that loan (para. 10);
- (iv) the introduction of a new cause of action for Shs. 3,333/- (mentioned, I imagine in error, in one place as Shs. 3,033/-), being the sum alleged to have been agreed to be paid by the defendant in consideration of an extension of time for repayment of the loan (paras. 9 and 12);

(*b*) so far as the second defendant is concerned:

- (i) that in the alternative to a notice of dishonour having been given, it was waived in the circumstances set out (paras. 4, 7 and 8);
- (ii) by alleging as a new cause of action that the second defendant had guaranteed the loan to the first defendant (paras. 9 and 11);

(*c*) so far as the third defendant is concerned –

- (i) that the promissory note was presented for payment to the third defendant (para. 2);

(ii) that there was waiver of notice of dishonour (para. 6);

(iii) by alleging as a new cause of action that the third defendant had, in like manner as the second defendant, guaranteed the loan (paras. 9 and 11).

For the rest, para. 9 contained a history of the transaction which seems more helpful than exceptional, and para. 14 alleged failure by the defendants to pay the amount claimed, which can be said to have been implied in the original plaint. The prayer was identical to the prayer in the original plaint, except that added to it was the claim for Shs. 3,333/- referred to above.

Mr. Kean, who has appeared throughout the proceedings for the appellant, has argued in the first place that the learned judge had no jurisdiction to make the order he did. He submits that apart from this, many of the amendments to the plaint could properly have been incorporated in a reply to the written statements, but that instead he was entitled to amend the plaint under the provisions of O. VI, r. 19 which, under O. VI, r. 23, would have given the respondents the right to amend their written statements, and that this procedure in fact put the respondents in a more favourable position than they would otherwise have been as there is no answer to a reply without the consent of the court. He submits that the amendments were necessary within the meaning of O. VI, r. 18 as being

> "for the purpose of determining the real question in controversy between the parties",

and that the appellant was entitled to base his claim on as many causes of action as were available to him. He submits that far from being an embarrassment, the amended plaint states more fully the real issues between the parties, and that the new causes of action arose directly out of the cause of action in the original plaint, and that having to file a new suit on the issues already pleaded would be to the prejudice of the appellant.

Mr. Khanna argued that the original plaint raised simple issues which were traversed in the several defences and that the amended plaint introduced drastic changes "in which the appellant changed his front", which he was not entitled to do and that it resulted in injustice to the respondents. He submitted that this court should not be influenced by the order of the learned judge allowing a new suit to be filed including the new causes of action. He said that one cause of action could not be substituted for another or new pleas be introduced, and that if they were, injustice might result to the respondents in their losing the case. He submitted that it was more convenient that the suit should be dismissed, and that this court should not interfere with the exercise of the judge's discretion.

On the question of jurisdiction the amendments to the plaint were made under O. VI, r. 19, which permits amendment without leave of the court if made within certain specified time limits. The first respondent applied under r. 21 to have the amended plaint, or specified paragraphs thereof, disallowed,

> "or such other order being made as the justice of the case shall seem to require"

(the formal order of the court incorrectly recited that the application of the first respondent was made under "r. 17, r. 21 and r. 29"). Rule 30 permits applications under r. 21 to be made by chamber summons, and the application was therefore in order. Rule 21 however only enables the court to disallow amendments or impose terms on their admission, and does not enable the court to dismiss the suit. The court may, under r. 29, order, inter alia, that the suit be dismissed; this relief was not however asked for by the first respondent, nor

could it have been asked for by means of a chamber summons for there is no special provision so enabling, and O. L, r. 1, provides,

> "All applications to the court, save where otherwise expressly provided for under these rules, shall be by motion and shall be heard in open court".

Under O. L, r. 8, the court may direct that a matter be transferred from the court to chambers; this rule is not however strictly applicable as no motion was brought under r. 1 in the first instance. It seems to me, therefore, that the learned judge had no express jurisdiction to dismiss the suit under O. VI, r. 21, nor to invoke r. 29.

The second and third respondents' applications purported to be made under O. VI, r. 17, r. 21 and r. 29. They asked for relief similar to that asked for by the first respondent, except that the specified paragraphs of the amended plaint were not identical; it was not asked in the body of the application that the suit should be dismissed. As I have already said, the court had no jurisdiction to dismiss the suit under r. 21, and an application by chamber summons under r. 29 was unauthorised. Rule 17 enables the court at any stage of the proceedings to

> "order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action;"

an application under this rule may be made by chamber summons (r. 30). The question of jurisdiction to hear an application under r. 29 by chamber summons was raised by Mr. Kean as a preliminary point on the hearing of the applications and the learned judge recorded that he would reserve his finding thereon after first hearing argument

> "on assumption that applications under O. XIX, r. 29, can be joined with those under O. XIX, r. 17 and r. 21";

by "O. XIX" he presumably meant "O. VI". The learned judge however made his order dismissing the suit without, so far as the record shows, coming to any finding on jurisdiction.

The learned judge did not say under which rule or rules he made the order, but the rule under which the original plaint could have been struck out on proper application and the action dismissed was r. 29 on the ground that it disclosed no reasonable cause of action or was frivolous or vexatious. He does not say or imply that any of these circumstances existed, nor were they specifically alleged in any of the respondents' applications, which were essentially applications relating to the amendments in the plaint. Rule 17 does not, as I see it, relate to the striking out of any pleadings as a whole, but only to such matter in the pleadings as may be

> "unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action".

The learned judge has not said or implied that any of these circumstances were present in the original plaint, nor were they so specifically alleged in any of the respondents' applications. The fact that the learned judge allowed a new suit to be filed, which embodied the issues in the original and amended plaints, shows that he could not have had in mind the existence of the circumstances envisaged in r. 17 or r. 29. He must therefore, necessarily have purported to act under r. 21.

For the reasons given it is, with respect to the learned judge, my view that he was clearly wrong in dismissing the suit under that rule. If he considered that on general grounds he could say that in view of the scope and nature of the amendments it would be to the convenience of the parties that a new suit should

be filed and that he had jurisdiction from some source other than r. 21 to make the order he did (a matter which, on the view I take of the appeal generally it is not necessary to decide) he should at least have heard Mr. Kean's submissions on his proposed course of action. This, according to the record he did not do; nor did he give counsel the option of accepting his order or proceeding on the original plaint.

So much for jurisdiction, which was the first limb of the appeal. The other limb was that the learned judge "erred in not confirming the amended plaint". The principles on which an amendment will be allowed are well known. In Bullen and Leake's Precedents of Pleadings (11th Edn.), p. 61 it is said in general as to amending one's own pleadings

> "A party has generally little difficulty in obtaining leave to amend his own pleadings provided his application is not left to so late a stage of the proceedings that to allow an amendment then would be unjust to his opponent".

In the instant case the amended plaint was filed within a fortnight of the filing of the last written statement of defence. In the Annual Practice 1961 of the English Rules of the Supreme Court it is said in the commentary to O.XXVIII, r. 2 (allowing in certain circumstances amendment without leave) that where application is made to disallow an amendment,

> "the amendment will be disallowed if it be such as the court would not have permitted on an application for leave to amend".

Order XXVIII, r. 1 of the English Rules relates to amendments with leave and is in similar terms to our O. VI, r. 18. In the Annual Practice 1961 at p. 622 it is said in the commentary to O. XXVIII, r. 1:

> "In *Tildesley v. Harper*, 10 Ch. D. pp. 396, 397, Bramwell, L.J., said: `My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise'. `However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs'
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> An amendment ought to be allowed if thereby `the real substantial question can be raised between the parties', and multiplicity of legal proceedings avoided . . ."

In *Eastern Bakery v. Castelino* (1), [1958] E.A. 461 (C.A.), the then president of this court set out principles on which amendment of pleadings should be allowed; the case was a Uganda one but the principles are equally applicable to the law in Kenya. The president said:

> "Generally speaking, this court will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle.
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> It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice

> if the other side can be compensated by costs: *Tildesley v. Harper* (1) (1878), 10 Ch. D. 393; *Clarapede v. Commercial Union Association* (2) (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: *Budding v. Murdoch* (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya v. Maung Mo Hnaung* (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen* (5), [1898] 1 Ch. 73, 81;
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> "The main principle is that an amendment should not be allowed if it causes injustice to the other side. Chitaley p. 1313."

We have been referred to a considerable number of cases in some of which amendments have been allowed and some disallowed. As was said by Jenkins, L.J., in *G. L. Baker Ltd. v. Medway Building and Supplies Ltd*. (2), [1958] 3 All E.R. 540 at p. 546,

> "As to these authorities, one may observe that the circumstances in which amendments may be sought are infinitely various and a decision against an amendment in the particular circumstances of one case may be no ground for refusing leave in another".

At the same time the authorities do show the liberality with which the courts allow amendments if made at a proper stage of the proceedings, including the introduction of new alternative causes of action. I have read the cases to which we have been referred, but the circumstances have been particular to each and they are not, I think, much help except insofar as they set out, or apply to those special circumstances, the principles already stated above. In *Ma Shwe Mya v. Maung Mo Hnaung* (3) (1921), 48 I.A. 214, to which both counsel referred, the desired amendment, which was disallowed, related to another contract independent of the contract originally pleaded, and it concerned quite different properties. Mr. Khanna has referred us to *B. Gopalakrishnamurthi v. D. S. Rao* (4) (1950), 37 A.I.R. Mad. 32 in support of the proposition that where there are new elements sought to be introduced by way of amendment which were known and available to a plaintiff at the time of filing the plaint, the court should not permit the amendment to be made. That case, which was heard by a single judge, was decided on its own particular facts which were quite distinct from those in the instant case, and I do not think it helps us. There has been no suggestion in the instant case of mala fides and it is quite clear from the authorities that there is no general principle that in the absence of mala fides no new cause of action may be founded on facts which were known to the plaintiff at the time he filed the suit.

Mr. Khanna also cited *Marshall v. London Passenger Transport Board* (5), [1936] 3 All E.R. 83. In that case amendment was refused because it would have circumvented the operation of the Statute of Limitation, but it was observed also that the amendment if allowed would have

> "set up a new cause of action involving quite new considerations, quite new sets of facts, and quite new causes of damage and injury".

That cannot, I think, be said of the proposed amendments in the instant case. In other cases cited, amendments have been disallowed because, or partly because, of the late stage at which the application has been made, where, for instance, evidence has already been taken and it would be unjust to the other party to widen or raise new issues which might result in virtually a new trial.

In applying general principles to the facts of the instant case I can see nothing inherently wrong in basing an amendment on the nature of the other party's pleadings, and the authorities support this view. Further, O. VI, r. 15 reads:

> "Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied, e.g. consideration for bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim."

Nor do I see anything necessarily wrong in amendments which disclose further details supporting or amplifying a cause of action. The authorities do not suggest that averments such as presentment, or the giving or the waiver of notice of dishonour cannot properly be introduced by way of amendment, and I can see nothing objectionable thereto. As to the new causes of action, it cannot, I think, be said that they are of a different character from or are foreign to or inconsistent with the original cause of action; they stem from the one transaction which was the loan of money to the first respondent. In *Attorney-General v. West Ham Corporation* (6) (1910), 74 J.P. 196, a new claim was allowed to be added on the ground that it was "so germane to, and so connected with, the original cause of action" and that it involved very much the same considerations as the original claim, that it would be unjust if leave to add it were refused. In Chitaley and Rao on the Indian Code of Civil Procedure (5th Edn.), Vol. II at p. 1762 it is said:

> "Where, in respect of an original liability to pay a certain sum of money, a document, such as a promissory note or a mortgage, is taken and the plaintiff in a suit on such document finds that the document is inadmissible in evidence owing to some technical defect, an amendment of the plaint by claiming relief as on the basis of the original liability does not, as a general rule, amount to a substitution of a distinct cause of action, and should, therefore, be allowed."

It is apparent from the note to this quotation that the learned author consulted many cases, including a Madras case referred to as follows,

> "12 A.I.R. (1925) Mad. 351. (Suit on pro-note insufficiently stamped – Consideration on note being antecedent debt – Relief based on antecedent debt cannot be granted)".

That case is cited in contrast to *Sarafalli Mahomadali v. M. Jechandbhai and Others* (7) (1933), 57 Bom. 802, where apparently a different view was taken. The report of the former case is not available to me, but the headnote to the report of the latter reads as follows:

> "In a suit brought on a promissory note, it is permissible to the court at the trial or even in appeal to allow an amendment of the plaint in order to entitle the plaintiff to sue in the alternative on the original cause of action giving rise to the consideration for the note."

An earlier case in which the opposite had been held was considered and disapproved. The learned Chief Justice in the *Mahomadali* case (7), referred to *Sadasuk Janki Das v. Sir Kishan Pershad* (8) (1918), 48 Cal. 663, in which the Privy Council had observed that a suit could contain a claim on a "hundi" and also in the alternative upon a consideration; the learned Chief Justice expressed the view that if the alternative claims could be combined in the original plaint he saw no reason on principle why they could not be combined at a later stage by an amendment. I see no reason to differ from that view.

I fail to see what injustice could result to the respondents or any of them by allowing the amendments. The trial has not started. Amended pleadings in

defence would be no more onerous than pleading to a new suit. Abortive pleadings to date can be compensated in costs. The mere fact that the plaintiff may succeed on the amended pleadings where he would have failed on the original pleadings is not an "injustice" to the defendants. As to convenience, it seems to me that there would be no greater convenience to the respondents in filing amended written statements of defence than in filing defences to a new suit. So far as the appellant is concerned, Mr. Kean has pointed out that the filing of a new suit would incur fresh fees, which are not inconsiderable, and that interest on the sum claimed would be lost if made to run from the date of the filing of the suit; these are factors which the court can properly consider.

I should perhaps before have referred to the practice in England whereby no amendment (except in circumstances which do not apply here) can be made without leave if the amendment increases the total amount claimed. This would relates to the claim for Shs. 3,333/-. No application to add this claim was made by the plaintiff, but it in fact came before the court on the applications of the respondents, and it seems to me that there would have been nothing improper in the court granting leave to include the new claim at the time of the hearing of those applications. The court clearly saw no objection to the claim being added, for liberty was granted to the plaintiff to bring a fresh suit in respect of all causes of action in the amended plaint.

One is loth to interfere with the judge's exercise of discretion, supposing that he had jurisdiction to make the order he did, but he has given no reasons why he preferred to allow a new suit rather than the amended plaint. Further, he appears to have made the order without hearing argument on the question of convenience or justice to the appellant; had he done so, it might well be that he would not have made the order he did, and would have allowed the amendments to stand. In the circumstances I think that we are entitled to interfere and I would allow the appeal and direct that the suit proceed on the plaint as amended, the respondents being at liberty, of course, to file amended defences thereto. I would allow twenty-one days from the delivery of this judgment for that purpose. I would order that the costs of, occasioned by or thrown away by the amendment be borne by the appellant in any event, but that the respondents in any event pay the costs of the applications to the Supreme Court to have the amended plaint disallowed. The respondents should also pay the costs of this appeal.

Sir Alastair Forbes VP: I agree and have nothing to add. There will be an order in the terms proposed by the learned Justice of Appeal.

Sir Trevor Gould JA: I also agree and have nothing to add.

Appeal allowed. Order that the suit proceed on the plaint as amended.

For the appellant:
Kean & Kean, Nairobi
M. Kean

For the first respondent:
Satish Gautama, Nairobi
D. N. Khanna and *S. C. Gautama*

For the second respondent:
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D. N. Khanna and *H. Shroff*

For the third respondent:
Winayak Johor & Co., Nairobi
D. N. Khanna and *J. K. Winayak*

Nazir Ahmed s/o Rehamat Ali and another v R
[1962] 1 EA 345 (CA)

Division:	Court of Appeal
Date of judgment:	2 May 1962
Case Number:	31/1962
Before:	Sir Ronald Sinclair P, Sir Trevor Gould and Crawshaw JJA.
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rudd, Ag. C.J., and Edmonds, J.

[1] Criminal law – Evidence – Finger and palm prints on stolen vehicles – Vehicles dismantled – Whether evidence sufficient to support conviction of theft – Plea that evidence capable of innocent explanation.

[2] Criminal law – Charge – Theft – Theft of four motor cars – Joinder of two accused on charges concerning four motor cars – No prejudice occasioned – Objection first made on appeal – Whether misjoinder fatal – Criminal Procedure Code, (*Cap.* 27), *s.* 3 (3), *s.* 134, *s.* 135, *s.* 136, *s.* 137, *s.* 275, *s.* 361 *and s.* 382 (*K.*) *– Penal Code* (*Cap.* 24), *s.* 20 (*K.*) *– Criminal Procedure Code*, *s.* 335 (*T.*) *– Eastern African Court of Appeal Rules*, 1954, *r.* 41 (1) *– Indian Code of Criminal Procedure*, 1898, *s.* 233, *s.* 234, *s.* 235, *s.* 236, *s.* 239 *and s.* 537 *– Indictments Act*, 1915, *s.* 3 (1) *and s.* 5 *and First Schedule, r.* 3 *and r.* 4 *– Criminal Appeal Act*, 1907, *s.* 4 (1).

Editor's Summary

The appellants were tried together by a magistrate on a charge sheet which originally contained ten counts, but during the course of the trial two counts were withdrawn and no evidence was offered on a third and an order for a separate trial was made in respect of two other counts. The trial proceeded on four counts, the first three of which charged the first appellant with the theft of three motor cars, and the last count likewise charged the second appellant with the theft of a fourth motor car. They were convicted on evidence that the finger and palm prints of the appellants were found in various places on the four cars, e.g. the pilot window, the rear number plate light, the off-side door and the underside of the rear bumper, and that when the cars were recovered, all but one had been stripped of wheels, tyres, starter motors, generators and lamps. Their appeals to the Supreme Court having been dismissed they appealed again and the two main grounds were (*a*) that the only evidence was that of finger and palm prints, the presence of which was consistent with an innocent explanation and (*b*) that the joinder of the appellants

in one charge and their trial together were invalid irrespective of any prejudice, though counsel for the appellants conceded that this had in fact occasioned no prejudice. Counsel for the appellants submitted that the magistrate and the judges of the Supreme Court had confused the probative effect of fingerprints found at the scene of a crime with that of the prints in the instant case, which were not necessarily made at the time of the crime in question, and that there was no evidence upon which the magistrate could reasonably have convicted the appellants of theft. It was also submitted that the magistrate had treated the case as one in which possession of stolen goods had been established and in which the appellants were called upon to give an explanation. As regards the misjoinder of counts, it was submitted that s. 134, s. 135 and s. 136 of the Criminal Procedure Code provided no basis for the trial together of the four counts in question, that the result had been that two trials, which ought to have been separate, had been held together, and that this could not be cured by s. 382 ibid. even though no prejudice had been caused to the appellants.

Held –

(i) it was not open to the court to interfere with the convictions unless the court was satisfied that no reasonable court could have come, on the

evidence and in the circumstances of the particular cases, to the conclusion that the magistrate and the Supreme Court in fact came to.

(ii) in view of the situation of the various prints the possibility that they had been placed there by accident or by an innocent person was too remote to warrant serious consideration.

(iii) the court was satisfied that so far as the effect of the evidence was concerned there was no case for interference.

(iv) it is the English law and practice to which it is right to turn to ascertain the effect of an irregular charge or information and Indian law and the decisions made thereunder are not in point.

(v) if the four counts in question were to be looked at alone, there was no doubt that there was a misjoinder, but as no miscarriage of justice was occasioned, s. 382 of the Criminal Procedure Code was consequently applicable.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Aves*, [1950] 2 All E.R. 330; 34 Cr. App. R. 159.

(2) *R. v. Court*, 44 Cr. App. R. 242.

(3) *Harris v. Director of Public Prosecutions*, [1952] A.C. 694; [1952] 1 All E.R. 1044.

(4) *R. v. Tizard*, [1962] 1 All E.R. 209.

(5) *Choukhani v. R.* (1938), 158 L.T. 437.

(6) *Rash Behari v. R.* (1936), A.I.R. Cal. 753.

(7) *Subramania Iyer v. R.* (1901), 28 I.A. 257.

(8) *Abdulla Mohamed Mubarak v. R.*, E.A.C.A. Criminal Appeal No. 172 of 1959 (unreported).

(9) *Babulal v. R.* (1938), A.I.R. P.C. 130.

(10) *Abdul Rahman v. R.* (1926), 54 I.A. 96.

(11) *Polukuri Kotayya v. R.* (1947), 74 I.A. 65.

(12) *R. v. Ngidipe* (1939), 6 E.A.C.A. 118.

(13) *Jeremiah v. R.* (1951), 18 E.A.C.A. 218.

(14) *R. v. Crane*, [1920] 3 K.B. 236.

(15) *R. v. Kingston*, 103 E.R. 259.

(16) *Castro v. R.* (1881), 6 App. Cas. 229.

(17) *R. v. Hayes*, 174 E.R. 247.

(18) *R. v. Muir*, [1938] 2 All E.R. 516.

(19) *R. v. Thompson*, 9 Cr. App. R. 252.

(20) *R. v. Disney*, 24 Cr. App. R. 49.

(21) *R. v. Wilmot*, 24 Cr. App. R. 63.

(22) *R. v. Gulamhussein Dharamsi Jetha* (1946), 13 E.A.C.A. 107.

(23) *R. v. Joseph s/o Odoro* (1954), 21 E.A.C.A. 311.

Judgment

Sir Trevor Gould JA, read the following judgment of the court: The two appellants were tried together on a charge sheet which originally contained ten counts; of these, counts 7 and 8 were withdrawn and during the course of the hearing no further evidence was offered in respect of count 9 and an order for a separate trial was made in respect of counts 1, 2 and 3. The trial proceeded on counts 4, 5, 6 and 10, on each of the first three of which the first appellant was charged with the theft of a motor car and on the last of which the second appellant was likewise charged with the theft of a car. The magistrate convicted the first appellant on counts 4, 5 and 6 and the second appellant on count 10; their appeals to the Supreme Court were dismissed. Each has now appealed to this court, the jurisdiction of which upon a second appeal is limited, under s. 361 of the Criminal Procedure Code of Kenya to

matters of law. We will first set out in brief the facts established by the prosecution evidence in respect of each count; neither appellant called any evidence or made any statement.

With regard to count 4, a motor car numbered KBS 519 belonging to a Mrs. Brough was parked at 8.30 a.m. on September 23, 1961, in the Sadler Street car park, Nairobi. The car was missed at 12.30 p.m. on the same day but was found later and examined by a fingerprint expert at an unstated time on September 23, on Magadi Road, fifteen miles from Nairobi. He found the palm print of the first appellant on the rear bumper of the car in a position consistent with the bumper having been held from underneath. The wheels, battery, generator and self-starter of the car had been removed.

With regard to count 5, a motor car numbered KGR 696 was parked by its owner, Mr. Kemp, at 1.50 p.m. on December 15, 1961, at the intersection of Sergeant Ellis Avenue and Government Road, Nairobi. It was missed at 4.30 p.m. on the same day. It was next seen, so far as the evidence goes, by a fingerprint expert at an unstated time on December 16, 1961, on the Magadi Road, ten miles beyond Ngong. Fingerprints made by the first appellant were found on the outside of the off-side pilot window with the fingertips pointing forward. The headlights, wheels and tyres had been removed.

With regard to count 6, a motor car numbered DST 240 was parked by its owner, Miss Caseley, at 8.20 p.m. on December 18, 1961, in the Queensway car park, Nairobi. It was missed at 12.30 a.m. on December 19, and was next seen by Miss Caseley at 2.30 a.m. on the same morning in the Eastleigh area of Nairobi. Fingerprints of the first appellant were found on the outside of the off-side door near the roof of the car and pointing upwards. The boot and one of the pilot windows had been forced but nothing was missing.

With regard to count 10, a motor car numbered KFC 782 was parked by its owner, Mr. Turley, at 8 a.m. on December 21, 1961, in Sadler House car park, Nairobi. It was missed at 12.30 p.m. on the same day and next seen by its owner at 3.15 p.m. in the Eastleigh area, Nairobi. Fingerprints of the second appellant were found on the rear numberplate light, apparently near to the left side of the boot. The tyres, wheels, generator and self-starter of the car had been removed.

A question arises as to the joinder of these four counts in one charge sheet, which, as counsel for the appellants freely conceded, in fact occasioned no prejudice. We will advert again to that matter after considering the grounds urged on behalf of the appellants in attacking the convictions on the merits. The substance of counsel’s argument was that the only evidence connecting the appellants with the respective thefts was that of their finger and palm prints. The presence of those was consistent with an innocent explanation, e.g. a passerby, or a mechanic called in, or at most with the appellants being accessories after the fact. The magistrate and judges, it was submitted, had confused the probative effect of fingerprints found at the scene of a crime with that of the prints in the present case, which were not necessarily made at the time of the crimes in question. There was no evidence, counsel contended, upon which the magistrate could reasonably have convicted the appellants of theft.

As an adjunct to this argument, counsel contended that the magistrate had treated the case as one in which possession of stolen goods had been established and in which the appellant was called upon to give an explanation. He conceded that if possession had been established in the appellants it was so recent as to call for an explanation, but, for the reasons given above, possession had not been proved. The relevant passage in the magistrate’s judgment is:

> “In my view the Crown having proved that the car was stolen and stripped and that accused had some dealings with vehicle consistent with the tampering which took place – e.g. the back of the vehicle lifted –

> the pilot window forced and the driver's door touched then the Crown have satisfied the court and it is incumbent on the accused to give a reasonable explanation for the presence of his prints – it need not be true but it must be reasonable – none has been forthcoming from the accused.
>
> "In all the circumstances of the first three counts and in the absence of any explanation however slight by accused I can only come to the opinion that the inculpatory facts are incompatible with the innocence of the accused and incapable of the explanation upon any other reasonable hypothesis than that of his guilt.
>
> "Exactly similar considerations apply to the fourth count – and the second accused – his prints are on the part of the vehicle when the boot is opened – no other prints were found and items had been stripped from the vehicle. Accused did not give evidence nor did he call witnesses. The only inference which can be drawn is that accused had a part in the offence charged. There can be no question of the charges being those of receiving – having regard to the time factor.
>
> "Accordingly on the evidence before me – and having directed my mind to the decision in court's case – and having regard to the absence of any explanation by accused (*R. v. Aves*) I can only come to the conclusion that accused are guilty of the offences charged."

The judges in the Supreme Court said that the magistrate did not refer to the doctrine of recent possession in his judgment. We think that his reference to *R. v. Aves* (1), by which is undoubtedly intended the case reported in (1950), 34 Cr. App. R. 159, indicates that he regarded that class of case as analogous to the present, but other parts of the passage quoted tend to show that he approached the case as one dependent entirely upon circumstantial evidence. In this he was correct and we would point out that proof of recent possession as evidence of theft is merely one form of circumstantial evidence. The magistrate may appear to have over-emphasized by repetition the matter of lack of explanation, which, of course, cannot be used to fill a gap in the case for the Crown, but we do not think that he intended to say more than that he found a prima facie case made out against the appellants, strong enough to call for an answer, in the absence of which he must convict. This attitude, in our opinion, he was entitled to adopt, and in the absence of evidence to set against the prima facie case arising from the circumstantial evidence, he would be entitled to disregard any extravagant or remote possibility which had not been put forward by way of explanation and to confine his consideration of the various hypotheses to what is reasonable and normal. We think, in effect, that the aspect of the judgments in the courts below which we have been considering leaves untouched the substantial question on the appeal, which is whether the evidence provided any reasonable basis for the inference of guilt.

In approaching this problem we emphasize that it is not open to this court to interfere with the convictions unless we are satisfied that no reasonable court could have come, on the evidence and in the circumstances of the particular cases, to the conclusion that the magistrate and the judges of the Supreme Court in fact came to. We may not concern ourselves with questions of degree or of the strength of evidence unless we are so satisfied. It may be appropriate here to mention the case of *R. v. Court* (2), 44 Cr. App. R. 242 which was relied upon for the appellants here and in the courts below. In that case it was held that a fingerprint of the accused found on the back of the driving mirror, in a car stolen two months earlier, with the fingerprints of another person on the driving wheel and the inside of the door, did not suffice to support the conclusion that the accused was in possession or control of the car. Those are very different circumstances from the present. The fingerprint evidence as a whole was consistent with the accused having been a passenger in the vehicle (a claim

which he appears from the report to have made at some late stage of the proceedings) and the adjustment of a driving mirror by a passenger was said by the Court of Criminal Appeal not to predicate dual control. We think that the inferences which may justifiably be drawn from the evidence of fingerprints must inevitably depend upon the exact circumstances of the particular case and that, in the present one, the decision in *R. v. Court* (2), is of no assistance.

It will now be necessary to look at the evidence more closely, and we will deal first with counts 4 and 5 in each of which the first appellant is concerned. In each case a car was taken in daylight from a parking place in Nairobi; in each case it was found stripped of wheels and other essential and saleable parts some distance along the Magadi Road. The time which had elapsed between the thefts and the finding of what remained of the cars cannot, on the evidence, be calculated with great accuracy – it seems probable that in the case of count 4 it was from seven to ten hours and the case of count 5 all that can be said is that the car was taken on the afternoon of one day and examined by the fingerprint expert at some time on the next. The first appellant had come into contact with the car in each case, he had no authority to do so and was unknown to the car owners. What are the reasonable inferences? In the first place accidental contact can be ruled out completely. The position of the prints, under the rear bumper and on the pilot window (notoriously a point of entry by wrongdoers) does not support that inference, but in any case the evidence on all three counts (4,5 and 6) can be looked at for this purpose. In our opinion a possible inference of accident in favour of an accused person is equivalent to a possible defence of accident conjured up on his behalf. The authorities on the subject are numerous and we need do no more than quote the summary of the effect of the speech of Viscount Simon in *Harris v. Director of Public Prosecutions* (3), [1952] A.C. 694 contained in the headnote at p. 695:

> "The proper rule, laid down in *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, 65, is that evidence tending to show that the accused has been guilty of criminal offences other than that for which he is being tried is inadmissible unless that evidence is relevant to some issue which is before the jury, as, for example, if it bears on the question whether the acts alleged to constitute the crime were designed or accidental, or if it rebuts some defence which would otherwise be open to the accused. Such evidence may be advanced without waiting to ascertain what is the line of defence adopted."

The possibility of accidental contact by the same person (being a person unconnected with the owners) with three cars stolen on different occasions does not warrant serious, or indeed any, consideration.

It is plain then that the first appellant had deliberate contact with the cars mentioned in counts 4 and 5 either at the time of the thefts or within a matter of hours thereafter. It is clear also, that both cars were taken to the particular places on Magadi Road where they were found, to be stripped; they could not, in reason, have been moved thereafter. It is relevant that the part of Magadi Road in question is remote, unfrequented and at a material distance from Nairobi, facts of which all Nairobi courts would take judicial notice. If then the first appellant was not the actual thief, what role did he play? Mr. Kapila suggested in argument that he might be an innocent mechanic picked up after the theft to help in dismantling the cars. He would of course know instantly that he was dismantling a stolen car, but it was argued that that would not render him guilty of the theft. That would be so, but in our opinion the circumstances render such a possibility too remote. Obviously, another vehicle would be required to move the wheels and other parts from a lonely place and that would entail some degree of planning. Any such pre-arrangement whether the confederate waited at Magadi Road or followed the thief there,

would render the confederate liable to prosecution as a principal offender under s. 20 of the Penal Code of Kenya. It is a reasonable inference, and in our view the only reasonable inference, that the stripping of the car in the open by a thief would be a matter of urgency, and he would not leave to chance the provision of any assistance he required. So long as the magistrate was satisfied that the first appellant, who left his prints on the cars, was inevitably either the thief, or encouraged or aided the thief by pre-arrangement, it was not necessary for him to determine the exact part played by him. We therefore think that the magistrate was fully justified in convicting the first appellant on the evidence before him.

The facts proved in relation to count 6 differ from those in counts 4 and 5 in that a much briefer period elapsed before Miss Caseley's car was found, in that Eastleigh, the area in which it was discovered, is a part of Nairobi and not as remote as the places in Magadi Road at which the other cars were found, and in that though the pilot window and door of the boot had been forced, nothing had been taken. In these circumstances does the presence of the first appellant's fingerprints on the door of the car provide a prima facie case that he was the thief? In our opinion the magistrate cannot be said to be wrong in finding that it did. Without going outside the evidence given on count 6 itself we would consider that the possibility that the presence of the fingerprints of the first appellant was mere accident does not merit serious consideration. As we have indicated, however, on this one issue the evidence on counts 4 and 5 may also be looked at. There is no need to predicate that any second person participated in this case, as nothing was taken. The forcing of the boot may indicate preparation to strip the car, but if more than one person was involved the short period which elapsed before the car was discovered points even more strongly than in the cases of the earlier counts, to either joint participation or pre-arrangement, particularly as the theft took place at night.

The case against the second appellant on count 10 must of course be considered quite separately. The car was stolen during the morning and found by 3.15 p.m. on the same day, again in the Eastleigh area. We are in agreement with the courts below in holding, as they must have done, that the presence of the second appellant's fingerprints on the rear numberplate light could not reasonably have been accidental. A confederate would not have been essential if the thief had left a vehicle near the place where the car was found. There may however have been one, and in the daylight hours it might have been less difficult to find assistance quickly than in the middle of the night. Nevertheless, the daylight and the more populated nature of the Eastleigh area would render speed particularly urgent and we cannot say that an opinion that it was beyond reasonable doubt that any such assistance must have been pre-arranged was so unreasonable as to amount to an error in law.

We are satisfied that so far as the effect of the evidence is concerned there is no case for interference by this court. Before passing to the question of possible misjoinder we would refer to the submission of counsel for the appellants that the magistrate misdirected himself in "seeming to accept" that there were not other fingerprints on the cars in question. The magistrate said (in distinguishing *Court's case* (2)), that "there is no evidence at all that other persons were involved"; referring to the instant case and with reference to count 10 he said, "no other prints were found". We agree that these were in the nature of misdirections for no evidence was given that other prints either were or were not found. We have already expressed the view that *Court's case* (2), has no particular bearing on the problem posed by the present one. On the general issue we do not think the misdirection is material, for once the possibility of accidental contact is excluded the same reasoning would apply even if other prints had been found.

We turn now to the matter of joinder. It is claimed in the memorandum of appeal that the magistrate and judges in the courts below erred in failing to hold that the joinder of the appellants in one charge and their trial together were invalid irrespective of any question of prejudice. The history of the matter is briefly this. Count 1 was the only joint charge in the original charge sheet and it was linked with charges 2 and 3 in that the three offences were alleged to have been committed in the course of the same transaction. Count 1, against both appellants, related to the attempted theft of a motor car; count 2, against the first appellant, was for assault in resisting arrest by the owner of the car, and count 3, against the second appellant, was for aiding the escape of the first appellant from the custody of the owner. These three counts were triable together under s. 136(*d*) of the Criminal Procedure Code of Kenya. Counts 4, 5 and 6 charged the first appellant with three separate motor car thefts and in counts 7 to 10 the second appellant was likewise charged with four separate thefts of cars. Pleas of not guilty were recorded on all charges. Before the trial commenced the prosecution withdrew the charges against the second appellant on counts 7 and 8 and he was acquitted and discharged on those counts. After two prosecution witnesses had been heard no further evidence was offered against the second appellant on count 9 and he was acquitted and discharged in respect thereof. Both appellants were represented by the same counsel and, after five prosecution witnesses had been heard, he submitted that the joinder of the first three counts with the others resulted in prejudice and embarrassment and asked the magistrate to order a separate trial of those three counts under s. 135 (3) of the Criminal Procedure Code. The magistrate did so order, and proceeded with the trial on the four remaining counts, Nos. 4, 5, 6 and 10. There was no suggestion at the time that count 10 should also he severed and it was in fact the submission of counsel for the appellants that a proper division of the counts was “the first three” and “the remaining four”. It would appear that nobody noticed, or considered of any importance, the fact that there was no longer any basis (if there ever had been one) for the joint trial of count 10 with counts 4, 5 and 6.

The point of misjoinder was taken on the appeal to the Supreme Court but no specific finding was made in relation to it in the judgment. It seems probable that as counsel made it clear that he could claim no prejudice, the judges considered that, if there was a defect, it was cured by the application of s. 382 of the Criminal Procedure Code (hereinafter called “the Kenya Code”) to which we will be referring later in this judgment.

It will be convenient at this stage to set out ss. 134, 135 and 136(*a*) to (*d*) of the Kenya Code, which read as follows:

> “134. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.
>
> “135 (1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.
>
> “(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.
>
> “(3) Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information,

or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of such charge or information.

"136. The following persons may be joined in one charge or information and may be tried together, namely –

(*a*) persons accused of the same offence committed in the course of the same transaction;

(*b*) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;

(*c*) persons accused of more offences than one of the same kind (that is to say, offences punishable with the same amount of punishment under the same section of the Penal Code or of any other Ordinance or law) committed by them jointly within a period of twelve months;

(*d*) persons accused of different offences committed in the course of the same transaction;".

Before this court, counsel for the appellants submitted that the foregoing provisions provided no basis for the trial together of the four counts in question and that the result had been that two trials, which ought to have been separate, had been held together. This could not be cured, he contended, by s. 382 even though no prejudice to the appellants had been caused. Counsel for the Crown submitted that the position at the beginning of the trial should be looked at – the first three counts were properly joined and the remaining counts covered a series of offences of a similar character to that in count 1. He relied also upon s. 382.

If the four counts in question are to be looked at alone there is no doubt that there was a misjoinder. There is no authority in any of the sections abovequoted for joining charges against different individuals merely because the offences are of the same character. Crown counsel relied upon s. 135 (1) but that relates to charges against the same person. The sub-section is in terms similar to those of r. 3 in the First Schedule to the Indictments Act, 1915, in England, in relation to which the Court of Criminal Appeal said in *R. v. Tizard* (4), [1962] 1 All E.R. 209 at p. 211 –

> ". . . but, in our judgment, this rule is concerned with the joinder of charges against one accused and not with the joinder of counts against two or more accused charged with separate offences. The principles which govern the joinder of counts against two or more accused have been evolved as rules of practice and, in respect of the offence of receiving, are subject to important statutory modifications."

In Kenya the practice as to joinder of accused persons has been embodied in s. 136 of the Kenya Code, and, as we have observed, nothing in that section would authorise such a joinder as the present.

It may be arguable that, technically, the charge in its original form was good, and if it had remained the basis of the trial throughout, that the only objection which could be taken on appeal would be whether the magistrate had in the circumstances exercised his discretion correctly in not ordering separate trials. The argument would be that the first three counts were properly joined under s. 136(*d*) of the Kenya Code, and that once there was one joint count, it was permissible to add, under s. 135 (1), in respect of each accused, charges of other offences of a similar character. In India s. 239 of the Indian Code of Criminal Procedure (hereinafter called "the Indian Code") deals with the question of joinder of persons in one count, and s. 234 authorises the charging of one person with not more than three offences of the same kind committed

within a year. In the Code of Criminal Procedure by Mitra (12th Edn.), p. 1019 it is stated –

> "There is nothing in the section [i.e. 239] specifically stating that as regards one or more of the persons accused, there should be no application to that person or persons of the previous section such as s. 234. Therefore, where a charge under s. 411, I.P.C., was framed against several accused and two other distinct charges under s. 411, I.P.C., was framed against only one of them, *held* that s. 239 did not exclude the procedure adopted by the magistrate and that there was no illegality in the trial – *Niranjan*, 35 Cr. L.J. 1224."

The authority quoted is not available in Nairobi. There is also authority in India for saying that the correctness of a joinder which depends on whether offences were committed in the course of the same transaction is to be determined by looking at the accusation (in other words, the charges as framed), and not at the result of the trial: *Choukhani v. R.* (5) (1938), 158 L.T. 437, a decision of the Privy Council and *Rash Behari v. R.* (6) (1936), A.I.R. Cal. 753. The bulk of the authorities however, of which the two cases just quoted are examples, appear to deal with the question of the consideration of the charges to ascertain whether they were committed in the course of the same transaction (s. 136(*d*) of the Kenya Code and s. 239(*d*) of the Indian) and can only by analogy be applied to the question whether charges of offences of a similar character can stand when the real basis of the joinder of the different accused, has disappeared. If, in the present case, the application for separate trials of counts 1, 2 and 3 had been made before any evidence was called, could the other counts have been proceeded with without further severance? We think not – the remaining counts would then have to be looked at as if they were the only original charges. But where, as here, the court could be said to have embarked upon a trial based on charges lawfully joined, and severance was made during the course of the trial, it might be that the principle underlying *Choukhani v. R.* (5), would be applicable, unless the fact that the appellants had ceased to be jointly "accused" (the word used in s. 136(*d*)) on the charge, distinguishes the case from that of *Choukhani* (5), in which the accusation continued right up to acquittal. We prefer to leave this question open and to proceed on the basis, but without deciding, that there was in fact an improper joinder of the two appellants in the one trial.

It has been conceded throughout that no prejudice was caused by the joint trial. The question therefore arises whether what occurred constitutes an error, omission or irregularity within the meaning of s. 382 of the Kenya Code – if so the appeals must be dismissed as no failure of justice was occasioned. Section 382 is as follows –

> "382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account –
>
> (*a*) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code; or
>
> (*b*) of the omission to revise any list of jurors or assessors in accordance with section 268 of this Code; or
>
> (*c*) of any misdirection in any charge to a jury,
>
> unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:

> "Provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

In relation to the Indian Code, a relevant decision (the extent of which has been the subject of much controversy over the years) is that of the Privy Council in *Subramania Iyer v. R.* (7) (1901), 28 I.A. 257, in which it was held that a trial in which there had been misjoinder of counts against one accused was illegal and the conviction must be set aside; the defect was not an irregularity which could be cured by s. 537 of the Indian Code for it amounted to disobedience of an express (statutory) provision as to a mode of trial. This and later authorities bearing on the same topic were considered by this court in some detail in *Abdulla Mohamed Mubarak v. R.* (8), E.A.C.A. Criminal Appeal No. 172 of 1959 (unreported), an appeal from the High Court of what was then British Somaliland in which an Ordinance similar to the Indian Code was in force. Cases then considered were *Babulal v. R.* (9) (1938), A.I.R. P.C. 130, *Abdul Rahman v. R.* (10) (1926), 54 I.A. 96, *Polukuri Kotayya v. R.* (11) (1947), 74 I.A. 65. The conclusion of this court is stated in the following passage from the judgment:

> "The true position is made very clear by their lordships of the Privy Council in *Polukuri Kotayya v. King Emperor* (1947), I.A.65.
>
> > 'When a trial is conducted in a manner different from that prescribed by the Code (as in *N.A. Subramania Iyer's* case) the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under s. 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India, between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships Board in *Abdul Rahman v. The King-Emperor* where failure to comply with s. 360 of the Code of Criminal Procedure was held to be cured by s. 537'.
>
> Accordingly, the distinction between an illegality which vitiates the trial and a curable irregularity is one of degree and not of kind. It is not, with respect, correct to say, as seems to have been said in *Kapoor Chand v. Suraj Prasad*, supra, that the sole criterion is whether the accused person has been prejudiced or not.
>
> "In the present case, we have not only multiplicity in one charge but also misjoinder of charges. The weight of the Indian authorities cited in *Mitra* at p. 959 is to the effect that the joint trial of distinct offences not committed during the course of one transaction is an illegality not curable under s. 537. See also *Raman Behari Das v. King Emperor*, supra. Previous decisions of this court on misjoinder or duplicity of charges, e.g. *R. v. Ngidipe*, supra, based on provisions of the Criminal Procedure Code of Tanganyika or Kenya which differ substantially from the provisions of the Criminal Procedure Ordinance of British Somaliland now under consideration, are not of assistance.
>
> "In our opinion, the present case is governed by *Subramania Iyer's* case, supra, by which we are bound. The trial of the appellant was incurably illegal."

The misjoinder in *Mubarak's* case (8), was of various charges against one accused, as it was in the case of *Subramania Iyer* (7). In the present case the misjoinder is that of two accused persons in the same trial but we see no difference in principle as the basis of the illegality is the same – disobedience of s. 233 of the Indian Code which reads:

> "233. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in s. 234, s. 235, s. 236 and s. 239."

If the present problem falls to be determined in the light of the authorities referred to above we should be bound to follow what was decided in *Mubarak's* case (8), and the convictions of the appellants could not be permitted to stand. It will be observed, however, that the court indicated, in the passage quoted above, that there were substantial differences between the Kenya Code and the British Somaliland Ordinance, and it follows that there are the same differences between the Kenya and Indian Codes. The effect of these differences is the next question requiring examination.

In the case of *R. v. Ngidipe* (12) (1939), 6 E.A.C.A. 118, the Indian decisions were looked to for guidance. That was a case of multiplicity in which the murders of three persons were charged in one count and this court held that there was illegality, but that it was cured, in the absence of any prejudice to the accused, by s. 335 of the Tanganyika Criminal Procedure Code. It may be that the court, basing itself on the Indian authorities quoted in the judgment, considered that the sole criterion was the presence or absence of prejudice, a conclusion with which the court in *Mubarak's* case (8), did not agree. *R. v. Ngidipe* (12), in fact resembled the case of *Babulal v. R.* (9), in that in the latter a multiplicity of thefts was charged in one charge and the Privy Council held that to be a curable defect.

The differences between the Kenya and Indian Codes on the subject of joinder of charges are substantial and the bulk of the provisions concerning informations and charges is drawn in the former, not from the Indian Code, but from the English Indictments Act, 1915, and the rules thereunder. Section 134 of the Kenya Code (above set out) is equivalent to s. 3(1) of the Act. Section 135 (1) of the Code is to the same effect as r. 3 in the First Schedule to the Act; s. 135(2) is the same as r. 4(1); the provisions of s. 137 are drawn from r. 4 (2) to r. 4 (6) inclusive; s. 275 (2) to (7) of the Code, relating to amendment, separate trials and postponement of trials is the equivalent of s. 5 (1) to (6) of the Act. Where the Act and the Code differ is in the fact that the Act does not deal with the question of joinder of accused persons in one information whereas that subject is dealt with in the Code in s. 136. As indicated in the passage from the judgment in *R.v. Tizard* (4), above quoted, in England, that aspect of the question of joinder has been evolved as rules of practice with certain statutory modifications. We consider it to be a justifiable assumption that it was in an endeavour to codify those rules of practice that s. 136(*a*) to (*d*) was produced; in so doing the draftsman followed the terms of s. 239(*a*) to (*d*) of the Indian Code which section obviously (with minor modifications) is itself based on English practice.

In *Jeremiah v. R.* (13) (1951), 18 E.A.C.A. 218, this court considered a related, though not identical problem. At p. 222 of the report is the following passage –

> "Mr. Todd, for the Crown, has frankly conceded that, apart from the name 'information' in substitution for 'indictment', the present provisions of the Kenya Code governing the form and contents of information are directly derived, with only minor and immaterial variations, from the English Act and Rules of 1915. These provisions are to be found under the heading 'Charges and informations' in s. 134 et sequentes of the Code as at present enacted, and it is only necessary to compile a comparative

> table to establish their direct derivation from the English legislation beyond all possible doubt."

And at p. 223 –

> "This close similarity to the English legislation is now maintained throughout the other relevant sections of the East African Codes. The forms of information in the Second Schedule to the Kenya Code which, or forms conforming thereto as nearly as may be, are by s. 137(*a*) (iv), to be used in cases to which they are applicable, in all instances closely resemble, and in the great majority of instances are merely copies of, the forms of indictment in the Appendix to the Indictment Rules, 1915, which, or forms conforming to as nearly as may be, are similarly to be used in cases to which they are applicable by virtue of r. 4 (5). We are of the opinion the local legislation governing informations is, for all practical purposes, indistinguishable from the English legislation governing indictments and that therefore, in accordance with *Trimble v. Hill* (supra), the English decisions on such legislation ought to be followed by this court."

With the reservation that s. 136(*a*) to (*d*) of the Kenya Code is not drawn directly from English legislation we would respectfully agree.

We have pointed out the similarity between s. 136(*a*) to (*d*) and s. 382 of the Kenya Code and s. 239(*a*) to (*d*) and s. 537 respectively of the Indian Code. We come now to the differences (on this topic) between the two Codes, for in construing s. 537 of the Indian Code in the *Subramania Iyer* case (7), the Privy Council placed emphasis upon the effect of other sections of the Code rather than upon any nice question of wording arising out of s. 537.

The manner in which the Indian Code was framed resulted in the creation of an express statutory prohibition of the inclusion of more than one person in a single trial unless the case falls within certain specific exceptions to that general rule. We have already set our s. 233 of the Indian Code, which enacts the prohibition; the sections referred to therein s. 234 to s. 236 and s. 239, create the exceptions which, so far as s. 234 to s. 236 are concerned resemble only in part what is provided by the Indictments Act, 1915, and the rules thereunder. Section 239, as we have observed, appears to be largely based on English practice. The vital difference between the Indian and Kenya Codes is that the latter contains no section equivalent to s. 233 of the former. The result is that whereas in India any departure from the exceptions created by s. 234 to s. 236 and s. 239 of the Indian Code results in a direct conflict with the prohibition in s. 233, in Kenya the Code is silent on that subject. Having regard to what we have said above concerning the source in English law of the relevant provisions of the Kenya Code we are of opinion that it is the English law and practice to which it is right to turn to ascertain the effect of an irregular charge or information and that the Indian law and the decisions made thereunder are not in point. Some support for this opinion can be derived from s. 3 (3) of the Kenya Code though it may not be precisely in point. The sub-section reads –

> "(3) Notwithstanding anything in this Code contained, the Supreme Court may, subject to the provisions of any law for the time being in force in the Colony, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this Code is inapplicable, exercise such jurisdiction according to the course of procedure and practice observed by and before His Majesty's High Court of Justice in England at the date of the coming into operation of this Code."

In England the power of the Court of Criminal Appeal to disregard errors, omissions or irregularities which have not occasioned injustice is contained in

the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. The proviso reads –

> "Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

The power, we consider, sufficiently resembles that conferred upon this court and the Supreme Court by s. 382 of the Kenya Code. There is also, so far as this court is concerned, the proviso to r. 41 (1) of the Eastern African Court of Appeal Rules, 1954, which is in terms almost identical with those of the proviso to s. 4 (1) of the Criminal Appeal Act, 1907.

The question is whether the misjoinder of the charges in the present case would be regarded, it being admitted that no miscarriage of justice had been occasioned thereby, as falling within the scope and object of the proviso last mentioned, or whether the whole trial would under English law be regarded as so illegal as to be void ab initio. We find nothing in the authorities which indicates that a misjoinder of accused persons in one indictment goes to the jurisdiction of the court as would be the case if more than one indictment were tried together: *R. v. Crane* (14), [1920] 3 K.B. 236. On the contrary, in *R. v. Kingston* (15), 103 E.R. 259, it was held that no objection on demurrer was sustained on the ground that several different defendants were charged in different counts of an indictment for offences of the same nature, though it might be a ground for application to the discretion of the court to quash the indictment. There was at common law no objection in law to the joinder of a number of counts of felony against the same person – see the speech of Lord Blackburn in *Castro v. R.* (16), [1881] 6 A.C. 229 at pp. 243 – 4. *R. v. Hayes* (17), 174 E.R. 247 was a case in which two receivers were charged in the same indictment with separate acts of receiving, a joinder which would under the present statute law be permissible: *R. v. Tizard* (4). In *R. v. Hayes* (17), it was held that it was too late after verdict to take the point that they should have been indicted separately. Obviously the misjoinder was not regarded as rendering the trial void ab initio.

There are some instances of the application of the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, in cases of irregular joinder of counts against one defendant. *R. v. Muir* (18), [1938] 2 All E.R. 516, is one such case in which charges of rape and indecent assault upon different persons at different times were joined. The court found that no miscarriage of justice had occurred and did not interfere with the conviction. *R. v. Thompson* (19), 9 Cr. App. R. 252, was a case of duplicity which was heard by a court of five judges. It was said that objection to a defect on the face of the indictment should be taken before the plea is taken, but the case was not decided on that ground. The court held that the indictment was irregular because of the duplicity but as no miscarriage of justice had been occasioned the proviso to s. 4 (1) was to be applied. In passing we would mention that s. 275 (1) of the Kenya Code provides that objection to any information for any formal defect on the face thereof shall be taken immediately after the information has been read over to the accused person and not later. We are dealing here with a charge before a magistrate and do not rely on this point, which we do not think in any event would save a charge which was void ab initio. More recent examples of duplicity than *R. v. Thompson* (19), are *R. v. Disney* (20), 24 Cr. App. R. 49 and *R. v. Wilmot* (21), 24 Cr. App. R. 63. In both of these cases the convictions were quashed, but it is apparent from the reports that the court considered in each case that there had been a miscarriage of justice in that the accused person, having been charged with different offences in one count in the alternative, could not know with precision what he has been charged with and therefore could not effectually plead autrefois convict.

It is to be gathered, we think, from these authorities that in England, misjoinder, be it of charges or accused persons, is not a defect which renders a trial inevitably void though it may lead to the quashing of an indictment if there was prejudice or even risk of prejudice. If no miscarriage of justice has occurred the defect is curable by virtue of the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. Substituting for that enactment s. 382 of the Kenya Code and r. 41 (1) of the rules of this court we think that is the law applicable in Kenya also. It has in fact been so applied by this court in *R. v. Gulamhussein Dharamsi Jetha* (22) (1946), 13 E.A.C.A. 107, and *R. v. Joseph s/o Odoro* (23) (1954), 21 E.A.C.A. 311, both appeals from the High Court of Tanganyika. Both were cases of misjoinder of charges and the court applied the similar curative section of the Tanganyika Criminal Procedure Code without any discussion of the Indian authorities. We see no reason in principle for distinguishing between misjoinder of charges and of accused persons in this respect.

In the present case it is conceded that, if there was misjoinder, it occasioned no miscarriage of justice. For the reasons we have given we consider that s. 382 of the Kenya Code is consequently applicable and we dismiss the appeals.

Appeal dismissed.

For the appellants:
S. R. Kapila and Kapila, Nairobi
A. R. Kapila

For the respondent:
The Attorney-General, Kenya
G. A. Twelftree (Crown Counsel, Kenya)

Hercules Insurance Co Limited v Trivedi & Co Limited
[1962] 1 EA 358 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	7 June 1962
Case Number:	12/1962
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Law, J.

[1] Insurance – Arbitration – Insurance policy containing arbitration clause – Application for arbitration – Denial that policy in force – Whether arbitration can be ordered – Rectification of policy – Indian Code of Civil Procedure, 1908, *Second Schedule, para.* 17 *– Arbitration Act,* 1889, *s.* 4 *– Arbitration Act,* 1950, *s.* 4 (1) *– Indian Contract Act,* 1872, *s.* 28.

[2] Arbitration – Insurance – Insurance policy containing arbitration clause – Application for arbitration – Denial that policy in force – Whether arbitration can be ordered – Rectification of policy – Indian Code of Civil Procedure, 1908, *Schedule II*, *para.* 17 – *Arbitration Act*, 1889, *s.* 4 – *Arbitration Act*, 1950, *s.* 4 (1) – *Indian Contract Act*, 1872, *s.* 28.

Editor's Summary

The respondent company having submitted to the appellant company a proposal form for insurance against burglary to cover part of its stock-in-trade received a letter from the appellant company on January 14, 1959, refusing to insure part of the stock only but offering a policy covering the entire stock. The respondent company accepted this offer by letter dated February 13, 1959, whereupon the appellant company issued a burglary policy dated February 17 at 4 p.m. standard time. However on February 16 the respondent company's premises having been burgled and goods to the value of over Shs. 5,000/- stolen, the respondent company by letter dated February 17 notified the appellant company which replied declining to recognise the claim on the ground that they

were not “on risk” at the time. Pursuant to a clause in the policy providing for arbitration the respondent company then applied in the district court for a written arbitration agreement between the parties to be filed in court. This application was dismissed on the ground that the respondent company had not satisfied the court that a contract of insurance was in force at the material time. On appeal the High Court reversed the magistrate’s decision and ordered that the agreement be filed with consequential orders as to the appointment of an arbitrator and the issue he should decide. The appellant company then appealed and submitted that since no contract of insurance was in force at the material time, the arbitration clause could not apply. For the respondent company it was argued that their letter of February 13 put the appellant company on risk either as from the date of the original proposal or from the date of posting the letter of February 13.

Held – the claim made by the respondent company was not a claim under the contractual document, namely, the policy, but was a claim under the preliminary contract between the parties for insurance; the real dispute between the parties was, therefore, one of rectification depending upon the existence of the alleged preliminary contract and the arbitration clause in the policy did not extend to a dispute as to rectification of the term of the policy.

Toller v. Law Accident Insurance Society Ltd., [1936] 2 All E.R. 952 followed.

Appeal allowed. Judgment and decree of the High Court set aside and decree of the district court restored.

Cases referred to in judgment:

(1) *Heyman v. Darwins Ltd.*, [1942] A.C. 356; [1942] 1 All E.R. 337.

(2) *Re Phoenix Trading Co. Ltd.’s Application*, [1958] 1 All E.R. 815.

(3) *British Equitable Assurance Co. Ltd. v. Baily*, [1906] A.C. 35.

(4) *Griffiths v. Fleming*, [1909] 1 K.B. 805.

(5) *Sun Life Assurance Co. of Canada v. Jervis*, [1943] 2 All E.R. 425.

(6) *Wood v. Dwarris* (1856), 11 Exch. 493; 156 E.R. 925.

(7) *Toller v. Law Accident Insurance Society Ltd.*, [1936] 2 All E.R. 952.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: This is a second appeal, and is against a judgment and decree of the High Court of Tanganyika which set aside a decision of the district court at Tabora. The appellant company, to which I will refer as “the insurance company”, was the original defendant, and was the respondent on the first appeal. It is an insurance company carrying on business in East Africa. The respondent company, to which I will refer as “the assured”, is a limited liability company carrying on business in Tabora. On November 3, 1960, the assured filed an application in the district court at Tabora under r. 17 of the Second Schedule of the Indian Code of Civil Procedure (which applies in Tanganyika and which I will refer to as “the Second Schedule”) for a written arbitration agreement between it and the insurance

company to be filed in court. On June 21, 1961, this application was dismissed with costs. On appeal to the High Court it was decreed that:

> "1. the appeal be and is hereby allowed.
>
> 2. the respondent do pay to the appellant Shs. 1,048/50 being the taxed costs of this appeal.
>
> 3. the order awarding costs to the respondent in the court below be set aside and each party do bear his own costs in the court below.

4. Original record of Tabora Civil Case No. 210 of 1960 be returned to the district court at Tabora with the following directions:

 (1) To file the agreement to refer to arbitration.

 (2) To appoint an arbitrator if the parties do not appoint one in accordance with the agreement.

 (3) To make an order of reference to the arbitrator to decide whether the respondent insurance company was 'on risk' in respect of the losses suffered by the appellant by reason of burglary of February 16, 1959, and if so, to determine the amount of such loss."

The insurance company now appeals against this decision.

I take the following statement of facts from the judgment of the learned judge of the High Court, the insurance company being referred to as the respondent, and the assured as the appellant:

> "The appellant, being desirous of taking out a policy of burglary insurance covering part of its stock-in-trade, completed on January 3, 1959, a proposal form issued by the respondent requesting cover for part only of the said stock (exhibit 3). The respondent by its letter dated January 14 (annexure 'A' to the application) replied that it would not issue a policy covering part only of the stock, but it offered to issue a policy covering the whole stock at what was described as 'the very low rate of 7 sh. 50 cts.' per centum. By a letter dated February 13 (annexure 'B' to the application) the appellant wrote to the respondent as follows:
>
> > 'With reference to your letter of January 14. . . we accept the offer sent by your head office and hereby request you to cover the whole stock against burglary. Thanking you for offering such a low rate, we remain, etc.'

On receipt of this letter in Nairobi the respondent issued a policy covering the appellant's stock to the value of Shs. 250,000/- in consideration of the payment of a sum of 937 Shs. 50 cts. acknowledged to have been paid by the appellant. The policy is dated February 17 at 4 p.m. standard time.

> "On February 16 the appellant's shop was burgled and goods to the value of between Shs. 5,000/- and Shs. 6,000/- stolen.
>
> "As appears from the agreed bundle of correspondence produced in the court below, the appellant notified the respondent of the burglary by letter dated February 19, and asked for information as to how to present a claim. The respondent replied by letter dated February 25 saying, inter alia –
>
> > 'Your letter of the 13th instant was received by us on the afternoon of the 17th instant and immediately our cover note was issued, commencing the insurance as from 17.2.59 to 17.2.60.
> >
> > 'There was no indication in your letter as to the commencing date of insurance and in absence of any specific advices from you the insurance was covered by us from the date of the receipt of your said letter. You will thus appreciate that the company was not on risk prior to the receipt of your letter, i.e. until 17th afternoon.
> >
> > 'In view of the above we regret to inform you that your claim is not admissible and the company cannot accept any liability whatsoever.'
>
> "From this moment a dispute arose between the parties as to whether or not the respondent was 'on risk' at the time of the burglary on February 16. The appellant's contention is that his letter of February 13 had the effect

of putting the defendant 'on risk' as from the date of the original proposal (January 3), alternatively that a binding contract of insurance came into existence at the moment of posting the letter dated February 13, accepting the terms offered in the respondent's letter of January 14. (Section 4 of the Indian Contract Act.) The respondent's contention is, and always has been, that no contract of insurance came into existence until 4 p.m. on February 17, when the policy was issued.

"By cl. 15 of the policy –

> 'All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators, one to be appointed in writing by both of the parties, or in the case of disagreement between the arbitrators to an umpire (such umpire to be appointed in writing by the arbitrators before entering on the reference) and unless and until an award has been made the company shall not be liable for any loss or damage and such award shall be a condition precedent to any liability of the company or any right of action against the company.'

"Correspondence followed between the parties and on January 11, 1960, the appellant invoked the arbitration clause in the policy and suggested the name of an arbitrator. The respondent by letter dated February 16 refused to submit the dispute to arbitration, maintaining that the policy was not issued until February 17, 1959, and that it did not apply to any loss which occurred before that date."

When the matter came before the learned resident magistrate the following issues were agreed:

"1. Whether there was a contract of insurance in existence as a result of the letters 'A' and 'B' annexed to the plaint.

"2. If the answer is in the affirmative, is the present application barred by conditions 2 and 16 in the policy."

Conditions 2 and 16 of the policy referred to in the second of the agreed issues prescribes special periods of limitation for claims under the policy. Condition 2, as was conceded before us, has no application on the facts of the instant case. Condition 16 reads:

"16. In no case whatsoever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

The learned resident magistrate, in view of his decision on the first issue, did not deal with the second issue. On the first issue the learned resident magistrate said:

> "I am quite unable to say therefore whether there is a contract in existence or not. From this it follows that I am not prepared to order under para. 15 of the policy that the matter be referred to arbitration as the plaintiff company have not discharged the onus on them of satisfying me prima facie that the contract was in fact in existence at the material time. The burden of showing cause why it should not be filed which would clearly have been on the defendant company does not therefore arise. The application of the plaintiff company is dismissed with costs."

On the appeal to the High Court, the learned judge considered the authorities

to which he had been referred, in particular *Heyman v. Darwins Ltd*. (1), [1942] A.C. 356, and said:

> "After careful consideration of the authorities quoted and arguments addressed to me, I have come to the conclusion that this appeal must be allowed. There can be no dispute that the proposal of January 3, 1959, the letters of January 14 and February 13 and the policy issued on February 17 resulted in a binding contract of insurance being made between the parties, and that that contract included an arbitration agreement, and that a difference arose between the parties as to whether the respondent insurance company was 'on risk' on the day of the burglary. This being so, the court below was bound by the mandatory provision of sub-para. (4) of para. 17 of the Second Schedule to order the agreement to be filed and to make an order of reference, unless the respondent could show 'sufficient cause' why the agreement should not be filed. The respondent did not in fact show sufficient cause, which expression I consider to be synonymous with the expression 'sufficient reason' which appears in s. 4 of the Arbitration Acts, 1889, and 1950, of the United Kingdom. Lord Macmillan gave examples of what would constitute sufficient reason in his speech in *Heyman's* case (supra), and instanced a dispute as to whether there had ever been a contract, or any ground relied upon to set aside a contract, such as fraud, duress or essential error. In Chitaley and Rao's Commentary on the Code of Civil Procedure (2nd Edn.), Vol. III, the following appears on p. 3039 under item 9 of the notes on para. 17 of the Second Schedule –
>
> > 'All grounds on which a contract will be voidable such as fraud, misrepresentation, etc. which will enable a party to avoid a contract or which render a contract unenforceable against a party will constitute "sufficient cause" against filing the agreement under this paragraph. Thus where the agreement to refer is shown to be vitiated by fraud or mistake or by misrepresentation or is not consented to by all the parties, the court will decline to file the agreement.'
>
> "The respondent does not pretend that there was no agreement to refer to arbitration, or that it was voidable or unenforceable or vitiated by fraud or misrepresentation. The respondent's case is that the agreement did not come into existence until February 17, and that the respondent is not accordingly liable to indemnify the appellant for the losses suffered in the burglary which occurred on February 16. These are matters which are in difference between the parties, and which the parties contractually agreed should be decided by arbitration. I have already quoted what Lord Macmillan said in *Heyman's* case (supra) –
>
> > 'If a question arises whether the contract has for any such reason come to an end I can see no reason why the arbitrator should not decide that question.'
>
> "By the same token, I do not see why the arbitrator should not decide the question whether the contract had come into existence on a particular day. Certainly I have been unable to find any authority for the proposition that where an insurance company admits the contract, and the agreement to refer to arbitration, but does not admit that the contract was in force on a particular date, that this can amount to sufficient cause for rejecting an application to file the agreement to refer to arbitration.
>
> "I believe that the learned resident magistrate was to some extent misled by the issues which were agreed before him by the advocates for both sides. He was invited in the second issue to deal with matters which did not fall to be considered by him, but which the parties had agreed to refer to

arbitration. The first issue was too narrowly worded, as the existence of a contract of insurance did not depend solely on the letters, annexures 'A' and 'B' to the application, but also on the proposal (to which the letters referred) and the policy which resulted from the proposal as affected by those letters. The true issues were, in my opinion –

1. Is there in existence between the parties an agreement to refer to arbitration?
2. Have differences arisen out of the agreement?
3. Has sufficient cause been shown why the agreement should not be filed?

"The answers to these issues are 'yes', 'yes', and 'no' respectively, with the consequence (which I have already indicated) that this appeal succeeds and is allowed, with costs."

I may say here that I respectfully agree with the learned judge when he says that he considers the expression "sufficient cause" in para. 17 of the Second Schedule to be synonymous with the expression "sufficient reason" in s. 4 of the Arbitration Act, 1889. The relevant English authorities relate to applications for a stay under s. 4 of the Arbitration Act, 1889 (now s. 4 (1) of the Arbitration Act, 1950). That section reads:

"4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Paragraph 17 of the Second Schedule (omitting sub-para. (2) which relates to procedural matters which are not relevant) reads:

"17.(1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court.

.

"(3) On such application being made, the court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

"(4) Where no sufficient cause is shown, the court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the court may appoint an arbitrator."

It may be noted that under s. 4 the court "may" make an order if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, while under para. 17 (4) the court "shall" order the

agreement to be filed where no sufficient cause is shown. This seems to indicate that the court under s. 4 possesses a discretion which does not exist under para. 17. But I think that in fact there is little practical difference between the powers of the court under the respective provisions. In *Heyman's* case (1), Lord Wright (at p. 388 of the report) described the position under s. 4 as follows:

> "Section 4 of the Arbitration Act, 1889, makes the power of the court to stay an action under the arbitration clause a matter of discretion and not ex debito justitiae. Though the dispute is clearly within the arbitration clause, the court 'may' still refuse to stay if, on the whole, that appears to be the better course. But the court must be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the court is on the person opposing the stay, because in a sense he is seeking to get out of his contract to refer, though in truth an arbitration clause is not of strict obligation. because it is, under s. 4, always subject to the discretion of the court."

I stress the words "But the court must be satisfied on good grounds that it ought not to stay". Similarly, if good grounds are shown why an order of reference should not be made under para. 17 of the Second Schedule, the court has jurisdiction to refuse to make the order. In either case the onus is on the party resisting the reference to arbitration to satisfy the court. So far as the instant case is concerned, I think the effect of the respective provisions is sufficiently similar for the English authorities to provide a useful guide. It is to be noted further that there is a distinction between the question whether an arbitration clause applies at all, and the question whether the court should exercise its discretion under s. 4 of the Arbitration Act, 1889. In *Heyman's* case (1) (at p. 368 of the report) Viscount Simon, L.C., said:

> "Secondly, what I have endeavoured to formulate in this summary is concerned solely with the question whether or not an arbitration clause applies. It has nothing to do with the further and quite distinct question whether, where an action is started in the English courts about a dispute which is within the scope of an arbitration clause, the action should be stayed at its inception under s. 4 of the Arbitration Act, 1889. The principles which should govern the exercise of judicial discretion on this matter have often been laid down and are well understood."

In the instant case one of the grounds of appeal urged on the court was that the arbitration clause did not apply. On this aspect there does not appear to be any difference between the law in England and the law in Tanganyika, and the English authorities are therefore applicable.

Four paragraphs are set out in the memorandum of appeal, but, as Mr. Dodd, who appeared for the insurance company stated, these cover two main grounds of appeal, which are:

(*a*) that whether or not a contract existed at the material time (which was contested by the insurance company), unless such contract was enforceable under the Code of Civil Procedure or in law, then an application to file an agreement for reference to arbitration must fail; and

(*b*) that there was no contract or agreement between the parties to arbitrate anything on February 16, 1959.

The argument advanced under (*a*) was that the application showed on its face that it was out of time under the limitation provisions contained in condition 16 of the policy of insurance, and that in such circumstances it was clearly a waste of time for the arbitration to proceed, and the court ought not to allow

it to do so. It will be noted that this ground of appeal is substantially the same as the second issue which was framed before the learned magistrate. The learned magistrate did not deal with this issue, and the learned judge dismissed it with the words "He", i.e. the learned resident magistrate

> "was invited in the second issue to deal with matters which did not fall to be considered by him, but which the parties had agreed to refer to arbitration".

Considerable argument was addressed to us as to whether the assured's claim was in fact barred by limitation. The answer to this question depends on the answers to two questions, namely (*a*) whether condition 16 of the policy is valid in view of the provisions of s. 28 of the Indian Contract Act; and (*b*) if so, whether the letter written by the assured on January 11, 1960, invoking the arbitration clause and suggesting the name of an arbitrator was such a step as made the claim "the subject of pending . . . arbitration". It was urged that these were purely legal questions which the court ought to answer instead of referring the matter to arbitration.

It is clearly established that in the case of an application for a stay under s. 4 of the Arbitration Act, 1889, or s. 4 (1) of the Arbitration Act, 1950, the mere fact that the point for decision is a pure question of law is not necessarily a sufficient reason for refusing a stay (*Heyman v. Darwins Ltd.* (1)); *Re Phoenix Trading Co. Ltd.'s Application* (2), [1958] 1 All E.R. 815. In the latter case Lord Evershed, M.R., said, at p. 818 applying *Heyman's* case (1):

> "It must, therefore, be taken that in a case under s. 4 of the Arbitration Act, 1950, the mere fact that the dispute is of a nature eminently suitable for trial in court is not a sufficient ground for refusing to give effect to what the parties have by contract agreed."

I think similar principles apply to an application under para. 17 of the Second Schedule.

In the instant case it is to be noted that the limitation relied on by the insurance company is prescribed in the policy itself. I express no view as to whether or not the position would be different if the limitation relied on were that prescribed by law, that is to say, by the Limitation Act. But so far as the instant case is concerned the dispute as to whether the limitation prescribed by condition 16 of the policy applies could hardly be more clearly a "difference arising out of" the policy, and so a matter which the parties have agreed to submit to arbitration; such a submission being under condition 15, a condition precedent to any liability of the insurance company. The only reason suggested why the matter should be determined by the court is that it is a matter of law which is more suitable for determination by the court. But in my view, following *Heyman's* case (1), and the *Phoenix Trading Co.* case (2), this is not a sufficient reason for refusing to make an order of reference under para. 17 of the Second Schedule. I think, accordingly, that the first ground of appeal argued should fail.

The second ground argued is substantially the question considered by the courts below and determined in favour of the insurance company by the learned resident magistrate, and in favour of the assured by the learned judge of the High Court. The contention of the insurance company simply is that the dispute does not fall within the arbitration clause at all since the policy, including the arbitration clause, was not in force at the material time.

It is clear from *Heyman's* case (1), that there is no inherent objection to parties agreeing to submit to arbitration the question whether or not an alleged contract between them is effective. Lord Wright said (at p. 384 and p. 385 of the report):

> "Nor are the appellants helped by the rule that, generally speaking, a

> dispute whether the contract ever existed, as contrasted with the question whether it has been ended, is not within the usual form of submission of differences arising out of the contract or the like, because, if there was never a contract at all, there could never be disputes arising out of it. Ex nihilo nil fit. It is all a question of the scope of the submission. Hence, if the question is whether the alleged contract was void for illegality, or, being voidable, was avoided because induced by fraud or misrepresentation, or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction.
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>
> Two recent cases in the Court of Appeal illustrate the principle laid down in *Woodall v. Pearl Assurance Co. Ltd*., [1919] 1 K.B. 593, that a denial of liability based on the express terms of the contract is in general different in its effect on the ordinary arbitration clause from a denial that there was ever a contract at all. These cases are *Golding v. London and Edinburgh Insurance Co. Ltd*. (1932), 43 L1. L. Rep. 487, and *Stevens & Sons v. Timber and General Mutual Accident Insurance Association Ltd.* (1933), 102 L.J. (K.B.) 337, 344, 345. In the latter case, it was observed by Romer, L.J., that an arbitrator could not arbitrate on the rightfulness of a repudiation because if he held that the repudiation was not justified, but the rescission was justified, he would be awarding that the contract was gone and making an award against the existence of his own jurisdiction. I should prefer to put it that the existence of his jurisdiction in this, as in other cases, is to be determined by the words of the submission. I see no objection to a submission of the question whether there ever was a contract at all, or whether if there was, it had been avoided or ended. Parties may submit to arbitration any or almost any question. But in general the submission is limited to questions arising on or under or out of a contract which would, prima facie, include questions whether it has been ended, and if so, whether damages are recoverable, and if recoverable what is the amount."

At p. 392 of the report Lord Porter said:

> "Meanwhile, I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends on the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises whether they have done so or not, or whether the alleged contract is binding on them, I see no reason why they should not submit that dispute to arbitration. Equally, I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute whether the contract ever bound them or continues to do so. They might, for instance, stipulate that, if a dispute should arise whether there had been such fraud, misrepresentation or concealment in the negotiations between them as to make an apparent contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to have been made, but I do not see why it should not be done."

At p. 360 of the *Heyman's* case (1), Viscount Simon, L.C., said:

> "The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (*a*) what is the dispute and (*b*) what disputes the arbitration clause covers."

The other judgments are to the same effect. What then is the dispute in the

instant case? The arbitration clause is a very wide one. It covers "all differences arising out of this policy". At p. 399 of *Heyman's case* (1), Lord Porter remarked that the expression "arising out of" has a wider meaning than the word "under". On the basis of *Heyman's case* (1), I would agree with the learned judge that where a claim is made under a contract which contains an arbitration clause such as the one in the instant case, and the answer depends on a decision as to the precise time of commencement on a construction of the contract, that would be a matter for the arbitrator to decide. If the claim is a claim under the contract which contains the arbitration clause, I can see no distinction between a dispute as to the time of commencement and a dispute as to the time of termination. But is the claim in the instant case a claim under the contract which contains the arbitration clause? In my opinion in substance it is not. The learned judge treated the proposal, correspondence and policy as together constituting the contract between the parties. He said

> "There can be no dispute that the proposal of January 3, 1959, the letters of January 14, and February 13 and the policy issued on February 17, resulted in a binding contract of insurance being made between the parties."

This, in fact, appears to have been the basis upon which the argument before him proceeded. But, with respect, I think it is a false approach. In contracts of insurance the policy is the contractual document (Halsbury's Laws of England, 3rd Edn., Vol. 22, p. 216). At p. 217 of the same volume of Halsbury the learned author says:

> "Where the policy as issued does not correctly embody a contract previously agreed between the parties, either party may apply for rectification of the policy. Rectification will only be granted on the strongest evidence of mutual mistake. Rectification can be claimed even after a loss has been suffered. In order that rectification may be obtained, it must be shown that there was in fact a prior agreement between the parties differing from that purporting to be embodied in the policy;".

In *British Equitable Assurance Co. Ltd. v. Baily* (3), [1906] A.C. 35 at p. 41 Lord Lindley said, in reference to policies of life assurance:

> "My lords, if these gentlemen were seeking to rescind or rectify their contracts on the ground of fraud or mistake, or were suing for damages occasioned by fraudulent misrepresentation, it would be legitimate to refer to the statements in the prospectuses on the faith of which they became policy-holders. But the complaining policy-holders are not doing anything of the sort, and the prospectuses, not being referred to in the policies, cannot, in my opinion, be legitimately referred to in order to construe the contracts into which the policy-holders have been induced to enter. These contracts are to be found in the policies themselves."

In *Griffiths v. Fleming* (4), [1909] 1 K.B. 805 at p. 817 Farwell, L.J., in the course of a judgment read and concurred in by Kennedy, L.J., said:

> "The proposals have been put in and used by both sides, and, although they could not be used in an action on the policy in order to construe the policy, they could, of course, be used in an action to rectify, and both parties desire to have their rights ascertained irrespective of the form of action."

Again Scott, L.J., in *Sun Life Assurance Co. of Canada v. Jervis* (5), [1943] 2 All E.R. 425 at p. 428, said:

> "There are two main issues in this case: (i) whether there was a contract of insurance made by the documents passing between the parties before the issue of the policy, under which the plaintiff was entitled to have a

> policy conferring rights more beneficial to him than those provided in the policy sent to him in December, 1929, and (ii) whether the interpretation of that antecedent contract submitted on behalf of the plaintiff was correct. If both questions are to be answered in his favour, it is not disputed that he is entitled to rectification of the policy so as to make it conform with the contract."

The policy in the instant case incorporates the proposal signed by the assured but does not refer to any other documents. It may be that the proposal together with the correspondence passing between the insurance company and the assured constitutes a binding preliminary contract of insurance between them, and that the policy issued was not in accordance with the terms of that preliminary contract. If this is so it may entitle the assured to have the policy rectified; or even to succeed on a claim based on the preliminary contract without express rectification (*Wood v. Dwarris* (6) (1856), 11 Exch. 493; 156 E.R. 925). But such a claim is not a claim under the contract contained in the policy. The distinction appears to me important when the arbitration clause is under consideration. An arbitrator would be bound by the plain terms of the policy unless and until there has been rectification; and a dispute as to whether or not there should be rectification is not a "claim under the policy".

This approach is, I think, the basis of the decision in *Toller v. Law Accident Insurance Society Ltd*. (7), [1936] 2 All E.R. 952. That case was not referred to in either of the courts below, but Mr. Thornton, who appeared for the assured, very properly drew our attention to the case, though contending that it could not now be regarded as authoritative in view of *Heyman's* case (1).

Toller's case (7), was a decision of the English Court of Appeal on an application for a stay of proceedings under s. 4 of the Arbitration Act, 1889, and the facts bear a considerable resemblance to the facts in the instant case, the arbitration clause in the two cases being in identical terms. Greene, L.J., stated the facts in the course of his judgment as follows:

> "The facts are quite short and simple. The plaintiff, in August, 1935, had a current policy, in relation to a Lancia motor-car, issued by the defendants. That car, in the middle of August, he decided to sell, and he decided to purchase a Morris car in place of it. Now an arrangement was made between the plaintiff and the defendants under which the plaintiff was to receive an allowance of, I think, £4 17s. 0*d*., off the price of the new policy. The plaintiff did not pay to the defendants the balance, and it is admitted that the defendants, the insurers, issued to him cover notes; and there were three of those. The first one lasted until the end of August; the second one was for fourteen days from August 31, and the third one was issued on September 16. After the expiration of the third cover note, namely, on October 2, when there was no cover note applicable, an accident took place, involving the plaintiff in certain liabilities which it is not necessary to go into. The company, on November 16, 1935, issued a policy dated as from October 29, 1935, that apparently being the date when the plaintiff paid up the balance of the premium. If the company's only obligation was to issue a policy dated as beginning on October 29, it follows that at the date of the accident they were not then liable to the plaintiff at all. On the other hand, the plaintiff complains that the defendant company had agreed to issue to him a policy which would have been in force on October 2, when the accident took place and so entitle the plaintiff to claim under it."

The plaintiff by his writ claimed, inter alia, a declaration that a binding contract of insurance existed on October 2, 1935, and an order directing the defendants to issue to the plaintiff a full comprehensive policy valid for twelve months

and dated August 15, 1935. The Court of Appeal held that the defendants, who were denying the existence of the contract at the material date, were not entitled to a stay under s. 4 of the Arbitration Act, 1889. Greene, L.J., in the course of his judgment, with which Scott, L.J., agreed, said:

> "The issue between the parties on that branch of the case is a perfectly simple one: the plaintiff alleging and the defendants denying the existence of a contract of insurance as on October 2, with a consequential obligation on the part of the defendants to issue a proper policy in the usual terms. Looking for the moment at that issue and that alone, it is said by Mr. Soskice that that is a matter which can be properly referred to arbitration under an arbitration clause which the policy, if and when it was issued, would contain. Now, that clause is set out in para. 5 of the affidavit of Mr. Parsons sworn on this application on May 20, and it provides for the submission to arbitration of 'All differences arising out of this policy'. Now, the position being one in which the plaintiff is asserting and the defendants denying the existence of any contract of insurance at the relevant date, and in which the plaintiff is asserting and the defendants are denying the right of the plaintiff to receive a policy issued by the company retrospective to that date and before it, this result follows: if the defendants are right there is in existence with regard to the relevant period, no contract of insurance whatsoever. It is said, nevertheless, that the issue whether or not such a contract was or was not in existence falls within the arbitration clause. With the greatest respect to the very careful argument of Mr. Soskice, I am quite unable to accept that view. It appears to me that it can be put in this way: if the arbitrator (assuming it was referred to him) found there was no contract in existence at all and no right to sue on the policy as at that date, he would be deciding that the very arbitration clause which founded his jurisdiction never existed and therefore he never could have had any jurisdiction to deal with that matter."

It is, I think, clear from this passage that the claim in *Toller* (7), was dealt with, not on the basis of a claim arising out of the policy of insurance which contained the arbitration clause, but on the basis of a dispute as to the existence of a preliminary contract of insurance which might entitle the plaintiff to rectification of the policy which had been issued. The dispute, therefore, was as to the existence of a contract, and not as to the validity of a claim under an admitted contract. On this basis there is no conflict between *Toller's* case (7), and *Heyman's* case (1), and, in fact, *Toller's* case (7), was mentioned in Heyman's case (1), with apparent approval by both Lord Wright and Lord Porter.

I can see no distinction between the instant case and *Toller's* case (7). The claim in the instant case is not a claim under the contractual document, the policy, but is a claim under what is alleged to have been the preliminary contract. The proper remedy would be a suit for rectification of the contract, though a court, in its equitable jurisdiction, might dispense with the formality of a specific prayer for rectification in considering the claim (*Wood v. Dwarris* (6)). That, however, does not alter the fact that the dispute here is essentially one of rectification, depending on the existence of the alleged preliminary contract; and the submission contained in the policy does not extend to a dispute as to rectification of the terms of the policy. In my opinion, therefore, though for different reasons, the order made by the learned resident magistrate was correct.

I would allow the appeal with costs, set aside the judgment and decree of the High Court, and order that the decree of the district court be restored. The appellant should have his costs of the appeal to the High Court.

Sir Ronald Sinclair P: I agree with the reasoning and conclusions of the learned Vice-President and have nothing to add. There will be an order in the terms proposed by him.

Crawshaw JA: I agree with the order proposed by the Honourable Vice-President. *In Toller v. Law Accident Insurance Society Ltd*. (7), the assured (the plaintiff) claimed that by reason of events which had happened a contract of insurance existed at the time of the accident, October 2, 1935, which entitled him to a policy valid on that date, which would include the usual arbitration clause. The assured issued a writ asking for a declaration to that effect, and an order that the policy be issued, and damages for breach of contract. The policy had in fact been issued dated October 29, 1935, and the insurance company (the defendant) asked for a stay of the action on the ground that the issue as to when the policy was to commence fell within the arbitration clause in the policy. The *Toller* case (7) is, I think, indistinguishable with the instant case except as to the form of the order asked for, and that whereas in that case it was the insurance company which asked for a stay for reference to arbitration, in the instant case the insurance company maintains that the arbitration clause does not apply and that it is the assured (the plaintiff) which asks for the submission to be filed. In *Heyman v. Darwins Ltd*. (1), the *Toller* case (7), is referred to with apparent approval. The editorial note to the *Toller* case (7), correctly, I think, expresses the effect of that decision in saying,

> "In the present case the contract which was to contain the arbitration clause was the policy itself and a contract to issue a policy would not contain an arbitration clause. Therefore, until the policy was issued there would be no effective arbitration clause though it might be averred that there was a contract to enter into the contract of insurance, i.e. the policy".

The same principles would no doubt have applied had the prayer been for rectification of the policy.

The *Toller* case (7), was decided on the argument whether or not an arbitration clause in a policy could be invoked where the existence of the policy was in dispute. The same argument was substantially before the courts below and before us in the instant case. In the *Heyman* case (1), on the other hand, the dispute was whether liability under a policy had come to an end, and the question before the court was whether the arbitration clause in the policy could be invoked to decide that dispute.

Law, J., in the instant case, reversing the decision of the magistrate and ordering that the agreement to refer to arbitration be filed, quoted the following passage from Lord Macmillan's judgment in *Heyman's* case (1), p. 371,

> "If a question arises whether the contract has for any such reason come to an end I can see no reason why the arbitrator should not decide that question".

Law, J., then went on to say,

> "By the same token, I do not see why the arbitrator should not decide the question whether the contract had come into existence on a particular day".

Earlier in the same paragraph, however, Lord Macmillan said:

> "I may clear the ground by disposing of one or two simple cases. If it appears that there has ever (never?) been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate."

This is one of the "cases" disposed of by Lord Macmillan; that quoted by LAW, J., is another of the cases, and with respect I think Lord Macmillan is distinguishing them. Viscount Simon at p. 366 makes similar observations. Lord Wright at p. 384 said:

> "Nor are the appellants helped by the rule that, generally speaking, a dispute whether the contract ever existed, as contrasted with the question whether it has been ended, is not within the usual form of submission of differences arising out of the contract or the like, because, if there was never a contract at all, there could never be disputes arising out of it. Ex nihilo nil fit. It is all a question of the scope of the submission."

Now as I read the quotation from Lord Wright's judgment (I think Lord Macmillan and Viscount Simon are in effect saying the same thing) he has in mind a contract containing an arbitration clause and is contrasting two possible disputes relating thereto (the two "cases" I have just quoted from Lord Macmillan's judgment): one a dispute as to whether the contract ever existed and the other whether it has come to an end. As to the former it might be contended that the contract was void for illegality or that the parties were not ad idem (e.g. as to the date of its commencement). It might also be contended, as I see it, that at the relevant time – in the instant case the date of the burglary and in the *Toller* case (7), the date of the accident – no contract had ever existed. In fact that was precisely what was contended in both cases, Greene, L.J., saying in the *Toller* case (7),

> "the issue between the parties on that branch of the case is a perfectly simple one; the plaintiff alleging and the defendant denying the existence of a contract of insurance as on October 2."

It was following that, that Greene, L.J., went on to say,

> "if the defendants are right there is in existence with regard to the relevant period, no contract of insurance whatsoever"

and that this was not a matter which the arbitrator could decide for if he

> "found that there was no contract in existence at all and no right to sue on the policy as at that date",

he would be deciding that he had no jurisdiction to deal with the matter.

Lord Porter at p. 392 of the *Heyman* case (1), said:

> "Meanwhile, I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends on the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises whether they have done so or not, or whether the alleged contract is binding on them, I see no reason why they should not submit that dispute to arbitration. Equally I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute whether the contract ever bound them or continues to do so."

As I read this passage Lord Porter is saying that if a dispute arises as to whether, for instance, a purported contract was ever entered into, the dispute may go to arbitration if the contract contains a clause in clear terms providing for arbitration in such circumstances; or, if there is no such clause in the contract, the parties otherwise agree to "submit that dispute to arbitration". In the instant case and in the *Toller* case (7), the arbitration clauses, wide as they were, do not cover such disputes.

As in the *Toller* case (7), the first question to be decided in the dispute which has arisen in the instant case is whether there was a contract of insurance at the relevant date, and indeed that is the very question which the assured expressly says in his application is the matter he requires to be decided. As I read the authorities this is not a matter which can be decided under the arbitration clause. This being so, the appellant did, I think, show good cause why the agreement should not be filed.

Appeal allowed. Judgment and decree of the High Court set aside and decree of the district court restored.

For the appellant:
Dodd & Co., Dar-es-Salaam
H. G. Dodd

For the respondent:
Fraser Murray, Thornton & Co., Dar-es-Salaam
R. S. Thornton

Govindji Popatlal v Nathoo Visandji
[1962] 1 EA 372 (PC)

Division:	Privy Council
Date of judgment:	1 May 1962
Case Number:	71/1960
Before:	Lord Denning, Lord Morris of Borth-y-Gest and Lord Guest
Sourced by:	LawAfrica
Appeal from	E.A.C.A. Civil Appeal No. 40 of 1959 on appeal from H.M. Supreme Court of Kenya – Mayers, J.

[1] Mortgage – Enforcement of security – Action against transferee of equity of redemption – Whether borrowers must be parties to action – Whether witness to attestation of charge by borrowers must give evidence proving execution – Indian Evidence Act, 1872, *s.* 68 *and s.* 69 *– Registration of Titles Ordinance* (*Cap.* 160), *s.* 1 (2), *s.* 23, *s.* 32 *and s.* 46 (*K.*).

Editor's Summary

In October, 1953, the three registered co-owners of a property borrowed Shs. 200,000/- from the respondent on the security of a registered charge. By October, 1954, the appellant became the sole owner of the property having derived his title from the persons who created the charge. In 1957 the respondent filed a suit against the appellant to enforce the security alleging that in breach of specific covenants in the

charge the appellant had failed to pay interest due and to insure the property, and claimed an account of the sum due to him and sale of the property in default of payment of the sum found to be due. The Supreme Court granted a decree in terms of the claim and the Court of Appeal affirmed this decision. On further appeal it was contended that there was no privity of contract between the appellant and the respondent, and that the original mortgagors who borrowed the money should have been made parties to the suit; and that the respondent had failed to prove execution or attestation of the charge upon which his claim was founded as required by s. 68 of the Indian Evidence Act. It was common ground that the second ground of appeal was not taken at the trial but only arose out of an additional ground of appeal lodged on the day of hearing of the appeal by the Court of Appeal.

Held –

(i) as the claim for a personal decree against the appellant had been abandoned there was no claim for payment by the appellant personally but a claim for the property to be sold and the claim was valid as against the property charged; accordingly there was no substance in the argument that the original borrowers should have been made parties to the suit.

(ii) where a case has been conducted before the trial judge by both parties upon the footing that a document has been properly admitted in evidence, it is not open to a party on appeal to argue that owing to some defect in the proof the document ought not to have been admitted.

(iii) the charge when registered under s. 32 of the Registration of Titles Ordinance has by s. 46 of the Ordinance the effect of a legal mortgage which transfers the property to the mortgagee leaving only an equity of redemption to the mortgagor; upon the production of the charge and the certificate of title with the memorial of the charge endorsed thereon it became unnecessary for the respondent to comply with the terms of s. 68 of the Indian Evidence Act, 1872.

(iv) s. 23 and s. 32 of the Registration of Titles Ordinance supersedes s. 68 of the Indian Evidence Act in regard to any requirement as to proof of the charge.

Appeal dismissed.

[**Editorial Note:** See also *Govindji Popatlal v. Nathoo Visandjee*, [1960] E.A. 361 (C.A.).]

Case referred to in judgment:

(1) *Ganga Ram v. Natha Singh* (1924), 51 I.A. 377.

(2) *Gopal Das v. Sri Thakurji* (1943), A.I.R. P.C. 83.

(3) *Baijnath Singh v. Brijraj Kuar* (1922), A.I.R. Pat. 514.

(4) *Shib Chandra Singha v. Gour Chandra Pal* (1921), 27 Cal. W.N. 134.

(5) *Ambar Ali v. Lutfe Ali* (1918), 45 Cal. 160.

Judgment

Lord Guest: This is an appeal from a decision of the Court of Appeal for Eastern Africa dismissing an appeal from the Supreme Court of Kenya whereby the Supreme Court granted the claim of the plaintiff (the respondent in the appeal) in an action filed against the defendant (the appellant in the appeal).

The plaintiff filed a mortgage suit against the defendant in the Supreme Court of Kenya in March, 1957, to enforce a charge over a plot of land of which the defendant is the registered proprietor by the defendant's predecessors in title. The charge purported to have been executed on October 10, 1953, by three persons who were at that time co-proprietors of the land as security for a sum of Shs. 200,000/- borrowed by them from the plaintiff. It is admitted that as from October 4, 1954, the defendant became sole proprietor of the land having derived his title from the persons who created the charge. The plaint alleged that in breach of specific covenants in the charge the defendant had failed to pay the interest due and to insure the property. The plaintiff claimed inter alia (*a*) an account of what was due to the plaintiff, (*b*) the sale of the property in default of payment of the sum found to be due, and (*c*) a personal decree against the defendant for any deficiency in the proceeds of sale, but at an early stage the plaintiff abandoned the claim to a personal decree. The Supreme Court of Kenya granted decree in terms of the claim (without the personal decree) and the Court of Appeal affirmed this decision.

A number of objections were taken before the Supreme Court in the defence to the claim, but the only issues argued before the Board related to two matters.

First, it was argued for the defendant that there was no privity of contract between the plaintiff and defendant, and the original mortgagors who borrowed the money should have been made parties to the suit. Their lordships consider that there is no substance in this point. The claim for a personal decree against the defendant has been abandoned long since. There is therefore no claim for payment by the defendant personally but a claim for the property to be sold and out of the proceeds of sale for payment of the principal, interest and

insurance premiums. The plaintiff by the failure of the defendant to fulfil the conditions of the charge has a right to foreclosure and sale. The interest and insurance premiums are secured on the property charged (Indian Transfer Act, 1882, s. 72; *Ganga Ram v. Natha Singh* (1) (1924), 51 I.A. 377 at p. 379). The claim is therefore valid as against the property charged.

The only other point argued before the Board was a contention by the defendant that the plaintiff had failed to prove the execution or attestation of the charge upon which his claim was founded by his failure to call one attesting witness. This contention was based on s. 68 of the Indian Evidence Act which is in the following terms:

> "68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence:
>
> "Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied."

It is to be observed that this point was not taken before the Supreme Court but only arose out of an additional ground of appeal lodged on the day on which the case came on for hearing before the Court of Appeal. The Court of Appeal allowed this additional ground of appeal to be argued, but they rejected it. Their lordships consider that they were right in so doing.

If the appellant had objected under s. 68 to the admission of the charge when this document was tendered in evidence by the respondent, the learned judge would then have had to consider whether the objection was well founded. If he had sustained the objection, the respondent would then have had an opportunity of complying with the terms of s. 68 by calling one of the attesting witnesses or by resort to s. 69. But no objection was taken by appellant's counsel and no cross-examination was directed to the respondent. The case thereafter proceeded upon the footing that the charge had been validly executed and the appellant's argument before the trial judge was principally directed to the point that the charge itself was not in proper form having regard to the terms of s. 46 of the Registration of Titles Ordinance and that it could not therefore be registered. The appellant was therefore relying on the form of the charge in order to justify his objection to its validity and his argument involved the assumption that it was validly executed. This point was dealt with by the trial judge adversely to the appellant, but there is no trace in his judgment or in the arguments of counsel that the execution of the charge was ever challenged. Their lordships consider that where a case has been conducted before the trial judge by both parties upon the footing that a document has been properly admitted in evidence, it is not open to a party on appeal to argue that owing to some defect in the proof the document ought not to have been admitted. The principles governing this matter were stated by this Board in *Gopal Das v. Sri Thakurji* (2) (1943), A.I.R. P.C. 83, at p. 87

> "Where the objection to be taken is not that the document is in itself inadmissible, but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof."

The charge was not inadmissible, but could according to s. 68 and s. 69 be proved in a certain manner. The objection could only be to the mode of proof.

This principle was given effect to by Dawson Miller, C.J., in *Baijnath Singh v. Brijraj Kuar* (3) (1922), A.I.R. Pat. 514, at pp. 523-4 (disapproving of an earlier case of *Shib Chandra Singha v. Gour Chandra Pal* (4) (1921), 27 Cal. W.N. 134; see also *Ambar Ali v. Lutfe Ali* (5) (1918), 45 Cal. 160 at p. 167). In the whole circumstances their lordships are satisfied having regard to the conduct of the trial the appellant must be held to have waived any objection to the admissibility of the charge.

Their lordships, however, consider that the grounds upon which the Court of Appeal disposed of the appellant's argument on this aspect of the case were well founded. Section 23 of the Registration of Titles Ordinance is in the following terms:

> "23. The duplicate certificate of title issued by the registrar to any purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of such proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. And a certified copy of any registered instrument, signed by the registrar, and sealed with his seal of office, shall be received in evidence in the same manner as the original."

and s. 32 provides as follows:

> "32. No instrument, until registered in manner hereinbefore described, shall be effectual to pass any land or any interest therein, or render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed the land specified in such instrument shall pass, or, as the case may be, shall become liable as security in manner and subject to the agreements, conditions and contingencies set forth and specified in such instrument, or by this Ordinance declared to be implied in instruments of a like nature."

It is also provided by s. 1 (2) as follows:

> "1.(2) Except so far as is expressly enacted to the contrary no Ordinance in so far as it is inconsistent with this Ordinance shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Ordinance."

It is therefore clear, that if there is any inconsistency between the provisions of s. 68 of the Indian Evidence Act and this Ordinance the latter is to prevail. In the present case the original of the charge and a certificate of title endorsed with a memorial of the charge were produced in evidence by the respondent. The certificate of title was in terms of s. 23 conclusive evidence of the title of the mortgagee to the property. The charge when registered under s. 32 has by s. 46 the effect of a legal mortgage which transfers the property to the mortgagee leaving only an equity of redemption to the mortgagor. Upon the production of the charge and the certificate of title with the memorial of the charge endorsed thereon it became unnecessary for the respondent to comply with the terms of s. 68 of the Evidence Act. In the view of their lordships s. 23 and s. 32 of the Registration of Titles Ordinance superseded s. 68 of the Evidence Act in regard to any requirement as to proof of the charge. Their lordships are able to adopt without qualification this observation of Windham, J.A., in the Court of Appeal.

> "Any other conclusion would violate the general principle of the sanctity of the register, which is the foundation of all legislation based, as the Registration of Titles Ordinance is upon the Torrens system of registration."

Their lordships consider that for these additional reasons this ground of appeal must fail.

Their lordships will humbly advise Her Majesty that this appeal be dismissed. The appellant must pay the respondent his costs of this appeal.

Appeal dismissed.

For the appellant:
T. L. Wilson & Co., London
E. Gardiner, Q.C. and *W. Jaywardena* (both of the English Bar)

For the respondent:
Knapp-Fishers and *Blake & Redden*, London
J. M. Nazareth, Q.C., R. Millner (of the English Bar) and *F. R. S. de Souza*

Gailey and Roberts (Tanganyika) Limited v Salum s/o Ramzani
[1962] 1 EA 376 (HCT)

Division:	High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	26 April 1962
Case Number:	3/1962
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Hire-purchase – Agreement on printed form – Conditions therein different from earlier order form – Order form signed by both parties – Order given for tractor repaired and in running condition – Tractor unusable – Warranty – Whether order form overrides terms of printed hire-purchase agreement – Indian Contract Act, 1872, *s*. 115.

Editor's Summary

By signing a printed form of order on October 20, 1960, the respondent agreed to purchase from the appellants a second-hand tractor "duly repaired and put in running condition" at a price of Shs. 8,000/- whereof a deposit of Shs. 3,500/- was to be paid and the balance on twelve months' hire-purchase. The appellants signed the form accepting the order subject to the conditions on the reverse one of which provided that acceptance should constitute a binding contract which could not be cancelled or varied except by mutual consent. Pursuant to the contract the parties entered into a hire-purchase agreement of

which cl. 4 provided that the hirer expressly agreed that there was no warranty representation or condition implied or otherwise on the part of the owners as to description, condition, quality, fitness or roadworthiness of the vehicle. The respondent duly took delivery of the tractor early in December, 1960, but it broke down before it reached his farm. The appellants repaired it just sufficiently for it to reach the farm when it broke down again. The appellants tried but failed to repair it so that the tractor never had sufficient power to pull a disc plough bought with it. Meanwhile, the respondent early in January, 1961, paid the hire-purchase instalment due for December, 1960, and having incurred Shs. 1,200/- expense in trying to put the tractor in running order he paid no more instalments but wrote the appellants suggesting that they reimbursed him Shs. 1,200/- as they had assured him that it was overhauled and repaired and would give good service. The appellants denied having given any warranty and threatened to resume possession if the respondent did not pay his instalments. When the respondent refused to pay these, the appellants

seized the tractor and plough which later they sold. They then sued for certain instalments under the agreement and the respondent filed a defence denying liability and counter-claiming all that he paid for the tractor and for repairs. The magistrate dismissed the appellants' claim and found for the respondent upon the whole of his counter-claim. On appeal the case for the appellants was founded almost entirely upon s. 115 of the Indian Contract Act and the hire-purchase agreement and cl. 4 thereof in particular.

Held –

(i) the agreement between the parties was made on October 20, 1960, when the order was signed; the hire-purchase was only a subsidiary agreement signed pursuant to the first agreement and it was not intended by the hire-purchase agreement to vary the first agreement.

(ii) the respondent had agreed to purchase a certain tractor "duly repaired and put in running condition" and nothing less; in so far as the first agreement and the hire-purchase were in conflict, the written words of the first agreement quoted above must override the printed words of a standard form.

(iii) since the tractor supplied was not repaired and put in running condition as stipulated, it was not such a tractor as the respondent had agreed to buy.

Appeal dismissed.

Cases referred to in judgment:

(1) *Helby v. Matthews*, [1895] A.C. 471.

(2) *Felston Tile Company Ltd. v. Winget Ltd.*, [1936] 3 All E.R. 473.

(3) *Massey-Harris & Co. (S.A.) Ltd. v. Muller*, [1959] E.A. 431 (C.A.).

(4) *Glynn v. Margetson & Co.*, [1893] A.C. 351.

(5) *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.*, [1959] 3 All E.R. 182.

Judgment

Sir Ralph Windham CJ: The defendant-respondent, on October 20, 1960, entered into a written agreement with the plaintiff-appellant company in Iringa for the purchase by him from them of a second-hand tractor. It was in the form of an order from the defendant to the plaintiffs on a printed form with printed column-headings, the particulars being inserted in handwriting and the order being signed by both parties. Shorn of its inessentials this order, produced as exhibit H, reads as follows:

"Please Supply:

	Price Quoted ex Iringa
1 Second-hand Model TEA Ferguson Tractor duly repaired and put in running condition.....	5400.00
1 Ferguson 2 disc plough New suitable for above Tractor	2600.00

8000.00

Terms of Payment:

Deposit Paid

Hire Purchase in 12 months with interest after depositing the initial payment of Shs. 3500.00.....

1000.00

Receipt No.

Special Instructions:

Tractor to be ready for delivery with Plough within two to three weeks and to be collected after the balance of deposit has been paid and agreement signed."

The order was signed at the foot by both parties, under the printed words:

> "We accept this order subject to the conditions set out on the reverse of this order."

Of the conditions printed on the reverse of the order one alone is relevant, and it reads:

> "11. Acceptance of this order constitutes a binding contract between the parties hereto and no cancellation or variation thereof shall be operative except by mutual consent of the parties."

In pursuance of the stipulation in the above contract that the terms of payment should be hire-purchase in twelve months, a hire-purchase agreement was entered into between the parties on November 29, 1960, in respect of the tractor and disc plough that were the subject-matter of the contract. In the hire-purchase agreement the tractor was described simply as –"One second-hand Massey-Ferguson Model TEA 20 tractor complete". It was a printed form of agreement with all the terms ordinarily contained in such forms, being a hire-purchase agreement in the true and legally accepted sense of the terms, of what is known as the *Helby v. Matthews* (1) [1895], A.C. 471 type. The only one of its clauses which, as I see it, is directly relevant to the points argued in this appeal is cl. 4, which provides as follows:

> "4. The hirer expressly agrees that there is no warranty representation or condition implied or otherwise on the part of the owners as to the description, condition, quality, fitness or roadworthiness of the vehicle."

What happened after the delivery of the tractor and disc plough by the plaintiffs to the defendant at the end of November or the beginning of December, 1960, may be described briefly. The defendant started to drive the tractor away, but it broke down even before it reached his farm. The plaintiffs then repaired it just sufficiently for it to reach the defendant's home, but it then again broke down. The plaintiffs attempted to repair it once more but failed to do so, and it never had sufficient power to pull the disc plough that had been sold together with it. The plaintiffs then closed their Iringa branch and told the defendant he would now have to repair the tractor himself. This was in the middle of December. The defendant, on January 3, 1961, paid his instalment in respect of December; but since he had in December and January incurred Shs. 1,200/- in trying to put the tractor into running order, he paid no further instalments; and on February 2 he wrote to the plaintiffs a letter, exhibit D, in which, while not rescinding the contract, he pointed out that they ought to reimburse him the Shs. 1,200/-, observing that

> "when I purchased the tractor and plough, I was assured that the tractor will be given to me thoroughly overhauled and repaired"

and that it "would give satisfactory service". The plaintiffs eventually replied to this letter on February 22; denying that the tractor had been sold with any warranty as to fitness or any guarantee, repudiating liability, demanding the instalments for January and February, and threatening to resume possession of the tractor and plough if these were not paid. The defendant declined to pay these instalments and on March 14, 1961, the plaintiffs resumed possession of the tractor and plough, which they later resold.

On May 20, 1961, the plaintiffs filed their suit, claiming Shs. 3,093/05, being three monthly instalments of Shs. 412/50 due at the end of December, January and February, plus half the amount of remaining monthly payments due under cl. 8 of the hire-purchase agreement upon termination of the agreement for non-payment of instalments. In his written statement of defence, the defendant

denied liability and counter-claimed for Shs. 4,700/-, this sum consisting of the Shs. 3,500/- which he had already paid to the plaintiffs in respect of the tractor and plough, plus the Shs. 1,200/- that he had spent in the purchase of spares and an engine block for the tractor in an attempt to repair it. In the statement of defence it was alleged that the plaintiff had

> "sold the said tractor subject to condition that the same would have no mechanical trouble"

and had misrepresented that it was "in perfect mechanical order", and also that they had "given six months guarantee for the said tractor".

The learned trial magistrate dismissed the plaintiffs' claim and found for the defendant upon the whole of his counter-claim. The plaintiffs have accordingly appealed. The defendant has not appeared to argue the appeal, either in person or through an advocate.

Before considering the grounds of construction and of law upon which the learned magistrate mainly founded his judgment and which have formed the subject-matter of the submissions of learned counsel for the plaintiff-appellants I would mention one finding of fact. The learned magistrate found that the defects in the tractor which exhibited themselves so very soon after the defendant started driving it away from the plaintiffs' workshops yard, and which necessitated his spending Shs. 1,200/- on it in an endeavour to put it into running order, were not due to the manner in which the defendant drove it, but must have been present from the beginning. There was sufficient evidence to support this finding, and I see no ground for upsetting it.

Both at the trial and in arguing the appeal before me, the plaintiff-appellants have relied almost entirely on the terms of the hire-contract agreement of November 29, 1960, in particular cl. 4, which expressly excludes any warranty or condition of fitness under that agreement, and upon the provisions of the former s. 115 of the Indian Contract Act excluding warranty of fitness in the case of specific chattels, and upon the defendant's admitted failure to pay any instalments after the beginning of January, 1961. The decision of the learned trial magistrate in the defendant's favour is based not on the terms of the hire-purchase agreement, which taken by themselves would be against him, nor, it is to be noted, upon the defendant's evidence that the plaintiffs gave an oral guarantee of the tractor for six months, to which evidence he does not even deem it necessary to refer in his judgment, but on the terms of the original contract of October 20, 1960, from which the hire-purchase agreement flowed and whose essential terms I have set out. The relevant passages from his judgment read as follows:

> "The question is whether the defects were the liability of the plaintiff. If the hire-purchase agreement stood by itself; if the defendant had gone into the plaintiff's showrooms, seen and examined a second-hand tractor and thereupon agreed to purchase that specific chattel, I might agree that there was no warranty of fitness to be implied. But the H.P. Agreement does not stand by itself and we are not concerned with implied warranties. The defendant alleges an express warranty.
>
> "The H.P. Agreement must be read in conjunction with the agreement of 20.10.60 which was reduced into writing (as exhibit H) and signed by both parties."

The learned magistrate, after setting out the essential terms and conditions of the original agreement, exhibit H, continues:

> "To my mind therefore the agreement between the parties was made on 20.10.60 when exhibit H was signed and the Hire Purchase agreement was only a subsidiary agreement signed in pursuance of the first agreement.

> It was not intended to vary the terms of the original agreement and there is no suggestion that the parties mutually agreed to vary these terms.
>
> "What the plaintiff delivered after the signing of the H.P. Agreement was not therefore simply a second-hand tractor which the defendant had examined and found suitable to his needs. It was a tractor which the plaintiff had specifically undertaken to put in good working condition and to supply with a plough 'suitable for the above tractor'.
>
> "Now I am satisfied that the tractor was not in good working condition. Its water pump did not work, and it was incapable of pulling any plough until it had had innumerable new parts installed. Nor can the plough be said to have been suitable for the tractor for a plough which is too heavy for the tractor to pull cannot be said to be suitable for that tractor.
>
> "When the defendant signed the H.P. Agreement and took delivery of the machineries he had every right in my opinion to assume that what was delivered to him would be in accordance with the agreement of 20.10.60. He did not inspect the tractor and nor had he any reason to do so."

In my opinion the learned trial magistrate's reasoning as set out in the passages from his judgment which I have quoted, and his determination of the suit in favour of the defendant upon the basis of that reasoning, were correct in point of construction and of law. The hire-purchase agreement of November 29, 1960, and the original contract of October 20, 1960, must be read together; and upon such a reading of them the only proper conclusion, and the only one which gives effect to what must have been the intention of the parties, and in particular that of the defendant, is that what was being sold under the hire-purchase agreement was, in all respects, that which the parties had agreed to buy and sell in the earlier contract. The hire-purchase agreement was no more than a carrying into effect of the clause in the earlier contract that the terms of payment for what was being sold should be by way of

> "hire-purchase in twelve months with interest after depositing the initial payment of Shs. 3,500/-".

And what was this thing that was being sold, so far as the tractor was concerned? It was not simply – "one second-hand Model TEA 20 Ferguson Tractor". It was –

> "one second-hand Model TEA 20 Ferguson Tractor duly repaired and put in running condition".

These words were written into the contract, exhibit H, in what appears to be the handwriting of the salesman himself who signed the contract on the plaintiffs' behalf. Therefore, the subject-matter of the hire-purchase agreement was a tractor so repaired and put into running condition, and nothing less. And there was, in my view, nothing in cl. 4 of the hire-purchase agreement which could be deemed to vary by mutual consent of the parties, for the purpose of cl. 11 of the original contract, the nature of the very thing which they had agreed to buy and sell. And therefore, when the plaintiffs delivered to the defendant something different, namely a tractor not so repaired and put into running condition, the matter went beyond a mere question of warranty or guarantee, or even of non-fulfilment of a condition. It went to the root of the contract, since the plaintiffs were delivering something that the defendant had never agreed to buy.

As authority for the proposition that the hire-purchase agreement cannot alone govern the contractual relationship between the parties, and cannot be deemed to have extinguished by merger the original contract, I would refer to certain passages from the judgments in *Felston Tile Company Ltd. v. Winget*

Ltd.(2),[1936] 3 All E.R. 473. In *Massey-Harris & Co*. (S.A.) *Ltd. v*. *Muller* (3),[1959] E.A. 431 (C.A.), the Court of Appeal for Eastern Africa, it is true, recently refused to follow *Felston's* case (2), in so far as it conflicted and could not be reconciled with the decision of the House of Lords in *Helby v*. *Matthews* (1), regarding the nature of a hire-purchase agreement. But the passages from *Felston's* case (2), on which I rely are not concerned with that question and are wholly untouched by anything decided by the Court of Appeal for Eastern Africa in the *Massey-Harris* case (3). Those passages are concerned with the question, vital both in *Felston's* case (2), and in the present case, whether or not a hire-purchase agreement ought or ought not to be read together with previous correspondence and agreements between the parties which led up to it, in order to ascertain what was the true and the whole agreement between them. In *Felston's* case (2), the hire-purchase agreement was entered into on or just before May 8. In a covering letter of that date the vendors said:

> "We have drawn up a hire-purchase agreement in accordance with the terms stated in our letter of March 11."

The letter of March 11 contained a written guarantee in respect of the subject-matter of the hire-purchase agreement. It was held that, since from all the documents read together it appeared clear that the parties intended that they should all be looked at in order to ascertain the contract between them, the court could and should look at them for that purpose. Greer, L.J., at p. 477, said that, in those circumstances:

> "we are entitled to add to the terms of the formal document the terms contained in the correspondence, and especially the terms contained in the letter of May 8, by reference to the letter of March 11."

And Slesser, L.J., at p. 479, said:

> "It is therefore clear to my mind that the agreement here has to be gathered from a number of different documents, from the letter of March 11 . . ."

The decisions in that case were dependent, it is true, on the fact that the parties had agreed that the previous correspondence should be treated as part of the contract. But a similar intention can, in my view, be inferred in the present case from the wording of the contract of October 20; in particular (*a*) the printed cl. 11 of it which makes it clear that the parties have entered into a binding contract which shall not be varied save by mutual consent; and (*b*) the provision that the *terms of payment* shall be by hire-purchase, which implies that the hire-purchase agreement giving effect to that provision shall be no more than ancillary to the contract of October 20, even though it may be a more elaborate document.

And with regard to the conflict which, it might be argued, exists between the description of the tractor being purchased in the October contract as a tractor "duly repaired and put in running condition", and cl. 4 of the November hire-purchase agreement which excludes warranty of fitness, it is to be noted that cl. 4 is a printed clause in a standard printed form whereas the description of the tractor in the October contract is in handwriting and relates only to the particular object being bought in the particular transaction. That is a relevant consideration. Scott, L.J., in *Felston's* case (2), refers, at p. 482, to the rule laid down in *Glynn v*. *Margetson & Co*., (4)[1893] A.C. 351, that if

> "the contract is contained in a series of documents, then if in that series you find a printed clause inconsistent with the written terms found in the correspondence, it is a rule of interpretation that the written words should override the printed words".

This rule, laid down by the House of Lords in *Glynn v. Margetson & Co*. (4), was recently followed and applied in its broader aspect in *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd*. (5),[1959] 3 All E.R. 182. Lord Denning, referring to a printed exemption clause in a bill of lading, said at p. 185:

> "The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the respondents complain, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them . . . If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract . . . The clause must, therefore, be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract."

In the present case, the main object and intent of the whole agreement, clearly expressed in the contract of October 20, was the purchase of a second-hand tractor which, because it was second-hand and not new, must first have been repaired and put into running condition by the plaintiffs. Since it was not so repaired and put into condition, the tractor supplied by the plaintiffs was not such a tractor as the defendant had agreed to buy. And, this being the case, and since the defendant at no time got any work or profit out of it at all, but was on the contrary obliged to spend Shs. 1,200/- on it, and since the plaintiffs then resumed possession of it, together with the plough that went with it and was useless without it, and sold them elsewhere and retained the proceeds of sale, the defendant was entitled not only to have the plaintiffs' claim dismissed but to succeed in the whole of his counter-claim.

For these reasons this appeal must be dismissed with costs.

Appeal dismissed.

For the appellants:
C. J. Davda, Dar-es-Salaam

The respondent did not appear and was not represented.

Muhidini s/o Asumani v R
[1962] 1 EA 383 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 May 1962
Case Number:	182/1961
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Sir Trevor Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Williams, J.

[1] Criminal law – Murder or manslaughter – Blow struck while effecting arrest of youth – Theft being

committed by youths – Intent – Evidence that similar thefts committed by armed gangs – Whether killing murder or manslaughter – Penal Code, s. 19 *and s.* 200(*b*) (*T.*) – *Criminal Procedure Code, s.* 19, *s.* 32 (1) *and s.* 152 (3) (*T.*) – *Penal Code, s.* 19 (*K.*).

Editor's Summary

The appellant was convicted of the murder of a youth aged fourteen years, and sentenced to death. The evidence showed that the deceased, accompanied by one, Robert, of the same age, and another boy, had entered a maize shamba after dark to steal either maize cobs or stalks. The alarm was raised, the appellant left his house with a panga and went to investigate. He encountered the deceased and Robert running towards him. The evidence as to what happened next was conflicting but the appellant admitted having slashed with his panga someone running past him. The blow struck the deceased cutting through his left hip and caused his death almost instantly. The appellant gave himself up to the police and made an extra-judicial statement to a magistrate but at the trial he elected not to give evidence. Robert gave sworn evidence suggesting that the appellant struck when the deceased was lying on the ground. There was also evidence that maize thefts were prevalent in the area and that they were often perpetrated by gangs who were sometimes armed. The trial judge accepting Robert's evidence held that when the appellant struck the deceased he knew he was dealing with a youth and further held that the medical evidence was more consistent with his story. On appeal counsel for the appellant challenged the findings of the trial judge and argued that in the circumstances of the case it could not be said that the force used was unreasonable, and that the appellant was entitled to acquittal.

Held –

(i) the trial judge ought to have recorded his investigation into the question whether the evidence of Robert should have been received on oath or affirmation, or unsworn, in pursuance of s. 152 (3) of the Criminal Procedure Code.

(ii) the trial judge had failed to direct either the assessors or himself on the risk of acting on the uncorroborated evidence of a child even though such evidence was on oath.

(iii) it did not follow from Robert's evidence that the appellant knew he was dealing with a young boy, and bearing in mind all the circumstances, it was unsafe to hold that the appellant knew before he struck the blow that he was not dealing with an adult.

(iv) the force used by the appellant was, however, excessive in the circumstances.

Appeal allowed. Conviction of murder set aside. Conviction of manslaughter substituted with sentence of three years' imprisonment.

Cases referred to in judgment:

(1) *Kibangeny v. R.*, [1959] E.A. 92 (C.A.).

(2) *R. v. Campbell*, [1956] 2 All E.R. 272.

(3) *Marwa s/o Robi v. R.*, [1959] E.A. 660 (C.A.).

(4) *Musembi* s/o *Kilonzo and Another v. R.*, [1957] E.A. 422 (C.A.).

Judgment

Sir Alastair Forbes VP, read the following judgment of the court: The appellant was convicted on November 9, 1961, by the High Court of Tanganyika sitting at Moshi of the murder of one, Mambuya s/o Menenia, and was sentenced to death. He has appealed to this court against conviction and sentence.

The alleged offence occurred at a village in the vicinity of Moshi on August 18, 1961, shortly after dark. The deceased was a boy aged about fourteen years. It appears that he and two other boys had entered a maize shamba belonging to a mission for the purpose of stealing either maize cobs or stalks. They were heard by one Masumbuko, who raised an alarm. The appellant, whose house was in the neighbourhood, heard the alarm and, picking up his panga, went to investigate. The boys had scattered and run on the alarm being raised, and the appellant encountered the deceased and one of the other boys running towards him. There is some conflict of evidence as to what occurred next, but in the result the appellant slashed the deceased with his panga, cutting through the deceased's left hip and causing his death almost instantly. The appellant gave himself up to the police the same evening.

There are two accounts of what occurred at the time of the slashing – that of the appellant himself, and that of the deceased's companion, Robert s/o Shalitifu. The appellant on the day after the incident made an extra-judicial statement to a magistrate at Moshi. At the trial he elected not to give evidence and adopted this extra-judicial statement. The statement is as follows:

> "Yesterday – 18.8.61 – I came from cultivating. About 6 p.m. I heard a noise. I heard people saying 'He's a thief, catch him'. I heard the noise in the valley and people after the thief. I listened to find out where it was coming from. It came from the valley. I left my house with a panga. About twenty-two paces from my house I met the thieves running away. I told them to stop or I'd hit them with the panga. They ran on. The first one passed. The second I hit with the panga. Lot of people came. The second man was dead. The father of the deceased came and told me to guard the body. I said I couldn't all by myself. I was afraid and ran to the police station."

The other version of the incident came from the boy Robert. Robert's age was about fourteen, and he gave evidence on oath.

We would comment here that the learned judge made no note of his investigation of the question whether Robert understood the nature of an oath. He merely noted:

> "Robert s/o Shalitifu, Mchagga, about fourteen, knows swearing oath, Christian, sworn";

and in his judgment said: "He [i.e. Robert] is young but was found capable of taking the oath". We would reiterate, what the court has said before (e.g. *Kibangeny v. R.* (1),[1959] E.A. 92 (C.A.)), that a trial judge ought to record his investigation into the question whether or not the evidence of a child should be received on oath or affirmation, or unsworn, in pursuance of s. 152 (3) of the Tanganyika Criminal Procedure Code and the corresponding provisions of law in East Africa. The note in the instant case is barely adequate, but in fact nothing turns on it.

Robert in his evidence admitted going to the maize shamba with the deceased and one Onesmo. He said at first that they went to look for maize cobs, but later said they were after stalks only. He agreed that on hearing the alarm they ran away. His evidence continued:

> "We met Muhidini. He is there (accused id.). He caught deceased. Before that accused said nothing. Caught without speaking. I went on running away. I thought the accused was going to take deceased to his father. I was that far away (about five paces). I noticed accused had a panga. I did not see what happened after deceased was caught. He caught deceased like that (from the front – hands each side of waist). He still held the panga. I did not see deceased injured. I only saw deceased grabbed. I ran on."

In cross-examination he said, inter alia:

> "We told him we had been in the shamba but did not stop as he had the panga. We were afraid. Accused did not ask who we were. He did not call on us to stop. I ran past him after deceased. I was following deceased. The third man Onesimo did not run with us went to the north. If accused says I was first, I say I was following deceased."

Other material matters to be taken into account in considering the charge were that maize thefts were prevalent in the area; that they were often perpetrated by gangs; that such gangs were sometimes armed; that at the time of the incident there was moonlight, the phase of the moon, according to the calendar, being the first quarter; and that the incident took place in bush in a valley.

The learned judge accepted Robert's evidence, saying:

> "The assessors, although they have drawn different inferences against accused, have both accepted the evidence of Robert. He is young but was found capable of taking the oath and gave evidence in a straightforward manner. Not too much significance should be attached to accused's not telling his story before this court but some must be and, taking into account that the medical evidence is more consistent with Robert's story, that accused might have been mistaken as to the order in which the two boys passed, especially if as appears they were close together, and that the question of whether there had been an actual theft of maize cobs is secondary as Robert frankly admits being in the maize shamba for stealing of some kind, I have decided that I should follow the assessors in accepting Robert's evidence."

With respect, the learned judge's treatment of and conclusions on, Robert's evidence are open to several criticisms. In the first place the learned judge's manner of acceptance of Robert's evidence is unsatisfactory. "I have decided that I should follow the assessors in accepting Robert's evidence" may be merely a manner of speech, but it leaves the impression that the learned judge may have been in doubt on the point and taken refuge in merely following the views of the assessors, instead of making up his own mind after giving due consideration to the views of the assessors and after giving the benefit of any reasonable doubt to the appellant. Secondly, the learned judge failed to direct either the assessors or himself on the risk of acting on the uncorroborated evidence of a child even though such evidence is on oath. The need for such a direction was stressed by this court in *Kibangeny's* case (1), when the following passage from the judgment of Lord Goddard in *R. v. Campbell* (2), [1956] 2 All E.R. 272 was cited:

> "The sworn evidence of a child need not as a matter of law be corroborated but a jury should be warned, not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls though they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn, or of an adult."

Thirdly, the acceptance of Robert's evidence is based on the assumption that "the medical evidence is more consistent with Robert's story". We are, with respect, unable to follow this proposition. The relevant medical evidence is as follows:

> "There was a deep penetrating cut wound on the left of pelvis. It had gone through the left hip-bone, and injured the leg vessels of the left leg. . . . A heavy sharp weapon like a panga would have caused the injury. . . .Quite some force would have been used . . . The nature of the blow was a slash not a stab. In my opinion the boy must have fallen down and then the injury was inflicted. It is very difficult to inflict such an injury with a sideways slash on a boy. He could have been lying on his right side and would not have got up from that position in view of the position in which I found the arms and legs. . . .
>
> "It is possible that the blow was struck while deceased was running past the assailant who was trying to stop him. If there was movement against the blow the resulting wound would be deeper. But if deceased were running away the wound could not be so deep as if he was approaching. It is more likely that this blow was struck when deceased was running towards accused. . . .
>
> "The blow could have been inflicted as deceased approaching . . . I would be inclined to expect another injury if deceased was killed while running as the tendency would be for the weapon not to strike hard immediately.
>
> "The wound being on deceased's left suggests he had his left facing accused. He could therefore have been passing him. I only exclude his having been running away."

The primary suggestion in this evidence is that the appellant struck the deceased while the latter was lying on the ground. If this, indeed, happened, it would be consistent with Robert's story on the basis that the appellant threw the deceased to the ground and then slashed him. If this had been established, the appellant would have been properly convicted of murder. There is, however, no such finding by the learned judge and, apart from the suggestion in the medical evidence, there is not a shared of evidence to support such a version. Before us Crown counsel, very properly in our view, conceded that it was impossible to find, on the evidence, that the deceased was slashed while lying on the ground. If this possibility is excluded, the medical evidence makes it clear that the deceased must have been struck when he was either running towards or passing the appellant, probably the former. This is far more consistent with the appellant's version than with Robert's, since the latter's version suggests that the deceased must have escaped from the appellant's grasp and been running away when struck – a possibility discounted by the medical evidence. Had the learned judge directed himself on the risk of acting on Robert's evidence without corroboration, and had he appreciated that the medical evidence tended to support the appellant's version rather than Robert's, we doubt whether he would have accepted Robert's evidence without qualification, as he did.

The importance of the acceptance of Robert's evidence is that the learned judge seems to have relied on it for his finding that the appellant knew he was dealing with a young boy. He discussed the relevant evidence other than Robert's, and continued:

> "I therefore consider it strongly arguable that even apart from Robert's evidence there would be justification for finding that he knew deceased to be a young boy. However it in fact follows from the acceptance of Robert's evidence that he did know as according to it he actually caught hold of deceased."

It is to be noted that the learned judge does not base his finding on the evidence other than Robert's; and that it must be implicit in his finding that the appellant caught hold of the deceased before striking him, if the finding is to have any relevance at all. Yet later he does not exclude the possibility that the blow was struck before the appellant caught hold of the deceased, but nevertheless adheres to his finding that the appellant knew at the time of striking that the deceased was a young boy. He said:

> "Assessor 1 [this should read assessor 2] has gone as far as to find malice aforethought in the form of an actual intention to kill. He suggests that accused struck the blow just before he caught hold of deceased. This is a possibility as is a striking after deceased escaped from his grip but however the blow was struck, it is clear in my view that accused must at least have had knowledge that a blow with a panga at a young boy would probably cause death or grievous harm."

We think, with respect, that the learned judge's reasoning is unsound, and that it cannot follow from Robert's evidence that the appellant knew he was dealing with a young boy unless the possibility of the blow being struck before the appellant caught hold of the deceased is excluded; and this the learned judge has not done. Accepting that Robert did see the appellant catch hold of the deceased, we think that the medical evidence supports the view that the appellant must have struck the deceased when the latter was running towards him, and that the deceased's impetus carried him into the appellant's arms. If Robert was following the deceased as he said, it would be strange, though not impossible, that he did not see the blow. If, however, Robert was ahead, as the appellant said in his extra-judicial statement, Robert might well have seen the deceased run into the appellant's arms without seeing the blow struck. Bearing in mind all the circumstances, we think it would be unsafe to hold that the appellant knew before he struck the blow that he was not dealing with an adult, and Crown counsel before us conceded this to be the case. Nevertheless, the fact remains that, even if the appellant thought he was dealing with an adult, the degree of force used by him was considerable, and the question is whether it was excessive in the circumstances.

The learned judge, besides accepting that the appellant knew he was striking a young boy, based his decision partly on the law in England as stated in Archbold's Criminal Pleading Evidence and Practice (34th Edn.), and partly on the assumption that knowledge that the blow the appellant struck was likely to cause death or grievous harm established malice aforethought. The relevant passages in the judgment (part of which has already been set out above) are as follows:

> "It being a general principle of English law which applies that the homicide of a felon is only justifiable if he cannot otherwise be apprehended (Archbold's Criminal Procedure Evidence and Practice (34th Edn.), p. 975), it remains to consider how unjustifiable accused's act was.
>
>
>
> "Assessor (2) has gone as far as to find malice aforethought in the form of an actual intention to kill. He suggests that accused struck the blow just before he caught hold of deceased. This is a possibility as is a striking after deceased escaped from his grip but however the blow was struck, it is clear in my view that accused must at least have had knowledge that a blow with panga at a young boy would probably cause death or grievous harm amounting to malice aforethought under sub-s. (*b*) of s. 200 Penal Code and therefore, although there must be some sympathy for accused in that the excitement of the hue and cry may have prompted him to use

very excessive force, I follow assessor 2 in finding him guilty of murder as charged contrary to s. 196 Penal Code."

With respect, we think that the learned judge was mistaken in the law he applied. The relevant English law as stated in Archbold is, no doubt a useful guide, but there are statutory provisions in the territory which govern the matter. The relevant provisions are s. 32 (1) and s. 19 of the Criminal Procedure Code (Cap. 20) and s. 19 of the Penal Code (Cap. 16). These read as follows:

(*a*) Section 32 (1) of the Criminal Procedure Code:

"32(1) Any private person may arrest any person who in his view commits a cognisable offence, or whom he reasonably suspects of having committed a felony."

(*b*) Section 19 of the Criminal Procedure Code:

"19(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

"(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest."

(*c*) Section 19 of the Penal Code:

"19. Where any person is charged with a criminal offence arising out of the arrest, or attempted arrest by him of a person who forcibly resists such arrest or attempts to evade being arrested, the court shall, in considering whether the means used were necessary or the degree of force used was reasonable for the apprehension of such person, have regard to the gravity of the offence which had been, or was being, committed by such person and the circumstances in which such offence had been, or was being, committed by such person."

There can be no doubt here, and Crown counsel conceded, that the appellant reasonably suspected that the persons running towards him had committed a felony. It must therefore be considered, under s. 19 of the Penal Code, whether the degree of force used was reasonable in the circumstances for the apprehension of the deceased, taking into account the gravity of the offence believed to have been committed; and, if the degree of force used was unreasonable, it must be considered whether the offence committed was murder or manslaughter.

Mr. Gledhill, who appeared for the appellant, argued that in the circumstances of the case it could not be said the force used was unreasonable, and that the appellant was entitled to acquittal. There is, of course, no finding by the learned judge on this aspect of the matter as he did not consider the question of the reasonableness of the force used; though he did say, on the basis that the appellant knew the deceased was a young boy, that the force used was "very excessive". We have carefully considered Mr. Gledhill's submission, but we are of opinion that had the learned judge addressed his mind to this aspect, on the basis of the appellant believing that he was dealing with an adult, he must still have reached the conclusion that the degree of force used was excessive. As the medical evidence showed, and as the learned judge found, "there must have been a slash with considerable force". While the theft of maize does not lack seriousness in a native community, particularly if it is prevalent in the area as appears to be the case here, it cannot, in our view, in the circumstances of this case, justify such a slash with a lethal weapon as was administered by the appellant. We therefore think that the appellant is guilty of an offence, but it remains to consider whether the offence is murder or manslaughter.

There is little authority that we have been able to find to indicate the circumstances in which the use of excessive force to effect arrest would amount to no more than manslaughter. In the passage in Archbold to which the learned judge referred, it is stated, inter alia:

> "But if homicide were occasioned by means not likely or intended to kill, such as tripping up his heels, giving him a blow of an ordinary cudgel, or other weapon not likely to kill, or the like, it would at most be only manslaughter."

This is stated in relation to the attempted arrest of the person killed for an offence which was no more than a misdemeanour; but it does indicate that the use of force, though causing death, may amount to manslaughter only. In *Marwa s/o Robi v. R.* (3), [1959] E.A. 660 (C.A.), this court was considering the defence of defence of property in relation to a murder charge. At p. 663 of the report the court said:

> "Upon such authority as we have been able to find we think it must be a question of fact in each case whether the degree of force used in defence of property which caused death was, in the particular circumstances of the case, justifiable, or, if not justifiable, whether it was such as to amount only to manslaughter or was so excessive as to constitute the offence of murder."

We think similar considerations apply in relation to force used to effect arrest. The learned judge concluded that knowledge that a blow with a panga would probably cause death or grievous harm established malice aforethought under para. (*b*) of s. 200 of the Penal Code, which reads:

> "200. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
>
> (*a*)
>
> (*b*) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;".

This provision must, however, be read subject to the provisions of s. 19 of the Criminal Procedure Code which is set out above. *In Musembi s/o Kilonzo and Another v. R.* (4), [1957] E.A. 422 (C.A.) this court considered a case in which a person had been killed by the appellants when they were trying to arrest him. The appellants had been convicted of murder, the learned trial judge taking a somewhat similar view of the law to that taken by the learned trial judge in this case. The case was a Kenya case, but the relevant provisions of the law are similar. At p. 424 of the report this court said:

> "Our respectful criticism of the judgment as a whole may be summed up by saying that the learned judge's approach to the legal effect of the facts was erroneous at the outset. Having, so to speak, started along the wrong path, he was led astray into a region where obscurity prevailed: having arrived at his findings of fact (though, not entirely, we think, without inconsistency) he was thus prevented from viewing them in the light of the relevant law. In our opinion the correct approach was as follows.
>
> "Shortly before his death the deceased uttered an express threat to kill the second appellant and the latter's wife if the second appellant did not immediately produce a certain scarf.

> "By s. 219 of the Penal Code of Kenya (as amended) the utterance of that threat was a felony.
>
> "Sub-section (1) of s. 33 of the Criminal Procedure Code provides as follows:
>
> > 'Any private person may arrest any person who in his view commits a cognizable offence, or whom he reasonably suspects of having committed a felony.'
>
> "The appellants were thereby lawfully empowered to arrest the deceased. How did the law entitle them to go about it? The answer is to be found in s. 19 of the Penal Code."

The court then set out s. 19 of the Kenya Penal Code, which is identical with s. 19 of the Tanganyika Penal Code set out above, and discussed the relevant circumstances which, in that case, were serious. At p. 425 the court continued:

> "Thus all the circumstances plainly indicated that to arrest the deceased would be a dangerous undertaking. Nevertheless, it was not only lawful but also, for personal reasons, necessary to arrest him.
>
> "Next, it was clearly justifiable for the appellants to arm themselves for that purpose. The learned trial judge said:
>
> > 'I believe it was the intention of the first two accused to use force in effecting the arrest of the deceased and to this end and for this purpose they armed themselves with lethal weapons.'
>
> We respectfully agree but we add that they were entitled to go armed against the most probable contingency, namely that the deceased would resort to dangerous violence. According to the two female witnesses (P.W. 4 and 5), as to whose truthfulness the learned judge said he was `quite satisfied', the second appellant tried at first to obtain a knife; `he appeared apprehensive', said one witness: `he appeared to be frightened', said the other. On being told that there was no knife he found and picked up an axe. The first appellant took a panga.
>
> "In the circumstances we do not think it could properly be inferred that the appellants, thus armed, embarked on their lawful undertaking with any unlawful intent. To infer that their intent was to cause grievous harm would be to close one's eyes to the right which the law gave them to carry lethal weapons when tackling a dangerous criminal (as they were entitled to regard him) who to their knowledge was lethally armed and likely to use his arms against them."

We stress the last paragraph of this passage. We think the essential matter which has to be determined, from the circumstances and from the nature of the injury inflicted, is whether the person endeavouring to effect the arrest was actuated by malice, or merely by the intent to arrest. Malice is an essential ingredient of the offence of murder. Normally, on the basis that a person must be taken to intend the natural consequences of his act, malice may be inferred from the fact of the intenational infliction of an injury calculated to cause grievous harm. Where, however, injury may lawfully be inflicted in order to effect arrest, the inference of malice does not arise unless the degree of force used is incompatible with a bona fide belief that such force was reasonable to effect the arrest. The degree of force used in a particular case may be so excessive that in the circumstances it can be inferred that the accused person must have intended to cause hurt – grievous harm – which was unnecessary for the purpose of effecting the arrest and so shown malice within s. 200 of the Penal Code; or it may be possible to infer express malice from other circumstances of the

case, for instance, if the evidence showed a desire to punish, over and above the effecting of the arrest. In either of these cases the offence would be murder. But the mere knowledge that the act which is the subject of the charge would be likely to cause grievous harm does not, in our opinion, establish malice aforethought if the accused person intended to do no more than effect a lawful arrest and had no realization that the force he used was excessive or unnecessary. If such was the intent, and the force used was in fact excessive, the offence would be manslaughter.

In the instant case Crown counsel conceded that it was reasonable for the appellant, on hearing the alarm, to arm himself with a panga in view of the known fact that maize thefts were often carried out by armed gangs. There was nothing in the evidence apart from the nature of the injury inflicted from which any intent other than an intent to effect the arrest of the deceased could be inferred, and, indeed, the learned judge appears to have accepted that this was the appellant's only intention. It is true the degree of force used was very excessive, but we cannot say that, if the learned judge had adopted the right approach to the matter he would inevitably have reached the conclusion, from the degree of force used, that the appellant must have intended to cause more harm than was necessary to effect the arrest and so was guilty of murder. Indeed, the closing words of his judgment set out above seem to indicate the contrary. In the circumstances we think the conviction of murder cannot stand, and we set aside the conviction and sentence. As we have indicated, however, the force used was undoubtedly excessive, and we are of opinion that the learned judge, on the application of the proper principles, must at least have reached the conclusion that the appellant was guilty of manslaughter. We accordingly substitute a conviction of manslaughter for the conviction of murder, and sentence the appellant to serve a term of three years' imprisonment.

Appeal allowed. Conviction of murder set aside. Conviction of manslaughter substituted with sentence of three years' imprisonment.

For the appellant:
J. Gledhill, Nairobi

For the respondent:
The Attorney-General Tanganyika
A. M. Troup (Crown Counsel, Tanganyika)

Mohamed s/o Issa v R
[1962] 1 EA 392 (HCT)

Division:	High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	28 February 1962
Case Number:	49/1962
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Criminal law – Breaking and entering dwelling-house – Accused lawfully in part of house – Entry to locked room effected by means unknown – Goods stolen from room – Whether accused can be convicted of housebreaking – Penal Code, s. 265, *s.* 293, *s.* 294 *and s.* 295 (*T.*).

Editor's Summary

The appellant was convicted on two counts, firstly, of breaking and entering a dwelling-house with intent to commit a felony therein and, secondly, of committing theft therein. The appellant was staying in the house of the complainant with the consent of the latter, and the housebreaking of which he was convicted was breaking, not into the complainant's house from outside, but into a room in the house which the complainant had locked and in which he had left the goods which were stolen. The appellant was found in possession of the stolen goods, but there was no evidence as to how the appellant effected an entrance from the rest of the house into the locked room, and in particular there was no evidence that the appellant did so by unlocking or opening in another way the door into the room, or by moving anything in order to gain entrance. On appeal

Held –

(i) there was no direct evidence how the appellant entered the room, nor any circumstantial evidence to prove, and certainly not beyond reasonable doubt, that the appellant must have moved something in order to do so, or alternatively that he came through a hole or a space which was there of necessity and which was as much closed as the nature of things permitted.

(ii) there was no breaking within s. 293 of the Penal Code, even assuming that the evidence established that the appellant climbed a partition wall.

Conviction of theft affirmed. Conviction for housebreaking set aside and conviction for being in a dwelling-house with intent to commit felony therein substituted. Sentence varied.

Cases referred to in judgment:

(1) *R. v. Brice*, 168 E.R. 892.

(2) *R. v. Spriggs & Hancock*, 174 E.R. 122.

Judgment

Sir Ralph Windham CJ: The appellant was convicted on the first count of breaking and entering a dwelling-house with intent to commit a felony therein, and on the second count of committing theft therein. He was staying in the house of the complainant with the consent of the latter, and the housebreaking for which he was convicted, on the first count was a breaking not into the complainant's house from outside, but a breaking into a room in the house which the complainant had locked and in which he had left the goods which the appellant was convicted of stealing on the second count.

The appellant was convicted, on both counts, upon the evidence of the complaint, which the court believed in preference to that of the appellant, who said that the complainant had given him the stolen goods. I see no ground

for holding that the court erred in accepting the complainant's evidence, nor for holding that the appellant was wrongly convicted of the theft. The only question that arises is whether there was evidence of a breaking, sufficient to support the conviction on the first count.

The passage in the complainant's evidence upon which the conviction was based, and which contains everything relevant to this appeal, reads as follows:

> "I did not know accused before that day when he came to my house. On Wednesday – December 13, 1961 – accused came to my house and brought coconuts. Accused slept at my house that night. Accused stayed at my house until he left that Friday. I was not present when accused left as I had gone to a burial. When I left I left accused in my house. My room was locked with a padlock. Accused slept in a different room. I returned home at about 3.00 p.m. on Friday. When I got back I did not find accused there. I found my room locked as usual. When I went into my room I found some bags which I had left there were missing. There had been seven bags there. There is no ceiling above my room. It is not difficult to climb into my room. There had been Shs. 5/- (a note) in with the bags and I looked for it and didn't find it."

The above evidence, together with evidence of the complainant's having on the very next day (Saturday) seen the appellant carrying sacks which he identified as the stolen sacks, amply supported the finding that the appellant must have stolen the property in the complainant's house while the latter was away. The conviction on the second count will therefore stand. With regard to the charge of housebreaking it is clear on the evidence that the appellant had a right to be in a part of the complainant's house, namely in the room which the complainant had allowed him to occupy, but that he had no right to enter the room which the complainant had locked up and which contained the sacks and the money. In these circumstances a breaking and entering of that room by the appellant with intent to steal would have constituted housebreaking, since the breaking of an internal part of a building, and in particular the unlocking of any door in a building which closes an opening that gives passage from one part of the building to another, is included in the definition of "breaking" in the first part of s. 293 of the Penal Code, which reads as follows:

> "A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window, shutter, cellar flap or other thing, intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building."

In the present case, however, there was no evidence as to how the appellant effected an entrance from the rest of the house into the locked room, and in particular there was no evidence that he did so by unlocking the door into it or opening that door in any other way, or by moving anything in order to gain entrance into the room. The trial magistrate seems to have assumed that the appellant must have gained entrance by climbing over a partition wall into the room, although there was no evidence to that effect; for he says in his judgment:

> "Since I believe P.W.1. when he said he locked the door of the room where the sacks were and found the door still locked when he came back, I find the charge of housebreaking fully proved. Breaking (even by climbing over a partition wall) into a room in a house where one is authorised to be, with intent to steal, is housebreaking (para. 1802, Archbold (34th Edn.))."

Certainly, as we have seen, a man lawfully in part of a house may commit

housebreaking by "breaking" into another part of it. But in so far as this passage from the judgment assumes that climbing over a partition wall is a "breaking" for that purpose, that proposition is supported neither by the wording of s. 293 of the Penal Code, which must be first resorted to, nor by the English decisions, which may be resorted to only in so far as that section leaves the matter unclear. Section 293 in effect defines "breaking" as meaning either the actual (i.e. physical) breaking of something, or the opening of something by moving the whole or a part of it. Climbing over a wall is neither of these things. Nor do the English authorities cited in the passage from Archbold relied on by the trial magistrate go as far as he would appear to think. The only exception to the English common law rule upon which s. 293 is modelled) that a breaking must entail the physical moving of something is in the case of chimneys, it having been held in *R. v. Brice* (1), 168 E.R. 892, that entry into a house by getting down the chimney is a "breaking", on the ground that a chimney is as much closed as the nature of things will permit. But this decision is not to be extended to other apertures or spaces regarding whose size there is (as in the present case) no evidence. In *R. v. Spriggs & Hancock* (2), 174 E.R.122, an entry through a hole in the roof left for the purpose of light was held not to constitute a "breaking", and Bosanquet, J., distinguishing *R. v. Brice*, said –

> "The entry by the chimney stands upon a very different footing: it is a necessary opening in every house, which needs protection: but if a man choose to leave an opening in the wall or roof of his house, instead of a fastened window, he must take the consequences."

The construction of African houses of a primitive kind is, of course, wholly different from that of houses in England; chimneys of the English style of construction are absent, and so usually are windows, while internal partitions are no doubt common. If in the present case there had been more detailed evidence of what it was that the appellant must have climbed over or through if he did not unlock the door, it might possibly have been open to the trial magistrate to find a "breaking" on the facts. But here, the word "partition" was not even mentioned. All that the complainant said on the point was:

> "There is no ceiling above my room. It is not difficult to climb into my room."

Nor is it recorded that the magistrate inspected the premises. There was thus no direct evidence as to how the appellant entered the room, nor any circumstantial evidence to prove, certainly not beyond a reasonable doubt, that he must have moved something in order to do so, or alternatively that he came through a hole or space which was there of necessity and which was as much closed as the nature of things permitted. And to hold that the mere climbing of a wall or partition is a breaking is, as I have said, supported neither by the wording of s. 293 nor by the English authorities, even assuming that the evidence established that the appellant climbed a partition.

On these grounds the conviction for housebreaking, on the first count, contrary to s. 294 (1) of the Penal Code, cannot stand, and is set aside. The evidence, however, was ample to support a conviction for the lesser offence of being in a building used as a human dwelling with intent to commit a felony therein, contrary to s. 295 of the Penal Code, since the appellant must have conceived and harboured such an intent before or at the moment of entering the locked room and stealing from it. I accordingly substitute for the conviction under s. 294 (1) on the first count a conviction under s. 295: and for the sentence of two years' imprisonment on that count I substitute a sentence of one year's

imprisonment, to run concurrently with the sentence of six months' imprisonment on the second count.

Conviction of theft affirmed. Conviction foy housebreaking set aside and conviction for beinr in a dwelling-house with intent to commit felong therein substituted.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika
N. D. Macleod (Ag. Crown Counsel, Tanganyika)

Balwant Singh v Joginder Singh and another
[1962] 1 EA 395 (SCK)

Division:	HM Supreme Court of Kenya at Kisumu
Date of judgment:	30 May 1962
Case Number:	13/1959
Before:	Farrell J
Sourced by:	LawAfrica

[1] Practice – Pleading – Application for representation order – Action for libel – Claim for damages against president and secretary of society – Officers sued as "acting on behalf of" the members – Whether all members have same interest in the defence to the action – Civil Procedure (*Revised*) *Rules*, 1948, *O. I, r.* 8 *and O. VI, r.* 18 (*K.*) *– Rules of the Supreme Court, O. XVI, r.* 9.

Editor's Summary

The plaintiff sued the two defendants as president and honorary secretary respectively "acting on behalf of the Ramgharia Sabha Kericho" (hereinafter referred to as "the society") and claimed damages for an alleged libel published in a letter written by the second defendant as secretary. At the hearing of the suit a preliminary objection was raised by counsel for the defendants that no application had been made for a representation order under O. 1, r. 8 of the Civil Procedure (Revised) Rules. The objection was upheld and the action stayed pending an appropriate application. The plaintiff subsequently made such an application and in his affidavit in support thereof averred that as the second defendant had written on the secretary's headed paper and the defamatory letter purported to be written on its behalf, all the members of the society were liable as principals as well as the secretary in his personal capacity, and that the president and secretary were the proper person to be sued and to defend the suit on behalf of the society.

Held –

(i) however desirable it might seem that the liability of the members of the society should be tried in

the action, the application for a representation order must, in view of the weight of authority to the contrary, be refused.

(ii) the plaintiff should have leave to amend the plaint but on the condition that the words “acting on behalf of the Ramgharia Sabha Kericho” be struck out.

Order accordingly.

Cases referred to in judgment:

(1) *Mercantile Marine Service Association v. Toms and Others*, [1916] 2 K.B. 243.

(2) *London Association for Protection of Trade and Another v. Greenlands Limited*, [1916] 2 A.C. 15.

(3) *Hardie and Lane v. Chiltern and Others*, [1928] 1 K.B. 663.

(4) *Campbell v. Thompson and Another*, [1953] 1 All E.R. 831.

Judgment

Farrell J: The first application before me is for an order under O. I, r. 8, that the defendants Joginder Singh and Pal Singh, being respectively the president and hon. secretary of the unincorporated body known as Ramgharia Sabha Kericho (to which I shall refer as R.S.K.) may be sued or authorised to defend the suit on behalf of all members of the R.S.K., and for consequential directions. The second application is for an order under O. VI, r. 18, giving leave to amend the plaint. It will be convenient to deal with both applications together.

The plaint was filed on December 20, 1958. In it the plaintiff claims damages for an alleged libel published in a letter written by the second defendant as secretary of R.S.K. on March 28, 1957. The defendants are sued as the president and hon. secretary respectively "acting on behalf of R.S.K.". Any uncertainty in the meaning of these words is clarified in the body of the plaint which alleges clearly that in writing the letter the second defendant was acting on behalf of himself, the first defendant, and all the other members of the society.

The case was set down for trial before Wicks, J., on October 1, 1959. At the hearing a preliminary objection was raised by counsel for the defendants that no application had been made for a representation order under O. I, r. 8. The learned judge upheld the objection and stayed the action, pending the making of an appropriate application.

The present applications, together with a third application which has since been withdrawn, were filed on February 16, 1960, and have only now come up for hearing.

From this short summary of the history of the suit, it emerges that there has been a quite remarkable lack of diligence on the plaintiff's side in bringing the case to trial. Whether the fault lies with the plaintiff himself or his advocates is not clear, but it is to be remarked that he has changed his advocates twice, and that his present advocate was appointed as recently as February 17, 1962, and cannot be blamed for any delay.

In his affidavit in support of his application for a representation order, the plaintiff avers that the R.S.K. has at least 150 members, and that the letter which is alleged to be defamatory was written by the second defendant on paper headed with the name of the society and purported to be written on its behalf. In those circumstances he is advised that all the members of R.S.K. are liable as principals as well as the secretary in his personal capacity, and the president and secretary are the proper persons to be sued and to defend the suit on behalf of the society.

The material words of the rule are contained in the first sentence of sub-r. (1) as follows:

> "Where there are numerous persons having the same interest in one suit one or more of such persons may sue or be sued, or may be authorised by the court to defend in such suit, on behalf of or for the benefit of all others."

The remainder of the rule deals with consequential matters.

In the present case it would obviously be impracticable to bring 150 defendants before the court, and unless constrained by authority to the contrary I should have been disposed to make the order for the following reasons. The plaintiff's case against the members of R.S.K. appears to be based on the well-established rule that a principal is liable for the act of an agent done within the scope of his authority. That this rule extends to defamation is clear from the following dicta from Gatley on Libel and

Slander (4th Edn.) at p. 404:

> "A principal or master is civilly liable for defamatory words published by his agent or servant with his authority or consent. He is also liable where his agent or servant, in publishing the words, was acting within the scope of his employment, even though he was expressly forbidden to publish any defamatory matter, or he published it solely for his own benefit and not for the benefit of his principal or master."

This principle has been applied so as to make a corporation or company liable for defamatory words published by its servants or agents while acting within the scope and in the course of their employment (loc. cit. p. 419). There would appear to be no reason in principle why the members of an unincorporated association should not similarly be liable for defamatory words published by its secretary acting in the course of his employment as such. The members would have a common interest in defending the suit, and prima facie it would be appropriate in such a case to make a representation order under O. 1, r. 8.

There is, however, powerful authority to the contrary. The material words of the rule are identical with the words of the English O. XVI, r. 9. In *Mercantile Marine Service Association v. Toms and Others* (1), [1916] 2 K.B. 243, the Court of Appeal held in similar circumstances that no representation order ought to be made. In that case the claim was in respect of an alleged libel published in a journal owned by a certain guild which was an unincorporated body. The three defendants were respectively the chairman, secretary and vice-chairman of the guild, and an order was sought that they should be appointed to represent all the members of the guild. In the following passage in his judgment Swinfen Eady, L.J., at p. 246 gives his reasons for refusing to make the order:

> "I have great difficulty in seeing that in this case there are numerous persons having the same interest in this cause or matter within the meaning of the rule. The action is for libel, and the plaintiffs must prove who published the libel, and prima facie only those who have published it either by themselves or by their servants or agents or have authorised its publication are liable. The various members of this association may be in a wholly different position. If the members of the management committee were sued, and if in fact they had authorised the publication of the libel, they could raise such defences as might be open to them. It might be that their defence would be that the words complained of were not capable of the meaning alleged or of any defamatory meaning, or that the words did not refer to the plaintiffs. The other members of the association, if sued, might say that, however defamatory the words complained of might be, they did not authorise their publication; that they were on the high seas and knew nothing about the matter. In my opinion this rule is not intended to apply to such a case as this. I think that the observation of Lindley, L.J., in *Temperton v. Russell*, [1893] 1 Q.B. 435 (towards the end of p. 438) is applicable to this case where he says – I am paraphrasing it to make it applicable to the present case – that the persons assumed to be represented by these three officers, the chairman, vice-chairman, and secretary, have no such interest as is contemplated by the rule. I asked during the course of the argument whether there is any authority in the case of an action of tort, because this is pure tort, for the application of this rule, and no case has been referred to, and so far as I know there is no case in the books in which it has been done. In *Wood v. McCarthy*, [1893] 1 Q.B. 775, Wills, J., referring to the observation of Lindley, L.J., on O. XVI, r. 9, in *Temperton v. Russell* (supra) (near the top of p. 438), said that the Lord Justice was referring to the well-established practice in the Court of Chancery, and was pointing out the distinction in that respect

between actions of contract and actions of tort. Lindley, L.J., in the passage referred to by Wills, J., said this:

> " 'This expression only extends, we think, to persons who have or claim some beneficial proprietary right, which they are asserting or defending in the cause or matter. The plaintiff in this case sues for damages, and the action . . . is founded on tort.'
>
> It is true that the limitation of the rule stated by Lindley, L.J., namely, that the expression 'having the same interest in one cause or matter' only extends to persons who have or claim some beneficial proprietary right which they are asserting or defending in the cause or matter, has been dissented from, and is no longer law. But apart from that the decision in *Temperton v. Russell* (supra) is good law. In *Wood v. McCarthy* (supra), Wills, J., was of opinion that O. XVI, r. 9, did not apply to actions of tort, and I am not aware that the rule has ever been applied in cases of the kind, and one can see many reasons why it should not be so applied. The judgments of Buckley, L.J., and of Kennedy, L.J., in *Walker v. Sur*, [1914] 2 K.B. 930 illustrate this. There are, no doubt, dicta in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, especially in the speech of Lord Macnaghten, which indicate that in a proper case it is possible that an order of that kind may be made; but I am quite satisfied that the present case is not one of those cases, and no order ought to be made here. If it be the fact that the issue of this paper contains a libel, the plaintiffs can sue and obtain relief against the persons who have authorised the libel and who have directed its publication."

Similar questions were considered in the House of Lords in *London Association for Protection of Trade and Another v. Greenlands Limited* (2), [1916] 2 A.C. 15. In that case proceedings in respect of an alleged libel had irregularly been brought against the association in its own name. In his speech at p. 30 Lord Atkinson appears to suggest that it would have been proper to proceed under O. XVI, r. 9, but Lord Parker of Waddington at p. 39 was very clearly of the opposite opinion. After referring to what he calls "the club cases" he says:

> "In view of such cases it would be going very far to hold that every member was liable for the tort of the secretary, even though such tort were committed in the course of carrying out the duties assigned to him under the contract between him and the persons who engaged him. In other words, there might be separate defences open to some members of the association and not to others, and if this were so there would be no common interest within the rule."

In *Hardie and Lane v. Chiltern and Others* (3), [1928] 1 K.B. 663, application was made for an order under O. XVI, r. 9, to enable the plaintiff to sue the defendants as representatives of other members of the Motor Trade Association, an unincorporated body. One of the causes of action was libel, but this claim was ultimately abandoned. The Master refused the order, the judge on appeal confirmed his refusal, and in the Court of Appeal Lord Hanworth, M.R., in giving reasons for dismissing the appeal said at p. 696:

> "It appears to me that the words of Lord Parker in *London Association for Protection of Trade and Another v. Greenlands Ltd*., and those of Seinfen EadY, L.J., in *Mercantile Marine Service Association v. Toms* are cogent to show that in the present case there is no ground for saying that the members of the Association have the same interest in the action or the defence to it or come within the ambit of O. XVI, r. 9."

Lawrence, L.J., at p. 701, also referred to the speech of Lord Parker as setting out

> "cogent reasons why such an action as the present does not come within O. XVI, r. 9."

The only case cited in support of the opposite view is *Campbell v. Thompson and Another* (4), [1953] 1 All E.R. 831, in which the plaintiff, who was employed as a cleaner by an unincorporated members' club, sued the assistant honorary secretary and the chairman of the house committee for damages for breach by the members of the club of the duty to take reasonable care of her safety as an invitee or servant of the members, and Pilcher, J., after citing the judgment of Swinfen Eady, L.J., in *Mercantile Marine Service Association v. Toms* (1), made an order under O. XVI, r. 9, directing the two named defendants to be appointed to represent all persons who had been members of the club on the date of the plaintiff's accident. This, of course, was an action for tort and the learned judge made the order because he was satisfied that the named defendants and all the other club members had the same interest in resisting the plaintiff's claim. It may, however, be of some significance that both parties were anxious to have the issue decided on the merits, and supported the application: and, furthermore, that as the default alleged was an omission of the common law duty to take care lying on the members jointly as employers, it was easier to be satisfied that there was a common interest than it would if it were sought to make the members vicariously liable for a positive wrongful act committed by one or more of them. Finally, it may be observed that if there is any conflict between *Campbell v. Thompson* (4), and the decisions of the Court of Appeal already cited, the latter must prevail even though earlier in date, as being decisions of a higher tribunal.

After reviewing the authorities, Gatley (loc. cit.) at p. 429 concludes that where a libel is contained in a journal published by an unincorporated association (or presumably in any other writing published by a servant of the association) the plaintiffs' only course is to sue the officers or members of the association who have authorised the libel and who have directed its publication. Even though it might, with respect, not be difficult to criticize in some particulars, the grounds of decision of the cases cited, it is not in my view possible to draw a valid distinction between (in particular) *Mercantile Marine Service Association v. Toms* (1), and the instant case. Even if the English cases are not strictly binding on me, they have high persuasive authority, and it would be temerarious in the extreme to fly in the face of the opinions of such eminent judges. That being so, however desirable it might seem that the liability of the members of the R.S.K. should be tried in the action, I find myself constrained to refuse the application for a representation order under O. I, r. 8.

Order accordingly.

For the applicant:
Mota Singh & Guram, Nairobi
Mota Singh

For the respondents:
M. H. Malik & Co., Kisumu
A. H. Malik

Pradhan Mulji Walji v Nurbai Jina Jeraj

[1962] 1 EA 400 (HCT)

Division:	High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	30 April 1962
Case Number:	34/1961
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Arbitration – Stay of proceedings – Contract containing arbitration clause – Action in subordinate court – Defence filed pleading arbitration clause – Application for stay of proceedings – Whether defendant entitled to stay after filing defence – Indian Code of Civil Procedure, 1908, *Second Schedule, para* 18 – *Indian Civil Procedure Rules, O. XIV, r.* 1 (5) – *Arbitration Ordinance* (*Cap.* 15), *s.* 3 *and s.* 6 (*T.*).

Editor's Summary

The appellant sued for damages for breach of a contract which contained an arbitration clause. In the respondent's defence the first material fact pleaded was the arbitration clause and the prayer sought a stay. The respondent then applied for a stay of the proceedings so that the dispute could be referred to arbitration. The magistrate having ordered a stay, the appellant appealed on the main ground that the application for a stay ought to have been made "at the earliest opportunity" and in particular that it ought to have been made before filing the defence.

Held –

(i) as the action was filed in the subordinate court, the relevant provision of the law governing the stage at which, or the time within which, the application for a stay of proceedings should have been made was para. 18 of the Second Schedule to the Indian Code of Civil Procedure, 1908, as it existed in 1920, and not s. 6 of the Arbitration Ordinance which applies to suits triable only by the High Court.

(ii) the Indian Code of Civil Procedure, Second Schedule, para. 18 requires that the application for a stay of proceedings should be made "at the earliest opportunity and in all cases where issues are settled at or before such settlement" and not before filing the defence as is required by s. 6 of the Arbitration Ordinance.

(iii) the application for a stay of proceedings was made within a reasonable time and before any settlement of issues; accordingly the application for a stay was within the time allowed by para. 18 ibid.

Appeal dismissed.

Cases referred to in judgment:

(1) *New Zealand Insurance Company Ltd. v. Andrew Spryon*, [1962] E.A. 74 (T.).

(2) *Austin & Whiteley Ltd. v. S. Bowley & Son* (1913), 108 L.T. 921.

(3) *Brighton Marine Palace and Pier Ltd. v. Woodhouse*, [1893] 2 Ch. 486.

(4) *Theodore Wendt v. Chhaganlal Jiwan & Co*. (1930), 1 T.L.R. (R.) 460.

(5) *Metropolitan Tunnel and Public Works v. London Electric Railway Co*., [1926] 1 Ch. 371.

Judgment

Sir Ralph Windham CJ: This is an appeal from a ruling in the resident magistrate's court ordering a stay of proceedings in a suit filed by the plaintiff/appellant in that court, for damages for breach of a written contract between the parties. The order for stay was made upon the application of the defendant-respondent, in order that the dispute should be referred to

arbitration, by reason of an arbitration clause in the contract. The appellant contends that the learned trial magistrate erred in ordering the stay, his main ground being that the application for a stay ought to have been made "at the earliest opportunity" and in particular that it ought to have been made before the filing of the written statement of defence or the taking of any other steps in the proceedings, whereas in fact it was first made in the statement of defence itself, in the form of a reference to the existence of the arbitration clause and a consequential prayer for the stay. The appellant also argues, though I think with less conviction, that in any event the learned magistrate exercised his discretion unjudicially in ordering the stay.

The suit was, as I have said, filed in a subordinate court and not in the High Court; and the first point to be made clear is that, this being so, the relevant provision of the law governing the stage at which, or the time within which, the application for a stay of proceedings should have been made is para. 18 of the Second Schedule to the Indian Code of Civil Procedure, 1908, as it existed in 1920, and is not s. 6 of the Arbitration Ordinance (Cap. 15), which section, by operation of s. 3 of that Ordinance, applies to suits triable only by the High Court and not (in the absence of special orders to that effect which have not been made) to suits triable by a subordinate court. In this respect it is to be noted that the position differs in a vital respect from that which was recently considered in this court by Daniel, Ag. J., in *New Zealand Insurance Company Ltd. v. Andrew Spryon* (1), [1962] E.A. 74 (T.), which was concerned with a case instituted in the High Court. Paragraph 18 of the Second Schedule to the Indian Code of Civil Procedure reads as follows:

> "18. Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the court to stay the suit; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit."

The vital words in the above paragraph, as touching the time within which an application for stay must be made, are the words:

> "at the earliest opportunity and in all cases where issues are settled at or before such settlement."

The corresponding words in s. 6 of the Arbitration Ordinance are:

> "at any time after appearance, and before filing a written statement, or taking any other steps in the proceedings."

It is suggested for the appellant that the words – "in all cases where issues are settled at or before such settlement" in para. 18 are appropriate only to India and to the court procedure there, that they should be ignored in applying the paragraph to Tanganyika, and that the lacuna that would be created by so ignoring them should be filled by resorting to the words –

> "before filing a written statement or taking any other steps in the proceedings"

in the otherwise non-applicable s. 6 of the Arbitration Ordinance. I can see nothing that could possibly justify this court in adopting such a course. The

duty of this court is to interpret and apply the relevant law unless the circumstances are such that the application of any part of that law would either be impossible or would lead to such difficulty or absurdity that it must be assumed that the legislature never intended that part of the law to be applicable. Such is far from the case here. For there do, of course, exist cases in Tanganyika where issues are settled, and therefore the words – "at or before such settlement" in para. 18 are appropriate to Tanganyika and must be given their due weight. In the present case, the provision of the Indian Code of Civil Procedure governing the settlement of issues is O. XIV, r. 1 (5), which provides that issues shall be framed at the first hearing of the suit, which is of course after the close of the pleadings.

Applying, then, the requirements of para. 18 to the present case, there is nothing therein which requires that the application for a stay of proceedings must be before the filing of the written statement of defence, such as there is in s. 6 of the Arbitration Ordinance. The first requirement of para. 18 is that the application shall have been made "at the earliest possible opportunity". Learned counsel for the appellant concedes, rightly, that these words do not mean that the application must be made on the very day of, or the very day after, the service of the plaint upon the defendant, but that they simply mean that the application may be made within any reasonable time provided that it is the first "step" taken by the defendant after service of the plaint upon him. In the present case the only thing done by the defendant-respondent before he filed his written statement of defence was his formal notification of intention to defend; and it has been held that such a notification is not a "step" for this purpose: *Austin & Whiteley Ltd. v. S. Bowley & Son* (2) (1913), 108 L.T. 921. There was also a certain exchange of correspondence between the parties' advocates, between the service of the plaint on the respondent and the filing of his statement of defence; but such letters similarly have been held not to constitute a "step" in the proceedings: *Brighton Marine Palace and Pier Ltd. v. Woodhouse* (3), [1893] 2 Ch. 486. In any event the application for a stay was made within a reasonable time and before any settlement of issues, and since it was so made, it was within the time allowed by para. 18. The point was so decided by this court in *Theodore Wendt v. Chhaganlal Jiwan & Co*. (4) (1930), 1 T.L.R. (R.) 460, a decision rightly relied on by the learned trial magistrate in delivering his ruling. It remains only to mention that in the statement of defence the first material fact to be pleaded was the existence of the arbitration clause in the written contract being sued on, and the first relief prayed for was a consequential stay; non-liability for damages under the contract and dismissal of the claim were pleaded and prayed later, the latter as an alternative to the prayer for a stay.

On these grounds I hold that the learned trial magistrate was right in holding that he had a discretion to order the stay; and I turn to deal briefly with the alternative contention that, even if he had, he ought not to have exercised it in the respondent's favour. The only argument advanced in support of this submission is that the statement of defence admits the breach of contract on which the claim is based, and that accordingly a reference to arbitration would only tend to delay the inevitable. But that contention cannot prevail; for although the defence admits the breach, it denies that the appellant suffered damages through it, and goes on to allege a running account between the parties, covering a number of separate transactions as well as the contract sued on, upon which account a balance of Shs. 912/48 is due from the appellant to the respondent. The appellant's claim is therefore very much in issue on the pleadings, and his success in obtaining the damages claimed, or any damages at all, is far from inevitable. Both from the wording of para. 18 and upon the decided authorities, the burden lies on the appellant, as the party opposing a stay sought for the purpose of a reference under an arbitration clause, to show why

the court should not exercise its discretion to refer the matter: see *Metropolitan Tunnel and Public Works v. London Electric Railway Co.* (5), [1926] 1 Ch. 371, at p. 385. The appellants have failed to discharge that burden.

For these reasons this appeal must be dismissed with costs.

Appeal dismissed.

For the appellant:
Mahmud N. Ratlansey & Company, Dar-es-Salaam
K. R. K. Tampi

For the respondent:
Adrian Roden, Dar-es-Salaam

R v Ivan Arthur Camps
[1962] 1 EA 403 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	2 May 1962
Case Number:	13/1962
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – MacDuff and Edmonds, JJ.

[1] Company – Director – Liability – Director validly appointed – Share qualification not taken as required – Disqualification – Acting as director after disqualification – Whether de facto director liable for offences under statute – Companies Ordinance (*Cap.* 288), *s.* 2, *s.* 27, *s.* 112, *s.* 123, *s.* 142, *s.* 268 *and s.* 270 (*K.*) *– Criminal Procedure Code, s.* 137 (*K.*) *– Companies Act*, 1862, *s.* 165 *– Companies* (*Consolidation*) *Act*, 1908 *– Companies Act*, 1929 *– Larceny Act*, 1861, *s.* 84 *– Defence* (*General*) *Regulations, reg.* 91.

Editor's Summary

The respondent, in his capacity as a director of a company, had been charged with several offences under the Companies Ordinance. Although the directors of the company had under art. 96 of the Company's Articles of Association duly appointed him to be director and he had acted as such, he never acquired the required share qualification but in a statutory return, subsequent to his appointment, he was shown as a director which, by art. 84, was fixed at one fully paid-up share in his own right. Article 87(*c*) which was substantially in the same terms of s. 142 (1) and s. 142 (2) of the Ordinance provided that the office of

director shall be vacated if a director ceases to hold the number of shares required to qualify him for office or fails to acquire the same within two months after his election or appointment. The magistrate held that as the respondent had never possessed or acquired his qualifying share his appointment was invalid and that there was no case for him to answer. He also held that the respondent was never even a de facto director and that in any event a de facto director was not criminally liable as a director for offences under the Companies Ordinance. Against that decision the attorney-general appealed to the Supreme Court by way of case stated, but the appeal was dismissed, the court holding that a de facto director was not liable qua director for criminal offences under the Companies Ordinance. On a further appeal it was submitted for the Crown that the respondent was validly appointed a de jure director, that at the expiration of two months he ceased to be a de jure director, that thereafter he was a de facto director and that a de facto director was criminally liable for offences under the Companies Ordinance.

Held –

(i) the word "director" in the Companies Ordinance includes a de facto director unless the context otherwise requires, and looking at the mischiefs at which the sections in question aimed a de facto director is as much a person whose conduct should be the subject of the sections as a person who has been duly appointed a director.

(ii) the respondent was duly and validly appointed a de jure director but he ceased to be a de jure director two months later as he failed to acquire his share qualification within that time.

(iii) if the respondent acted as a director after the expiration of two months from his appointment he was then a de facto director and he was a director for the purposes of those sections of the Companies Ordinance which it was alleged he had contravened.

Appeal allowed. Acquittal set aside. Case remitted to the trial magistrate to make a finding whether the respondent was a de facto director during the time covered by the charge and then to decide whether there was a case for him to answer, and, if so, to determine the case according to law.

Cases referred to in judgment:

(1) *Re International Cable Company, Ex parte Official Liquidator* (1892), 66 L.T. 253.

(2) *Gibson v. Barton* (1875), L.R. 10 Q.B. 329.

(3) *Re Canadian Land Reclaiming and Colonizing Company* (*Coventry and Dixon's Case*) (1880), L.R. 14 Ch. D. 660.

(4) *R. v. Lawson*, [1905] 1 K.B. 541.

(5) *Dean v. Hiesler*, [1942] 2 All E.R. 340.

(6) *Pope v. R.*, [1960] E.A. 132 (C.A.).

Judgment

Sir Ronald Sinclair P, read the following judgment of the court: The respondent was charged before a resident magistrate, Nairobi with the following offences:

First count: Failing to keep proper books of account contrary to s. 268 (1) of the Companies Ordinance (Cap. 288).

Second Count: Failing to hold an annual general meeting contrary to s. 112 of the Companies Ordinance (Cap. 288).

Third count: Failing to lay before a company a profit and loss account contrary to s. 123 (1) of the Companies Ordinance (Cap. 288).

Fourth count: Failing to lay before a company a balance sheet contrary to s. 123 (2) of the Companies Ordinance (Cap. 288).

Fifth count: Being an unqualified person acting as a director of a company contrary to s. 142 (5) of the Companies Ordinance (Cap. 288).

All the counts relate to Rhokatan Investments (Kenya) Limited, a private company with limited liability registered under the Companies Ordinance, and in the first four counts the respondent was charged in the capacity of a director of that company. The respondent pleaded not guilty to the first four counts and at the close of the case for the prosecution the trial magistrate ruled that there was no case for the respondent to answer and acquitted him on those counts. He also held that the first count was bad for duplicity. Against that decision the attorney-general appealed to the Supreme Court by way of case stated. To the fifth count the respondent pleaded guilty and was sentenced to pay a fine of Shs. 12,400/-. He appealed to the Supreme Court against the severity of the sentence. The two appeals, which were consolidated for

hearing, were dismissed by the Supreme Court. The attorney-general now appeals to this court against the dismissal of his appeal by the Supreme Court.

The facts, as set out in the case and the magistrate's ruling which forms part of the case, can be briefly stated. The relevant provisions of the Articles of Association of Rhokatan Investments (Kenya) Limited (hereinafter referred to as "the company") are:

> "Article 84. 'Until otherwise resolved in general meeting, the qualification of a director shall be the holding in his own right alone and not partly with any other person of at least one fully paid share in the capital of the company.'
>
> "Article 96. 'The directors shall have power at any time and from time to time to appoint any other person to be a director of the company, either to fill a casual vacancy or as an addition to the board, but so that the total number of directors shall not at any time exceed the maximum number fixed as hereinbefore mentioned. Any director so appointed shall hold office only until the next following ordinary general meeting, when he shall retire, but shall be eligible for re-election.'
>
> "Article 87. 'The office of a director shall be vacated:
>
>
>
> (*c*) If he cease to hold the number of shares required to qualify him for office or fail to acquire the same within two months after his election or appointment.'"

Article 87(*c*) merely repeats the substance of the provisions of sub-s. (1) and sub-s. (3) of s. 142 of the Companies Ordinance which read:

> "142 (1) Without prejudice to the restrictions imposed by the last foregoing section, it shall be the duty of every director who is by the articles of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles.
>
> "(3) The office of director of a company shall be vacated if the director does not within two months from the date of his appointment or within such shorter time as may be fixed by the articles, obtain his qualification, or if after the expiration of the said period or shorter time he ceases at any time to hold his qualification."

The directors of the company, acting under art. 96, appointed the respondent as a director on February 10, 1959. At no time did he have or acquire the requisite share qualification under art. 84. In a subsequent statutory return, the date of which is not given, the respondent's name appeared as a director of the company, but there is no finding, either in the case or in the learned magistrate's ruling which forms part of the case, that he acted as a director during the period covered by the first four counts of the charge. The learned judges of the Supreme Court answered the questions submitted to them on the basis that the respondent was a de facto director at the material times.

The sections of the Companies Ordinance which the respondent was charged with contravening in the first four counts provide that a director of a company is guilty of an offence in the circumstances set out therein.

The learned magistrate held that as the respondent never possessed or acquired his qualifying share, his purported appointment as a director on February 10, 1959, was invalid and no appointment at all. He then appears to have held that, since there was no appointment at all as distinct from a defective appointment, the respondent was never even a de facto director. However, he came to the

conclusion that in any event a de facto director is not criminally liable as a director for offences under the Companies Ordinance.

The questions submitted for the opinion of the Supreme Court were as follows:

"1. Was the learned magistrate correct in holding that the prosecution had failed to prove that the accused was duly and validly appointed as a director of Rhokatan Investments (Kenya) Limited?

"2. Was the learned magistrate correct in law in holding that the appointment of the accused as a director of Rhokatan Investments (Kenya) Limited was invalid and hence no appointment at all?

"3. Was the learned magistrate correct in law in holding that the appointment of a person without a qualifying share to the board of Rhokatan Investments (Kenya) Limited, would not be a valid appointment?

"4. Was the learned magistrate correct in law in holding that a de facto director cannot be charged as a director with a criminal offence under the Companies Ordinance?

"5. Was the learned magistrate correct in law in holding that the first count was bad for duplicity?

"6. Was the learned magistrate correct in law in holding that there was no case for the accused to answer on count 1 of the charge?

"7. Was the learned magistrate correct in law in holding that there was no case for the accused to answer on count 2 of the charge?

"8. Was the learned magistrate correct in law in holding that there was no case for the accused to answer on count 3 of the charge?

"9. Was the learned magistrate correct in law in holding that there was no case for the accused to answer on count 4 of the charge?"

The answers of the learned judges of the Supreme Court to those questions are summarised in the following passage from their judgment:

> "In our view the simple answer to the questions before us is that the respondent was not a director in fact at the material time, and it was not open to prosecute him as such. To repeat the words of Tucker, J., 'If it had been thought necessary or desirable to include such persons (i.e. de facto directors) within the purview of this regulation, the appropriate words could have been used to effect that purpose'. That the legislature did not intend to include such persons is, we think, clear from the provisions of s. 142 (5), under which the respondent was charged on the fifth count, and by which a penalty is imposed upon 'any unqualified person' who 'acts as a director of the company'. The respondent was correctly charged under this sub-section and it is difficult to understand why it was thought necessary to charge him on the other counts.
>
> "In view of this opinion it is unnecessary for us to consider the question of whether the learned magistrate was right in holding that the first count was bad for duplicity. The answers to the other questions posed for our opinion are, speaking in general terms, in the affirmative."

Those answers are in some respects a little obscure, but it is quite clear that the learned judges held that a de facto director is not liable qua director for criminal offences under the Companies Ordinance.

Mr. Brookes for the Crown submitted that the respondent was validly appointed a de jure director; that at the expiration of two months he ceased to be a de jure director; that, if he thereafter continued to act as a director, he was a de facto director; that a de facto director is criminally liable for offences under the Companies Ordinance.

Where the acquisition of a share qualification is not a condition precedent to the appointment of a director, he may be appointed and act before he qualifies and his acts as a director are valid if done before he is bound by law to acquire his qualification: see Halsbury's Laws of England (3rd Edn.) Vol. 6, p. 285 and *Re International Cable Company, Ex parte Official Liquidator* (1) (1892), 66 L.T. 253. In the present case the acquisition of a qualifying share by the respondent was clearly a condition subsequent, and not a condition precedent, to his appointment. In our view he was validly appointed as a director on February 10, 1959, and he continued to be a de jure director until the expiration of two months from the date of his appointment when under art. 87 his office of director was vacated. If he then continued to act as a director he was a de facto director only.

We turn now to the main question, namely, whether a de facto director is liable qua director for criminal offences under the Companies Ordinance. In support of his contention that a de facto director is so liable, Mr. Brookes relied on the definition of "director" in s. 2 of the Companies Ordinance and on *Gibson v. Barton* (2) (1875), L.R. 10 Q.B. 329, *Re Canadian Land Reclaiming and Colonizing Company* (*Coventry and Dixon's Case*) (3) (1880), L.R. 14 Ch. D. 660 and *R. v. Lawson* (4), [1905] 1 K.B. 541.

"Director" is defined in s. 2 of the Companies Ordinance as including "any person occupying the position of director by whatever name called". The same definition first appeared in England in the Companies (Consolidation) Act, 1908, and was repeated in the subsequent Companies Acts. Before the 1908 Act there was no definition of "director". The cases relied on by Mr. Brookes were therefore decided when there was no definition of "director" in the legislation. We propose to examine them first, before considering the meaning and effect of the definition.

The facts in *Gibson v. Barton* (2) can be taken from the headnote of the report:

> "By s. 26 (of the Companies Act, 1862): 'Every company . . . shall make once at least in every year a list of all persons who on the fourteenth day succeeding the day on which the ordinary general meeting . . . is held are members of the company . . . and a copy shall forthwith be forwarded to the registrar of joint stock companies.' By s. 27 'if any company . . . makes default in complying with the provisions of the Act with respect to forwarding such list such company shall incur a penalty . . . and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur a like penalty'.
>
> "The appellant was the secretary of a company registered under the Companies Act, 1862. The articles of association did not provide for the appointment of a manager, and none had been appointed. At a meeting of directors in 1872, the appellant reported that he had called a general meeting of the shareholders; and in 1874 he had, in a letter to the directors, stated that unless certain contracts were carried out he should feel it his duty to summon a general meeting of shareholders. No ordinary general meeting of shareholders had been held in the year 1873, and no list of shareholders had been forwarded to the registrar in compliance with s. 26, and the appellant had not taken any steps to cause a meeting to be held in 1873. He was convicted on an information charging him, as manager, with authorising a default in forwarding a copy of the list of shareholders to the registrar in 1873."

It was held by Blackburn and Lush, JJ. (Quain, J. dissenting) –

> "that the conviction ought to be affirmed: for that there was evidence that the appellant was manager de facto, and therefore a manager within

> s. 26: and as he took no steps in 1873 to call a meeting, and thereby made it impossible for him to forward to the registrar a list of the members, there was evidence that he had knowingly and wilfully authorised a default within s. 27."

In his judgment Blackburn, J., said at p. 337 of the report:

> "The evidence comes to no more than this, that he was permitted by the board of directors to manage the company generally, just as if he had been legally appointed by them to act as manager. I think there is evidence that the appellant took upon himself to act, and did act just as if he was such manager. The question, therefore, is whether a person who is thus a manager de son tort, – a manager in his own wrong – whether he can protect himself from the liability cast upon a manager under s. 27, by saying, 'I am not manager de jure'. I think he cannot."

and later at p. 341:

> "So, if a director were to set up in answer to a penalty under s. 27, that he was not a director, that he was illegally elected, the answer would be, 'You have acted as director, and were a director in your own wrong'."

Lush, J., said at p. 341:

> "Then is he a 'manager' within s. 27? I think he is, and that 'manager' in that section must mean manager de facto. I do not think that it is competent for him to say, "True, I acted as manager of the company; but yet, not being manager de jure, I can evade the liability imposed as between the public and the company by s. 26'. The appellant is fulfilling the duties of manager of the company, and is the person to whom the statute looks for the fulfilment of the obligations imposed under s. 26."

The observations of Blackburn, J., regarding the liability of a director were, of course, obiter. Commenting on those observations the learned judges of the Supreme Court said:

> "With respect we find it difficult to follow the reasoning of the learned judge in that case so far as the liability of a director de facto is concerned, for at p. 336 of his judgment he says, when referring to the provisions of s. 27. 'In what sense are the words "director" and "manager" used in that section? When the section says "director" it is plain enough a director is a director, but the words are "and manager". We have to say who is to be considered a manager.'
>
> "We understand him there to mean that the question of the penal liability of a director depends on whether the person sought to be charged is in fact a director, that is to say, one duly and validly appointed under and by virtue of the Act and the articles of association, while the question of who should be charged as a manager will depend upon the extent to which a person has acted in a managerial capacity."

With respect, we do not agree with the construction the learned judges of the Supreme Court have put on the judgment of Blackburn, J. We find it impossible to accept that that learned judge would have contradicted himself in the course of the same judgment in the way suggested by the learned judges of the Supreme Court. Reading the judgment as a whole we think that when Blackburn, J., said

> "It is plain enough a director is a director, but the words are 'and manager'. We have to say who is to be considered a manager",

he meant that there can be no dispute as to whether a person is or is not exercising the functions of a director; while the extent to which a person may have exercised managerial functions can vary considerably and it may be difficult in a particular case to say whether a person has or has not acted as "manager". Blackburn, J., in fact goes on to discuss this aspect of the matter saying

> "A manager would be, in ordinary talk, a person who has the management of the whole affairs of the company; not an agent who is to do a particular thing . . ."

We see no contradiction in the judgment which would detract from the force of the opinion expressed that a de facto director would be liable to the penalty under s. 27. The decision of the majority in that case in relation to the meaning of "manager" has been followed in a number of later cases and, so far as we are aware, has never been dissented from. We see no reason to doubt the correctness of that decision. The learned judges of the Supreme Court, however, preferred to follow the reasoning of Quain, J., in relation to the meaning of "director", although that reasoning as directed to the meaning of "manager" has never been followed. Quain, J., said in his dissenting judgment:

> "The penalty is, by the express terms of s. 27, imposed upon 'every director and manager of the company'. In my opinion the appellant is neither a director nor manager of the company within the meaning of that section. I think that 'manager' means a statutable manager, a manager appointed by virtue of the Act of Parliament and the articles of association; and, in a penal statute like this, we must so confine it, and impose the penalty only on a person who fills that character.
>
> "Therefore I think the appellant is not a 'manager' within the meaning of the Act of Parliament, and merely acting as manager de facto is not sufficient, because, if he is manager de facto he is not the manager in the statutable sense: he is the mere agent of the directors. The directors are responsible for his act, and the directors are liable to the penalty."

The facts of *Coventry and Dixon's* case (3) were that two gentlemen were appointed, and for some time acted, as directors of a company in which the qualification for a director was the holding of one hundred shares. Neither was or became the holder of any shares. After an order for winding up, the liquidator took out a summons asking that these two gentlemen might be respectively ordered, under the provisions of s. 165 of the Companies Act, 1862,

> "to contribute to the assets of the company £500, being the value of one hundred shares of the company, which they ought respectively to have taken to qualify them as directors"

or such other sum as the court should think just. Section 165 provided:

> "The court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the court think just."

Jessel, M.R., granted the application holding that de facto directors were directors for the purpose of the section. He said at p. 664 of the report:

> "No doubt they were not properly elected, and were, therefore, not de jure directors of the company; but that they were de facto directors of the company is equally beyond all question. The point I have to consider is whether the person who acts as de facto director is a director within the meaning of this section, and whether he can afterwards be allowed to deny that he was a director within the meaning of this section. I think he cannot."

He stated that his view was very strongly confirmed by *Gibson v. Barton* (2). Although the decision of the Master of the Rolls granting the application was reversed on appeal to the Court of Appeal on another ground, his conclusion that de facto directors were liable under the section was not disturbed. James, L.J., said at p. 670 of the report:

> "It was admitted by the appellants that these persons, as de facto directors, would be liable for any act of commission or any omission on their part in the same manner and to the same extent as if they had been de jure as well as de facto directors. They were, so to say, directors de son tort, and liable in that character, but not otherwise, and you must show something that they did which resulted in loss to the company, and for which, if they had been duly appointed directors of the company, the company would have been entitled to a remedy against them."

Section 270 of the Companies Ordinance provides a similar remedy against directors to that provided by s. 165 of the Companies Act, 1862. The learned judges of the Supreme Court distinguished *Coventry and Dixon's* case (3), from the present case on the ground that s. 165 was not a penal section, but one providing machinery

> "for compensating the company in respect of the loss occasioned by the misfeasance of de facto directors",

and that a penal enactment must be construed strictly. For the Crown it was contended that since the word "director" was defined the same meaning must be given to it throughout the Ordinance, whether used in a penal section or not, unless a clear contrary intention is expressed.

The third and last case on which the Crown relied is *R. v. Lawson* (4). In that case it was held that s. 84 of the Larceny Act, 1861, which made it a misdemeanour for

> "any director, manager, or public officer of any body corporate or public company"

to publish false statements with intent to deceive or defraud, applied to a person who, without having been appointed an officer of the company, has in fact acted throughout as the manager of the affairs of the company. Lord Alverstone, C.J., said in his judgment at p. 545:

> "In my opinion the mere perusal of the language of that section (i.e. s. 84) shows that the word 'manager' cannot be used in a technical sense. 'Director' is possibly a term of art; but ought the word 'manager' to have the limited meaning for which Mr. Innes contends? He says the manager must be an appointed officer of the company at any rate, whether all the formalities of appointment have been complied with or not, and that the word in the section does not apply to a person who in fact manages the affairs of the company. . . . we have not before us anything that would lead us to think that the word 'manager' is used in any technical or limited sense, and, looking at the mischief intended to be aimed at by the section, it seems to me that a de facto manager is as much a person whose conduct might be the subject of the section as a person who had been formally appointed manager."

Lord Alverstone concluded his judgment as follows at p. 549:

> "Finding the offence aimed at and contemplated by the section to be an offence the consequences of which might be just as serious if a de facto manager was guilty of the offence, and that the principle has been applied in *Gibson v. Barton* and approved of, or at least not dissented from, by this large number of judges, I have myself no doubt in coming to the conclusion that the direction of A. J. Lawrence, J., was right, and that the conviction must stand."

Darling, J., based his decision in that case, not on the narrow ground that the defendant was a manager de son tort, but on the ground that the defendant being a person who was doing the things which, if there had been a manager, the manager would have done, it would be taking an extraordinarily technical view in his favour to hold that he was not the manager.

Lord Alverstone in the first passage we have quoted referred to the possibility that the word "director" might be a term of art, but in his judgment Channell, J., said at p. 550 of the report:

> "I think that this is one of a group of sections dealing with offences which can only be committed by persons who occupy certain positions, but I think they can be convicted if they occupy those positions quite apart from whether they happen to have been either duly appointed or appointed at all to those positions."

That passage is obiter in so far as it relates to directors, but it will be observed that the learned judge considered that a person who *occupied the position of a director* could be convicted as a director whether he had been duly appointed or not. We emphasize the words "occupied the position of a director" because similar words are used in the definition of "director" in s. 2 of the Companies Ordinance.

The learned judges of the Supreme Court found strong support for the view which they took in the case of *Dean v. Hiesler* (5), [1942] 2 All E.R. 340. In that case the respondent was proceeded against under reg. 91 of the Defence (General) Regulations as being a director of a company at the time certain offences against the regulations were committed. It was proved that he was not appointed at a duly convened meeting of the board, though a return was sent to the registrar notifying a change of directors and giving the respondent's name as the new director. At all material times the respondent attended at the offices of the company, and signed letters, cheques and documents describing himself as a director. Apart from that, he did nothing as a director of the company, and at no time did he take up his qualifying shares. It was held that reg. 91 of the Defence (General) Regulations being a penal enactment, must be construed strictly, and the respondent, who had not been duly appointed could not be a director within the meaning of the regulation. Viscount Caldecote, L.C.J., said at p. 341 of the report:

> "I observe, first of all, upon this question, that we are not construing the language of the definition section of the Companies Act, 1929. What has to be decided is whether, following the terms of the Defence (General) Regulations, this respondent was a director of Wooltex Co. Ltd. Clearly he was not a director in the ordinary sense of the term. It is quite true he acted as a director: he signed letters and cheques and documents and, more particularly, he signed a return in which it appeared that he had been appointed a director of the company, and he signed as a director. That is said by the appellant to be enough, because it is said that under the Companies Act, 1929, 'a director' includes anyone who is in the position of a director, and that this man, by the acts which he performed and the

> duties which he took upon himself, had come into the position of a director and, therefore, must be treated as a director although, in fact, he was not a director. It is quite true, of course, that this man usurped or performed some of the duties of a director and it may be that, to that extent, he was in the position of a director, but I think that what the court here has to determine is whether the man was a director in fact, and has not to consider what is the precise meaning and effect of the definition contained in the Companies Act, 1929, s. 380. We have been referred to a number of sections in the Companies Act, 1929, which say what a director must do, and what the effect of invalidating his appointment may be with regard to acts which he performed while he was purporting to be a director, but we come back, in my judgment, to this simple question, whether the man in question was a director of the company.
>
> "The answer, which I think is the right answer, is that which the magistrate has given, that, in spite of the fact that he performed some of the duties of a director and even described himself as a director, he was not in fact a director of the company."

Tucker, J. (as he then was), after pointing out that the regulation had the force of a penal statute and should be construed strictly, said at p. 341:

> "In this penal statute the words in question are 'every person who, at the time of the commission of the offence, was a director'. In my view this must mean every person who, at the material time, held the office of director, that is, who had been validly appointed a director in accordance with the provisions of the Companies Act, 1929. The interpretation which we are invited to put upon this regulation by counsel for the appellant is that, for the purposes of the regulation, a 'director' must be held to include a person who is acting as a director or purporting to fill that office. If it had been thought necessary or desirable to include such persons within the purview of this regulation, appropriate words could have been used to effect that purpose, but, in my view, such words not having been used, the natural and restricted interpretation is the only one which can be put upon it, and I agree that the magistrate came to a correct decision."

We do not think that case is any guide to the meaning of the word "director" in the Companies Ordinance. It is quite clear that the decision is limited to the Defence (General) Regulations. Viscount Caldecote expressly stated that they were not construing the language of the definition section in the Companies Act, 1929, and no reference was made to any decision relating to the Companies Act. It is apparent that it was considered that the meaning of "director" as defined in the Companies Act, 1929, had no bearing on the construction to be placed on the word "director" in the Defence (General) Regulations.

We return now to the meaning of the definition of "director" in s. 2 of the Companies Ordinance which, as we have said, is stated to include

> "any person occupying the position of a director by whatever name called".

The learned judges of the Supreme Court dealt with the definition as follows:

> "We are firmly of the opinion that the words 'by whatever name called' indicate that the definition was intended to cover the contingency of a validly appointed director being described by the company by some other title – such as manager, secretary, chief executive officer, etc., – for it may well be that, while a person may be described by a company under one of those titles, he is nevertheless a validly appointed director."

We are unable to agree that such a limited meaning should be given to the definition. In our view, a person who acts as, and performs the functions of,

a director, although not duly appointed as a director, is occupying the position of a director. Support for that view is to be found in the obiter dicta of Channell, J., in *R. v. Lawson* (4), to which we have referred, and, indeed, in the observations of Viscount Caldecote in *Dean v. Hiesler* (5). We think the words "by whatever name called" do not limit that meaning but, in fact, extend its meaning to include a person who performs the functions of a director though called by another name. That construction is in conformity with the view expressed in *Gibson v. Barton* (2) and *Coventry and Dixon's* case (3), before there was a definition of "director".

We are therefore of opinion that the word "director" in the Companies Ordinance includes a de facto director unless the context otherwise requires. In our view, the context does not require a different meaning in the sections which the respondent was charged with contravening in the first four counts. The fact that a provision is penal is not, in our view, a "context" which requires a special meaning. We do not think the penalties to which an unqualified person acting as a director is liable under s. 142 (5) of the Companies Ordinance indicate a contrary intention. To hold otherwise would, in our view, defeat the object of the penal sections relating to the liability of directors. Looking to the mischiefs intended to be aimed at by the sections in question, it seems to us that a de facto director is as much a person whose conduct should be the subject of the sections as a person who has been duly appointed as a director. If a de facto manager can be liable, so should a de facto director.

The remaining question to be decided is whether the first count was bad for duplicity. The particulars of that count read:

> "Ivan Arthur Camps, at Nairobi, in the Colony of Kenya, being a director of Rhokatan Investments (Kenya) Limited, Private Company registered with limited liability in the Colony and Protectorate of Kenya, which Company commenced to be wound up on the 22nd day of December, 1960, was knowingly a party to or connived at the default of the said company to keep proper books of account within the period of two years immediately preceding the commencement of the winding up of the said company."

In *Pope v. R.* (6), [1960] E.A. 132 (C.A.) it was held that "falsifying or being privy to the falsifying" of a document was one offence. Similarly, in the present case we think that "knowingly being a party to or conniving at" the default of the company to keep books is one offence, part of the offence being in the alternative within the meaning of para. (*b*)(i) of s. 137 of the Criminal Procedure Code, and the first count was not duplex.

To sum up, our conclusions are:

(*a*) the respondent was duly and validly appointed a de jure director of the company on February 10, 1959;

(*b*) he ceased to be a de jure director at the expiration of two months from February 10, 1959;

(*c*) if he acted as a director after the expiration of two months from February 10, 1959, he was a de facto director of the company during the period when he so acted;

(*d*) a de facto director is a director for the purposes of the sections which the respondent was charged with contravening in the first four counts;

(*e*) the first count was not bad for duplicity.

We accordingly order that the acquittal of the respondent on the first four counts should be set aside, that the case should be remitted to the trial magistrate

with the opinion of this court, that the trial magistrate should make a finding as to whether the respondent was a de facto director during the period covered by the charge and that he should then decide whether there is a case for the respondent to answer on all or any of the first four counts and thereafter determine the case according to law.

Appeal allowed. Acquittal set aside. Case remitted to the trial magistrate to make a finding whether the respondent was a de facto director during the time covered by charge and then to decide whether there was a case for him to answer, and, if so, to determine the case according to law.

For the appellant:
The Attorney-General, Kenya
K. C. Brookes (Crown Counsel, Kenya) and *H. H. Mainprice* (Legal Assistant, Official Receiver's Department, Kenya)

For the respondent:
B. Georgiadis. Nairobi

Caspair Ltd v Harry Gandy
[1962] 1 EA 414 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	23 June 1962
Case Number:	31/1962
Before:	Sir Ronald Sinclair, P, Sir Alastair Forbes VP and Sir Trevor Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Lewis, J.

[1] Evidence – Affidavit – Commission for examination of witness outside jurisdiction – Affidavit supporting application – Deponent's means of knowledge not stated – No distinction between matters within deponent's knowledge and matters of belief – Whether affidavit sufficient – Civil Procedure Rules, O. 17, *r.* 3 (1), *O.* 25, *r.* 4 *and r.* 5 (*U.*) *– Civil Procedure* (*Revised*) *Rules*, 1948, *O. XVIII, r.* 3 (1) (*K.*).

[2] Evidence – Commission for examination of witness outside jurisdiction – Order made requiring examiner to report on credibility of witness – Whether such an order is proper.

Editor's Summary

The respondent sued the appellant claiming an account of the income of a shop and commission on the sales. Judgment in default of appearance was entered ex parte but subsequently it was set aside. The

respondent's advocates then applied for the issue of a commission or letter of request for the examination and cross-examination of the respondent at Bota in the South Cameroons where he was employed. This application was supported by the affidavit of an advocate employed by the firm representing the respondent, stating inter alia that the respondent had left East Africa before the ex parte judgment had been set aside, and that he was prevented by his duties and the expense involved from coming to Uganda to give evidence. The judge granted the application on the grounds that there were exceptional circumstances disclosed in the affidavit and some doubt whether the respondent's employer would consent to his absenting himself from work. On appeal,

Held –

(i) the affidavit did not state the deponent's means of knowledge of or the grounds of his belief in the matters set out in the affidavit nor did it distinguish between matters stated on information and belief and matters to

which the deponent swore from his own knowledge; moreover, the assertions regarding the expense and respondent's duties were bare assertions not based on any alleged facts.

(ii) the judge took into account matters, the existence of which had not been established, in concluding that special circumstances existed; moreover, such matters as were properly before him were not sufficient to establish circumstances which would justify the order for examination of the respondent out of the jurisdiction.

(iii) it is only in exceptional circumstances that a court will allow a plaintiff to be examined out of the jurisdiction.

(iv) it is not the function of a special examiner to report on the credibility of a witness examined by him.

Appeal allowed.

Cases referred to in judgment:

(1) *Assanand & Sons v. E.A. Records Ltd*., [1959] E.A. 360 (C.A.).

(2) *In the Estate of Wippermann, Wissler v. Wippermann and Others*, [1953] 1 All E.R. 764.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: This is an appeal with leave from an order of the High Court of Uganda under O. 25, r. 4 and r. 5 of the Civil Procedure Rules directing that a special examiner be appointed for the purpose of taking the examination, cross-examination and re-examination viva voce on oath or affirmation of the plaintiff (the respondent in this appeal) at Bota in Victoria, South Cameroons, Federation of Nigeria, and to report on the credibility of the plaintiff.

In his plaint the plaintiff alleged that at all material times he was employed by the defendant company (the appellant in this appeal) as manager of its branch at Entebbe; that during the period of his employment a shop for the sale of radio equipment and other chattels was opened at Entebbe which it was part of his duty to manage; that by virtue of his terms of employment as embodied in a letter dated June 11, 1957, he was entitled to a commission of 3% of the gross income of the shop; and that he had not received this commission; and he claimed an account of the gross income of the shop and payment to him of 3% of such gross income. The plaint was filed on July 1, 1960; the plaintiff having left East Africa, as was conceded before us, on February 9, 1960. On September 24, 1960, judgment was entered for the plaintiff in default of entry of appearance by the defendant company. On November 8, 1960, this judgment was set aside on the ground that it was not competent, and the defendant company filed a written statement of defence on November 18, 1960. The written statement, inter alia, set up by way of defence an alleged oral agreement in relation to the Entebbe shop. The application from which this appeal arises was made on February 9, 1962, and was supported by an affidavit sworn by Mr. D'Silva, an advocate employed in the firm of advocates representing the plaintiff.

It may be noted in passing that the application, in terms of O. 25, was for the issue of a commission or letter of request for the examination of the plaintiff at Bota, while the learned judge's order was for the

appointment of a special examiner. Though expressing doubt as to the propriety of such an order on the application made, Mr. James for the appellant company did not seek to challenge the order on this ground and we have accordingly not considered

whether or not the order was competent, but have assumed for the purposes of this appeal that it was competent.

Mr. D'Silva's affidavit stated, inter alia:

> "4. Prior to the said judgment being set aside the plaintiff had left Uganda for the United Kingdom to seek employment.
>
>
>
> "7. The plaintiff is an air pilot by profession and considerable difficulty was experienced after the setting aside of the judgment in obtaining instructions from him, but finally it was discovered that he was employed by a firm of aircraft operators in the South Cameroons now part of the Federation of Nigeria.
>
> "8. The evidence of plaintiff is essential to deal with the allegations aforementioned relating to an oral agreement which plaintiff denies was made.
>
> "9. Plaintiff is prevented by his duties and by the expense involved from coming to Uganda to give evidence."

It was common ground both at the hearing of the application and on the appeal that only in exceptional circumstances will a court allow a plaintiff to be examined out of the jurisdiction. The learned judge found that there were exceptional circumstances in this case, saying:

> "In my opinion, the affidavit in support of the application disclosed exceptional circumstances. The plaintiff obtained judgment in default of appearance and before it was set aside the plaintiff had left Kenya. It was only when the defence was filed on November 18, 1960, that counsel for the plaintiff had notice that the verbal agreement as to the income from the defendant's shop at Entebbe was denied. On account of the plaintiff's employment as an air pilot, difficulty was experienced in obtaining his instructions, but he was eventually found in the Cameroons. Apart from the expense of getting the plaintiff to Uganda, there is a reasonable doubt whether his present employers would consent to his absenting himself from work.
>
> "The defendants say it is essential that not only should the plaintiff be cross-examined, but that the trial judge should see and hear him. I entirely agree. However, there is no reason why, if a special examiner is appointed to take the plaintiff's evidence, he should not be requested to report on the credibility of the plaintiff."

With respect, I think Mr. D'Silva's affidavit was quite inadequate to show exceptional circumstances. In *Assanand & Sons v. E.A. Records Ltd*. (1), [1959] E.A. 360 (C.A.) at p. 364 the then learned President of this court said:

> "The affidavit of Mr. Campbell was deficient in three respects. First, it did not set out the deponent's means of knowledge or his grounds of belief regarding the matters stated on information and belief, and, secondly, it did not distinguish between matters stated on information and belief and matters deposed to from the deponent's knowledge (see O. XVIII, r. 3 (1) and *Standard Goods Corporation Ltd. v. Harakchand Nathu & Co*. (1950), 17 E.A.C.A. 99). The court should not have acted upon an affidavit so drawn. Thirdly, the assertion that payment of the account was to be made at Nairobi was a bare assertion not based on any alleged facts. There was nothing to show whether this assertion was a fact, an inference from undisclosed facts, or a conclusion of law."

Order XVIII, r. 3 (1) of the Kenya Civil Procedure (Revised) Rules, 1948, to which the learned President referred in the passage cited is in identical terms with O. 17, r. 3 (1) of the Uganda Civil Procedure Rules. All the criticisms directed at Mr. Campbell's affidavit in that case apply to Mr. D'Silva's affidavit in the instant case. Mr. D'Silva does not state the means of his knowledge or the grounds of his belief regarding the matters set out in his affidavit; he does not distinguish between matters stated on information and belief and matters deposed to from his own knowledge; and the assertions in para. 9 are bare assertions not based on any alleged facts. In my opinion the learned judge ought not to have acted on Mr. D'Silva's affidavit which could not support either the finding that there was reasonable doubt whether the plaintiff's present employers would consent to his absenting himself from work, or any finding as to expense. In any case, it is clear on the authorities that expense alone is not normally a special circumstance justifying examination of a plaintiff out of the jurisdiction; though no doubt it is a factor which may be considered, and its importance may vary according to the circumstances.

Before us Mr. Wilkinson, who appeared for the respondent, stated that the principal exceptional circumstance on which he relied, and which he had put forward at the hearing of the application in the High Court, was the circumstances in which the allegation of the existence of an oral contract had been put forward; that in correspondence between the parties prior to suit there had been no hint of the existence of the alleged oral contract, which was only put forward for the first time in the written statement of defence; that the plaintiff's evidence only became necessary as a result of the allegation of the existence of the oral contract; that the learned judge who set aside the ex parte judgment did not accept the defendant company's evidence in support of the application to set aside the judgment, and only set it aside on technical grounds; and that in view of these circumstances the bona fides of the defendant company must be suspect.

This argument does not appear to have carried much weight with the learned judge as he does not deal with it. It is true that he remarks that the plaintiff obtained judgment in default of appearance; that before it was set aside he left Kenya; and that it was only when the defence was filed that he had notice of the alleged oral agreement. But he does not mention, and does not appear to regard, the bona fides of the defendant company as being affected. On the material before us I would not be prepared to reach a conclusion adverse to the defendant company as to its bona fides; and so far as the other facts mentioned are concerned, while they are no doubt matters which can properly be taken into account, I do not think that, standing alone – and, in view of what I have said regarding Mr. D'Silva's affidavit, they do stand alone – they sufficiently establish such exceptional circumstances as would justify an order for the examination of the plaintiff out of the jurisdiction. It may be remarked that the learned judge, from the way he phrased the relevant passage in his judgment, and no doubt as a result of the phrasing of para. 4 of Mr. D'Silva's affidavit, appears to have been under the impression that the plaintiff left East Africa after the ex parte judgment had been obtained; while in fact it is now common ground that the plaintiff had left East Africa before the plaint was filed. This, I think, weakens somewhat the plaintiff's case for the existence of special circumstances based on the late disclosure of the allegation of the existence of an oral contract.

It follows from what I have said that I think the learned judge took into account matters, the existence of which had not been established, in concluding that special circumstances existed; and that I do not think that such matters as were properly before him sufficed to establish circumstances which would justify the order for the examination of the plaintiff out of the jurisdiction. I would accordingly allow the appeal with costs, set aside the order of the

High Court, and order that the defendant company's costs of the application in the High Court be paid by the plaintiff in any event.

There is one other matter on which I would comment. The learned judge said, at the end of the passage from his ruling which is set out above, that there was no reason why the special examiner should not be requested to report on the credibility of the plaintiff, and the formal order inter alia called for a report by the special examiner on the credibility of the plaintiff. With respect, I do not think it is the function of a special examiner to make such a report. I would respectfully adopt the remarks of Pearce, J., in *In the Estate of Wippermann, Wissler v. Wippermann and Others* (2), [1953] 1 All E.R. 764 at p. 767:

> "In my opinion, the right of an examiner to report is intended to give him an opportunity of recording facts (for example, the witness fainted, or rose to his feet, and tried to assault the cross-examining counsel), and it is not proper for an examiner to give his opinion on the credibility of the witness. If laudatory comments are permissible, so, too, must be damaging criticism. It would then be permissible for an examiner to report: 'The witness appeared to me to be a specious liar'. The examiner has no such function. If it were otherwise, the procedure in choosing an examiner would be different. Instead of appointing (as generally happens) examiners who have not a very long or varied experience of litigation, one would insist on appointing some person known to the court as capable of supporting the extremely difficult task of assessing credibility from demeanour. The selfreliant person who has the technique of giving evidence – namely, the power to answer calmly and with poise and proper emphasis – is often, in my view, less reliable than the fumbling, hesitant witness. When the witness speaks in a foreign tongue and the examination occurs in a difficult case, and when there are complicated points with which an examiner can have only a nodding acquaintance (if that), it is impossible for him to express an opinion on which a trial judge ought to rely."

Sir Ronald Sinclair P: I agree. There will be an order in the terms proposed by the learned Vice-President.

Sir Trevor Gould JA: I also agree.

Appeal allowed.

For the appellant:
Hunter & Greig, Kampala
A. I. James

For the respondent:
Wilkinson & Hunt, Kampala
P. J. Wilkinson, Q.C., and *B. D'Silva*

Khimji and another v Tanga Mombasa Transport Co Ltd
[1962] 1 EA 419 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	5 April 1962
Case Number:	84/1961
Before:	Sir Alastair Forbes VP, Crawshaw and Newbold JJA

Sourced by: LawAfrica

Appeal from High Court of Tanganyika – Williams, J

[1] Carriage of passengers – Negligence – Fatal accident – Claim for damages – Deceased a passenger in bus – Driver of bus urged by passengers to cross flooded river – Driver attempts crossing unwillingly – Bus overturns when crossing – Passengers reach river bank – Deceased missing – Deceased subsequently found dead – Whether doctrine of volenti non fit injuria applies – Duties of common carrier – Law Reform (*Fatal Accidents and Miscellaneous Provisions*) *Ordinance* (*Cap.* 360), (*T.*) *– Eastern African Court of Appeal Rules*, 1954, *r.* 65.

Editor's Summary

The appellants as administrators of the estate of the deceased claimed damages under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance on behalf of the deceased's estate and certain alleged dependants in respect of the death of the deceased while travelling on a bus belonging to the respondents, which at the material time was carrying on a public passenger transport business between, inter alia, Mombasa and Tanga. The deceased was a passenger in a small public service vehicle belonging to the respondents travelling to Tanga. At Ndahaya the vehicle was held up overnight by a swollen river, and among other vehicles which were also held up there were two large buses, one of which belonged to the respondent company. The following morning the two large buses crossed the river and proceeded. The driver of the small vehicle refused to try to cross whereupon his passengers including the deceased boarded the large bus belonging to the respondents and proceeded by that vehicle. These passengers paid no fares on joining the large bus but the conductor apparently raised no protest at their presence, and the driver was unaware that these passengers had joined his bus. The bus proceeded to Mtimbani where it was again held up by a flooded river. The other large bus was also there, but after some two hours it managed to cross safely. According to the driver of the respondents' bus, whose evidence the trial judge accepted, his passengers then pressed him to cross which he was unwilling to do. After some persuasion he agreed to try and while doing so the bus struck some submerged object which caused the steering to turn and the bus to go over the downstream edge of the causeway into deeper water where it stuck. The conductor's evidence was that finding himself in the water he swam to the Mombasa side of the river and saw an Indian climbing up the bank on the same side. The driver and the other passengers reached the Tanga bank and it was thought at the time that all the passengers had got out safely, but after the driver had landed "one Indian said that an Indian sitting next to him was missing". No serious search was made for the missing man until next day when the body of the deceased was found some four miles downstream. The trial judge held that the deceased was travelling on the bus as a normal passenger and that he went into the river from the bus and was shortly drowned, but he dismissed the claim on the ground that liability in negligence had not been proved as the maxim volenti non fit injuria applied. The appellants thereupon appealed on the grounds, inter alia, that the trial judge had erred in holding (*a*) that the maxim volenti non fit injuria applied and (*b*) that the respondents' liability in

negligence had not been proved, and that the respondents, being common carriers, had no authority to contract out of their common law liability for negligence. The respondents contended that the decision should be supported on grounds other than those relied on by the trial judge, namely, that the trial judge had erred in holding that the persons who had transferred to the bus at the previous river were to be deemed normal passengers and that he should have held that the evidence was insufficient to justify a finding that the deceased had died at the time of and as the result of the accident.

Held – (per FORBES, V.-P., and CRAWSHAW, J.A.; NEWBOLD, J.A., dissenting) –

(i) there were no grounds to justify a different conclusion from that reached by the trial judge that the maxim volenti non fit injuria applied in the circumstances.

(ii) as the trial judge had held, permission to travel on the bus must be implied since the conductor had not stopped the bus or questioned the persons who had transferred as to their readiness to pay the fare which, in fact, they were never asked to pay; the conductor was ostensibly in charge of the passengers in the bus on behalf of the respondents and at least, acquiesced in the presence of these new passengers on the bus.

(iii) the respondents were under a duty to carry the "transferred" passengers safely and in the absence of any special terms attached to the tickets which had been issued to them, the extent of the duty was the same whether or not the tickets gave them a right to transfer; more particularly, because the claim was in tort and not in contract.

(iv) the accident was the result of the ordinary risk of crossing the drift, to which the passengers had consented and all the adult passengers had consented and all the adult passengers must have fully appreciated the nature and extent of that risk.

(v) in the circumstances it was probable that the Indian seen by the conductor climbing up the bank on the Mombasa side was the deceased, and that he lost his life in a subsequent attempt to rejoin the rest of the passengers on the Tanga side.

Appeal dismissed.

Case referred to in judgment:

(1) *Lakhamshi Govindji & Co. v. hasham Suleman Ltd.*, [1960] E.A. 40 (T.).

(2) *Watt* (*or Thomas*) *v. Thomas*, [1947] A.C. 491; [1947] 1 All E.R. 582.

(3) *Benmax v. Austin Motor Co. Ltd.*, [1955] A.C. 370; [1950] 1 All E.R. 326.

(4) *Austin v. The Great Western Railway Co.* (1867), L.R. 2 Q.B. 442.

(5) *Ludditt v. Ginger Coote Airways Ltd.*, [1947] A.C. 233; [1947] 1 All E.R. 880.

(6) *Peek v. North Staffordshire Railway Co.* (1863), 10 H.L. Cas. 473.

(7) *Clark v. West Ham Corporation*, [1909] 2 K.B. 858.

(8) *Dann v. Hamilton*, [1939] 1 K.B. 509; [1939] 1 All E.R. 59.

(9) *Slater v. Clay Cross Co. Ltd.*, [1955] 2 Q.B. 264; [1956] 2 All E.R. 625.

(10) *Letang v. Ottawa Electric Railway Co.*, [1926] A.C. 725.

(11) *London Graving Dock Co. Ltd. v. Horton*, [1951] A.C. 737; [1951] 2 All E.R. 1.

(12) *A. C. Billings & Sons Ltd. v. Riden*, [1958] A.C. 240; [1957] 3 All E.R. 1.

(13) *Foulkes v. Metropolitan District Railway Co*. (1880), 5 C.P.D. 157.

(14) *Osborne v. London & North Western Railway Co*. (1886), 21 Q.B.D. 220.

(15) *Grand Trunk Railway Co. of Canada v. Robinson*, [1915] A.C. 740.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: This is an appeal from a judgment and decree of the High Court of Tanganyika dated September 5, 1961, dismissing with costs the appellants' claim as administrators of the estate of one Fidahussein Rajabali Khimji (hereinafter referred to as "the deceased") under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Cap. 360 of the Revised Laws of Tanganyika), on behalf of the estate of the deceased and certain alleged dependants of the deceased, for damages in respect of the death of the deceased.

The respondent company is a limited liability company registered in Tanganyika which at the material time was carrying on the business of a public transporter and was running passenger buses between, inter alia, Mombasa and Tanga. It was not contested that the English common law relating to common carriers applies in Tanganyika and that the respondent company is a common carrier. The English common law relating to common carriers has been previously held to apply in Tanganyika by the High Court – *see Lakhamshi Govindji & Co. v. Hasham Suleman Ltd.* (1), [1960] E.A. 40 (T.), and I respectfully agree with the reasoning in that case for holding that it does apply. The deceased was a young Asian aged twenty-two years, a resident of Mbale in Uganda. On May 8, 1959, the deceased left Mombasa in a licensed public service vehicle, No. TA. 8926, owned by the respondent company, having duly paid the first-class fare of Shs. 22/- for the journey to Tanga. The fact that the deceased had been a passenger on this vehicle was contested at the trial, but was accepted by the respondent company for the purposes of the appeal. Vehicle No. TA. 8926, which, it appears, was a comparatively small petroldriven vehicle and was carrying some twelve passengers, proceeded on May 8, 1959, as far as Ndahaya. There it was unable to proceed further owing to a flooded river which it could not cross. Two other buses were also held up there, both large diesel vehicles, one belonging to another company, the Kenya Bus Co., and one, No. TAA. 193, belonging to the respondent company. None of the buses was able to cross the river that day, and the passengers of No. TA. 8926 slept the night in the bus. On the following morning the water in the river was still high. but the two larger buses were able to cross. The driver of No. TA. 8926 refused to attempt the crossing with his smaller bus while the water remained as high as it was: whereupon his passengers apparently boarded bus No. TAA. 193 and proceeded by that vehicle. There was some conflict of evidence as to how many of the passengers of TA. 8926 boarded TAA. 193, but it is accepted that the deceased was one of them. According to the driver of TA. 8926:

> "My passengers were down on the ground. They jumped on the other defendants' bus. As it started to cross. They did not tell me anything. They did not take their luggage. I asked and they said to send it by any vehicle any day."

The driver of TA. 8926 remained there till 2.30 p.m. By that time the water had not gone down, and he decided to return to Mombasa, having handed over the luggage of his passengers to a lorry belonging to the respondent company which, presumably, though it is not so stated, was on its way to Tanga.

Bus No. TAA. 193, which was carrying nineteen passengers, mostly second-class, had also left Mombasa for Tanga on May 8. It was ahead of bus No. TA. 8926, which caught it up when it was held up by the flooded river, at Ndahaya. As I have said, on the morning of May 9 it crossed the river, and the conductor said of the passengers from TA. 8926 joining:

> "Passengers – two or three from the small bus left it when they saw us

> cross and come on our bus. I gave them no permission. They were Indians. They brought no luggage."

It would seem these passengers paid no fare for travelling in TAA. 193, but the conductor apparently raised no protest at their presence. The driver of TAA. 193 was unaware that passengers from TA. 8926 had joined his bus. TAA. 193 proceeded to Mtimbwani where it was again held up by a flooded river. The Kenya Bus Co. bus was also held up there. After some two hours, the Kenya Bus Co. bus attempted the crossing and reached the far side safely. According to the driver of TAA. 193, whose evidence the learned trial judge accepted, the passengers of TAA. 193 then pressed him to cross, though he was unwilling to do so. He said:

> "My passengers said 'Let us go. The first bus got across alright. We can also go.' I told them, 'Let us wait a little until the water has gone down more'. They still said 'We can cross alright'. Let us go'. Some passengers were down but got in and said 'Do not be afraid. We can cross alright'. All passengers said this. Two Indians said 'We have slept on the way and this water has gone down already. We cannot wait until the water is dry'. They were youths. I told them it was dangerous to cross with passengers on the bus and I had better go alone and they should remain there and I would wait at the other side until the water went down. As no one agreed and they pressed me, I started to cross."

On the way across the front wheel of the bus apparently struck some obstruction which caused the steering to turn with the result that the bus went over the downstream edge of the causeway of the drift into deeper water, where it stuck at an angle of about thirty degrees sideways and fifteen degrees downwards. The conductor gave evidence that he found himself in the water though he did not know how he had come out of the bus; that he swam to the bank on the Mtimbwani side – that is, the Mombasa side; and that as he was climbing up the bank on that side he saw an Indian with wet clothes also climbing the bank on that side. The conductor remained on that side for the night. Of the other passengers, some appear to have waded ashore on their own; others to have been helped; and children carried. A rope and a wire were attached to the bus from the Tanga bank and were used for passing to and from the bus. After the passengers had got ashore, the luggage, except for one postbag, was safely taken off by local Africans. There is evidence that all these passengers landed on the Tanga bank. There is no evidence of any passenger crossing from the Mombasa bank to the Tanga bank; but the passengers from the bus were taken on to Tanga later. At that time it was thought that all the passengers had reached the shore safely, but apparently after the driver had gone ashore – he had remained on the bus till after the luggage was taken off – "one Indian said an Indian sitting next to him was missing". However, it would seem that the deceased was not seriously missed till the following day, when a search was made downstream, and, on May 12, the body of an Asian was found some four miles downstream. The learned judge accepted the evidence identifying this body as the body of the deceased, and this was not challenged on the appeal.

After some preliminary correspondence the suit from which this appeal arises was instituted. At the commencement of the trial the following issues were settled:

1. Was the deceased travelling on the bus?
2. If so, in what capacity?
3. If he was travelling, did he die while on the bus?
4. Were defendants by their servants or agents or otherwise negligent?
5. If so, was such negligence the sole or contributory cause of death?
6. To what relief, if any, are plaintiffs entitled?

The learned judge decided the first five of these issues as follows:

1. Deceased was travelling on the bus.
2. As a normal passenger.
3. Deceased went into the river from the bus and was shortly drowned.

4/5. Liability in negligence has not been proved against the defendants.

The learned judge did not consider the sixth issue in view of his decision on the fourth and fifth issues, and dismissed the suit with costs. The basis of his decision on the fourth and fifth issues was:

> "that the danger was apparent to the passengers, that they had proper warning as well and that they had adequate opportunity of electing whether to accept the risk or not";

and that accordingly the maxim volenti non fit injuria applied.

Five grounds of appeal are set out in the appellants' memorandum of appeal, which reads as follows:

1. The learned trial judge erred in believing the respondent's witness Saidi Hamadi (D. 4) and disbelieving the respondent's witness Immanuel Mathew (D. 5) on the point whether the driver of the bus said anything to the passengers and vice versa.
2. The learned trial judge erred in holding that the maxim of volenti non fit injuria applies and that the respondent's liability in negligence has not been proved.
3. The learned trial judge ought to have held that the respondent, being a common carrier, had, during the course of performing a contract of carriage of passengers, no authority to contract out of its common law liability for its negligence and that the respondent was by its servant or agent negligent.
4. The learned trial judge erred in holding that the passengers had adequate opportunity of electing whether to accept the risk or not and that they fully appreciated and voluntarily accepted it.
5. The learned trial judge ought to have held that the passengers had no adequate opportunity of electing whether to accept the risk or not and/or that they were obliged to incur it.

The respondent company sought leave to file notice of intention to support the decision on grounds other than those relied on by the learned trial judge. The notice was out of time under r. 65 of the Rules of this court, but Mr. Donaldson, who appeared for the appellants, did not seek to object on this ground, and the notice was therefore admitted. The grounds set out in the notice are:

"1. The learned trial judge erred in holding that the persons who transferred into the bus in question at the previous river stop were to be deemed to be normal passengers.

"2. The learned trial judge erred in failing to give any or adequate consideration to the evidence on record that persons left the bus by a window or door on the left side of the bus and swam and (*b*) that an Indian climbed up the river bank at the same time as the witness Immanuel Mathew (D.W. 5) and should have held that the evidence on record was insufficient to justify a finding that the deceased died at the time and as the result of the accident."

I will deal first with the appeal against the learned judge's findings of fact, that is grounds 1, 4 and 5 of the memorandum of appeal. As to this, it

is sufficient to say that the learned judge accepted the evidence given by Saidi Hamadi, the driver of TAA. 193, to the effect that he was pressed by the passengers to attempt the crossing, that he warned them of possible danger in crossing, and advised them to dismount from the bus before he attempted the crossing. This evidence was in apparent conflict with the evidence given by Immanuel Mathew, the conductor of TAA. 193, who said he did not hear anything said by the passengers and did not hear the driver say anything. The learned judge, however, considered this conflict and preferred the evidence of the driver. Bearing in mind the principles stated in *Watt* (*or Thomas*) *v. Thomas* (2), [1947] A.C. 491 and *Benmax v. Austin Motor Co. Ltd.* (3), [1955] A.C. 370, which should be observed by an appellate court in considering findings of fact based on credibility, I can see no ground which would justify this court in coming to a different conclusion from that reached by the learned judge. I think the grounds of appeal which attack the learned judge's findings of fact must fail.

I will consider next the first of the grounds urged in the notice filed by the respondent, namely that the learned judge was wrong to hold that the persons who transferred from bus No. TA. 8926 to bus No. TAA. 193 were normal passengers. In this connection two concessions were made at the trial by counsel for the appellants: (*a*) that the fare paid by the deceased did not authorise his changing from one bus to another; and (*b*) that bus drivers and conductors had no authority to permit a non-fare-paying passenger on to a bus. Mr. Reid, for the respondent company, contended that the passengers who transferred to TAA. 193 were trespassers in that bus. He founded his contention on the concessions I have mentioned and the evidence that these persons boarded bus TAA. 193 when it was moving, and tendered no fares. The learned judge held that permission to travel on TAA. 193 must be implied from the conduct of the conductor in not stopping the bus or questioning the persons who had transferred as to their readiness to pay the fare which, in fact, they were never asked to pay.

In my view the learned judge's conclusion is the correct one. The bus travelled many miles between the point where the passengers from TA. 8926 boarded it and the scene of the accident. The conductor was ostensibly in charge of the passengers in the bus on behalf of the respondent company, and, at the least, acquiesced in the presence of these new passengers on the bus. I further agree with the learned judge that, for practical purposes, the question whether or not these persons' original tickets gave them the right to transfer is not material. In *Austin v. The Great Western Railway Company* (4) (1867), L.R. 2 Q.B. 442, the plaintiff was a child of three and a half years of age who had been injured in an accident. The railway company was bound to carry free children under the age of 3, but were entitled to half fare in respect of children between three and twelve years of age. The plaintiff's mother, carrying the plaintiff in her arms, had taken a ticket for herself but not for the plaintiff, no question being asked by the defendants' servants as to the age of the plaintiff. At p. 445 to p. 446 of the report Blackburn, J., said:

> "It was there laid down that the right which a passenger by railway has to be carried safely, does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely. If there had been fraud on the part of the plaintiff, or if the plaintiff had been taken into the train without the defendants' authority, no such duty would arise. . . . We must take it that the child, without fault and through an honest mistake on the mother's part, was taken into the train by the railway company and received as a passenger by their servants with their authority. Under those circumstances, does or does not the law require those who were carrying the child to take reasonable care that he should come to no damage? It certainly seems to me that a duty to carry safely arises under those circumstances."

In the instant case there is no suggestion of fraud on the part of the persons who transferred from TA. 8926 to TAA. 193. In my opinion a duty to carry them safely arose, and, in the absence of any special terms attached to the tickets which had been issued to them, the extent of the duty was the same whether or not the tickets did give a right to transfer. It is to be noted that the claim as framed in the plaint is a claim in tort based on negligence, and is not a claim in contract.

It is convenient here to set out at length passages from the judgment of the Privy Council in *Ludditt v. Ginger Coote Airways Ltd*. (5), [1947] A.C. 233. That case was not referred to in argument, but it sets out very fully the general law relating to the carriage of passengers by common carriers. It is relevant not only to the point I have just been considering, but also to the main issue of the appeal, and it incidentally disposes of Mr. Donaldson's reliance on two cases which he cited in support of his arguments, that is to say, *Peek v. North Staffordshire Railway Co*. (6) (1863), 10 H.L. Cas. 473, and *Clark v. West Ham Corporation* (7), [1909] 2 K.B. 858. The case was an appeal from the Supreme Court of Canada. Commencing at p. 240 of the report their lordships said:

> "It will be convenient in the first place to explain what is the general law on the subject before discussing the special legislative provisions which are relevant. The liability of a common carrier of passengers was settled by the decision of the Exchequer Chamber in 1869 in *Readhead v. Midland Railway Co*. (1869), L.R. 4 Q.B. 379. It was there held that the liability of a general or public or common carrier of passengers is more limited than that of a common carrier of goods. By the custom of the realm a common carrier of goods was at common law 'bound to answer for the goods at all events . . . The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the King'. Ibid. 382. The carrier of passengers is not subjected to a duty so stringent. His obligation at common law, as was held in the leading case just cited, is to carry 'with due care'. One reason for the distinction, no doubt, is that the carrier of goods is a bailee of the goods which he carries, whereas a carrier of passengers is not a bailee of his passengers. Both classes of carriers, however, are subject to the obligations which arise from their exercising a public profession which requires them to carry for all and sundry, subject to the obvious limiting conditions.
>
> "The common carrier of goods was nevertheless at common law free to limit his stringent obligations by special contract. He still remained a common carrier, and was bound to carry for all according to his profession, but he could all the same insist on making his own terms and refuse to carry except on those terms, provided that there were no statutory conditions limiting his right. The classical exposition of this principle is to be found in the language of Blackburn, J., in advising the House of *Lords in Peek v. North Staffordshire Railway Co.* (1863), 10 H.L. Cas. 473. The issue in that case was as to the effect of s. 7 of the Railway and Canal Traffic Act, 1854, which imposed certain conditions on railway companies seeking by special contract to limit their liability in respect of goods which they carried as common carriers. Under these statutory conditions such contracts were only valid if they were in writing and were just and reasonable. But apart from the Act the general freedom possessed by carriers was unimpaired, and the Act clearly had no reference to the conveyance of passengers. It was therefore only with reference to carriers of goods that Blackburn, J., observed at p. 511 that a condition exempting the carriers wholly from liability for the neglect and default of their servants was prima facie unreasonable. Ibid. 511. When making that observation that learned

judge was discussing the effect of s. 7 of the Act which, as already stated, contained an express enactment that the terms of the special contract should be reasonable, and it was in that connection that he went on to say that an offer to carry at a lower rate than the normal rate might be reasonable for the purposes of the Act. He added: 'For the terms of a special contract entered into by a person who has the option of employing the carrier on the terms of the contract, or on the terms of his undertaking the common law liability, are necessarily reasonable as regards the person having that option'. Ibid. 512. But this principle, stated in regard to a railway company as a carrier of goods and in regard to the operation of the Railway and Canal Traffic Act, has no bearing on the position of a carrier of passengers whose complete freedom at common law to make such contracts as he thinks fit, has not been curtailed by the Act of 1854. What limitations on this freedom result from the relevant legislation for the control of the carriage of passengers by air will be examined later, but light is thrown on the common law position of carriers of passengers by the decision of this Board in *Grand Trunk Railway Co. of Canada v. Robinson*, [1915] A.C. 740. The main question in that case was whether a passenger carried at half fare under what was called a 'livestock special contract' was bound by a term of the contract giving the carrier complete exemption from liability even when caused by the negligence of the railway company. A subsidiary question was whether the passenger, who went on the train to look after a horse during the transit, was bound by the special contract which his employer had made on his behalf. The subsidiary issue, which was decided against the man, is not material in this case, but the general law was stated by Lord Haldane, L.C., delivering the judgment of the Board, in the following terms: Ibid. 747. 'There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on a mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law, and in the latter case as in form a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England in different ways, be superseded by a specific contract, which may either enlarge, diminish or exclude it. If the law authorises it, such a contract cannot be pronounced to be unreasonable by a court of justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him.'

"Their lordships accept this statement of general principles . . ."

Their lordships then proceeded to consider the effect of any statutory restrictions existing in Canada which might affect the question of liability. In the instant case our attention has not been drawn to any relevant statutory provisions. Their lordships continued (at p. 244):

"There was thus no reason to hold that statutory restrictions had been infringed . . . It follows, in their lordships' judgment, that there is no valid reason against holding the appellants and each of them bound by their contract.

"In their lordships' opinion the view they have expressed provides an answer to the contention, so strenuously urged, that if the passenger is not given an option either to retain his full rights against the carrier at the

> higher fare or to waive them in whole or in part at the lower, the specific contract must be invalid. As their lordships have pointed out Blackburn, J., in *Peek's* case merely said that such a contract may (not must) be invalid, and he only said that in reference to the construction of s. 7 of the Railway and Canal Traffic Act . . . It does not matter for this purpose whether the carrier was a common or general carrier or not. His duty to carry for all and sundry according to his profession is something different from the terms on which he so carries. A carrier of goods or of passengers may or may not be a common carrier. In the words of Maule, J., quoted by Atkin, L.J., in *G.N. Railway Co. v. L.E.P. Transport & Depository Ltd.*, [1922] 2 K.B. 742, 771: 'I deny the truth of the position that a man who is not an insurer is therefore not a common carrier. A common carrier who gives no notice limiting his responsibility, is an insurer; but, if he gives notice that he will contract only to a limited extent, and with respect to articles of a given value, he ceases to be an insurer beyond that, though in all other respects he remains a common carrier'. In this passage Maule, J., is speaking of carriers of goods, but the same principle is true, mutatis mutandis, of a carrier of passengers who in law is neither an insurer nor precluded from making a special contract with his passengers. From this aspect it is not material whether he is a common carrier or not . . .
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> "Finally it may be observed that their lordships do not regard the decision of the Court of Appeal in *Clark v. West Ham Corporation*, [1909] 2 K.B. 858 as giving any real help or guidance in the decision of the present appeal. While they do not think it necessary to give any opinion on the correctness of much that was said in that case, or of the actual decision, the judgment at least of the majority in the Court of Appeal turned largely on the construction of the statutes regulating the tramways operated by the corporation for the carriage of passengers. These statutory regulations were substantially different from those in question in this appeal."

I turn now to consider grounds 2 and 3 of the memorandum of appeal. Bearing in mind the general law as stated in *Ludditt v. Ginger Coote Airways Ltd.* (5), I think in the case of an unusual risk arising in the course of a journey, where the choice is between delaying the journey or incurring the risk, it would be open to a common carrier, in the absence of any statutory restriction, to make an express contract with his passengers that, to avoid the delay to the passengers, he will undertake the risk and proceed on the condition that he will not be responsible for any injury suffered by a passenger in the negotiation of the particular risk. This would be a variation of the original contract for good consideration to meet a particular situation not contemplated when the journey commenced. Here, however, the claim is not in contract, and there is no express contract on which the respondent company can rely. The claim is in tort founded on alleged negligence, and the defence relied on, and held by the learned judge to apply, is that the maxim volenti non fit injuria applies. Although the claim is founded on negligence, and some cases suggest that the maxim is not applicable to the law of negligence, it seems to me that in the circumstances of this case the maxim could apply. The position, as I see it, differs from that considered in *Dann v. Hamilton* (8), [1939] 1 K.B. 509. There it was held that the maxim does not apply to the tort of negligence so as to preclude from remedy a person who has knowingly and voluntarily accepted the risks which may arise from the driver of a car being under the influence of drink, and has been injured in consequence. The basis for that decision was that

> "the plaintiff, by embarking in the car . . . with knowledge that through drink the driver had materially reduced his capacity for driving safely,

> did not impliedly consent to, or absolve the driver from liability for any subsequent negligence on his part".

Similarly, in *Slater v. Clay Cross Co. Ltd.* (9), [1955] 2 Q.B. 264, where a woman was injured by a train while walking through a tunnel, Denning, L.J. (as he then was) said

> "when this lady walked in the tunnel, although it may be said that she voluntarily took the risk of danger from the running of the railway in the ordinary and accustomed way, nevertheless she did not take the risk of negligence by the driver".

In the instant case, however, the passengers were not consenting to possible negligence on the part of the driver in executing the crossing of the flooded river; nor does the evidence suggest that the accident in mid-stream was caused by the negligent driving of the driver after he had undertaken the crossing. The act relied on before us to support the plea of negligence was the risking of the crossing. This was a specific act. It was undertaken to overcome an unexpected hazard which had arisen in the course of the journey. The alternative, i.e. waiting till the flood subsided, would involve delay and inconvenience to the passengers. No doubt the duty of the driver as a common carrier was not to risk the safety of his passengers. But, if the passengers, fully appreciating the risk, nevertheless desired to incur it to avoid inconvenience to themselves, it appears implicit that, by requesting the driver to incur the risk, they would waive the carrier's duty in relation to the particular act and accept the ordinary risks attendant upon it. This is not to say that there was not still a duty on the driver to perform the crossing without negligence, but the consent to the undertaking of the crossing was a consent to incur the ordinary risks involved in the crossing. It was as a result of such an ordinary risk of the crossing that the accident occurred. Accordingly, as I have said, I think the maxim could apply in the case if the facts necessary to support it are established.

In *Letang v. Ottawa Electric Railway Co.* (10), [1926] A.C. 725 at p. 731, their lordships of the Privy Council said:

> "The law of Canada and England seems to be summed up in the leading proposition to Will's J.'s judgment" (in *Osborne v. London and North Western Railway Co.*, 21 Q.B.D. 220, 223): "'If the defendants desire to succeed on the ground that the maxim volenti non fit injuria is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it'."

In my view the question here is whether the respondent company has established that the deceased

> "freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it".

So far as knowledge of the nature and extent of the risk is concerned, I think there can be no question but that all the adult passengers must have fully appreciated the risk involved. The crossing of flooded rivers is a comparatively commonplace hazard in East Africa, and in the two hours the bus was waiting before attempting the crossing there was ample opportunity to see and assess the risk, apart from the warning which, it was accepted, the driver gave the passengers. The real question is whether the deceased "freely and voluntarily" agreed to incur the risk.

As I have already said, the learned judge, accepting the driver's evidence, found

> "that the danger was apparent to the passengers, that they had proper warning as well and that they had adequate opportunity of electing whether to accept the risk or not".

This finding seems to be based to a great extent on the driver's evidence that he advised the passengers to leave the bus before he attempted the crossing and that they did not choose to do so. With respect, I do not think this finding goes far enough to support a plea of volenti non fit injuria. Mr. Reid argued that a carrier, encountering a hazard on the way, could always give his passengers the option of leaving his bus before attempting the hazard, and so avoid liability, but I do not think this is so. It is, of course, possible to envisage a type of hazard where there would be no hardship in the passengers descending from a bus, walking a short distance, and re-embarking when the hazard had been negotiated. In such a case an election to remain on the bus after warning given might well be taken as an acceptance of the risk incurred. Here, however, the choice was between staying on the bus, or being left on the wrong side of a flooded river which it was obviously dangerous to cross on foot, and with no prospect of other transport being readily available if and when it became safe for a bus to cross. In these circumstances, if the decision depended on the mere offer of the alternatives of staying in the bus or being left behind, I would say the choice was not free and voluntary. In the instant case, however, the evidence goes beyond this. I have already set out the relevant passage of the driver's evidence, evidence which was accepted by the learned judge. From that evidence it seems clear that the driver was urged to attempt the crossing by his passengers. It is true the deceased is not specifically named as one of the passengers who was urging the driver to attempt the crossing. I accept that if any passenger did not wish to incur the risk of crossing and merely remained on the bus as a preferable alternative to being left behind, he would not "freely and voluntarily" have agreed to incur the risk. But the driver says all his passengers urged him to cross. Even if this be not taken literally, that each passenger individually urged the driver to cross, it seems evident that no contrary opinion was expressed by any passenger, and that it was the unanimous view of the passengers, or at least the adult passengers, that the driver should attempt the crossing. This goes far beyond the case of a passenger being merely faced with the alternative of being left behind, or taking a chance in staying on a bus. It does, in my view, amount to a free and voluntary election to incur the risk; and, since there were apparently no dissentients among the passengers, I think it is sufficiently established that the deceased was one of the ones who elected to incur the risk.

If this conclusion is right, it would be sufficient to dispose of the appeal, and it would be unnecessary to consider the second ground urged by the respondent company in its notice of intention to support the decision on grounds other than those relied on by the learned judge. However, I would express the view that there is considerable force in the submission that the deceased must have been the Indian whom the conductor saw climbing the bank after the accident, and that he must have been drowned later in an attempt to cross the river. The learned judge did not discuss this aspect of the matter, and, with respect, his finding begs the issue. He said:

> "There is no evidence that deceased died on the bus but I accept that part of the evidence outlined under issue I which is relevant as proving that he went into the river from the bus and was shortly drowned."

It was conceded before us, on the one hand, that if the deceased was drowned in attempting to reach the bank from the bus, his death would be due to the accident, and, on the other, that if he was drowned in a later attempt to cross the river, then his death could not be said to result from the accident so as to

make the respondent company liable. The evidence to which I have already referred, while not as clear as could be desired, indicates that the passengers, other than the one Indian whom the conductor saw and who can only have been one of the passengers, all assembled on the Tanga bank of the river from whence they were later taken on to Tanga. The only person missing was the "Indian" who was mentioned by one of the passengers and who must have been the deceased. Ibrahim Dachi, who tied a rope to the bus and assisted in bringing the passengers ashore, said that the passengers were taken to the Tanga side of the river. This would be the natural thing to do from the place where the bus came to rest; and there is no mention of any passenger landing on the Mombasa side and then crossing or being brought across to the Tanga side. In these circumstances it seems to me that there is a strong probability that the Indian seen climbing up the bank on the Mombasa side by the conductor was indeed the deceased, and that he lost his life in a subsequent attempt to rejoin the rest of the passengers on the Tanga side. On this evidence I would hold that the appellants had not established that the death of the deceased resulted from the accident to the bus.

For these reasons I would dismiss the appeal with costs.

Crawshaw JA: The body of the plaint does not allege negligence or breach of duty in attempting to cross the river, but says "by reason of the negligence . . . while crossing". Three of the particulars of negligence in the plaint relate to the driver's negligence in the manner in which he drove the vehicle whilst crossing the river. That it was negligence to attempt to cross the river is, however, alleged in paragraph (*d*) of the particulars of negligence which reads:

> "(*d*) recklessly attempting to proceed across the said river when it was unsafe to do so."

There was no evidence of any negligence by the driver in the manner in which he drove the vehicle; the accident was apparently caused by some submerged object deflecting the wheels.

I do not think that it can be said that the learned judge was not entitled to accept the evidence of the driver that the passengers were warned of the risk but that they urged him to cross the river. The conductor said that he did not hear the driver say this, but they were at the riverside for some two hours before attempting to cross and it was, of course, quite possible that the conductor was not at the moment present or was not listening. It was unlikely that any decision would be left to him. It was not put to the driver in cross-examination that in referring to this conversation with the passengers the deceased might not have been present or have heard.

I think it was justifiable for the court to find knowledge of the risk proved. Not only was there the driver's warning, but the passengers had had ample time to see and consider the state of the river; they had seen another bus of similar weight cross the river. The driver of that bus had, he said, waited for the river to subside somewhat. There is no suggestion that the bus in which the deceased was driving encountered any difficulty until, about half-way across, the wheel hit a submerged object; everyone knows that flooded rivers carry with them such objects and it requires little or no imagination to appreciate what, on a narrow causeway, the effect might be on the wheels of a motor vehicle coming into contact with invisible objects.

As to the deceased consenting to take the risk, the learned judge accepted the driver's evidence, that not only did the passengers consent but that they actively pressed the driver to cross the river. This meant that, knowing the risk, they agreed to take it.

> "The defences open to the carrier are those usual in actions for tort, including consent,"

(Chitty on Contracts (21st Edn.), Vol. 2, p. 226). The driver's evidence was not that he would leave the passengers and drive on to Tanga should they refuse to chance the crossing, which in the circumstances would have amounted to coercion, but that he advised them to wait for the water to fall further. The risk was therefore voluntarily taken, no doubt in preference to delaying further a journey which had already been considerably delayed for similar reasons at another river which was swollen with the rains. The defence of volenti non fit injuria was not specifically raised in the written statement of defence but that point has not been taken on appeal and would not anyway be fatal: (*London Graving Dock Company Limited v. Horton* (11), [1951] A.C. 737 at p. 746).

The question does not arise here (as it did in *Dann v. Hamilton* (8), as to whether the passengers were consenting to or absolving the driver from liability for any subsequent negligence on his part in the manner he drove, for there was no subsequent negligence. In the instant case it was consent to the risk necessarily attendant on the crossing. *Slater v. Clay Cross & Son Limited* (9), is also distinguishable from the instant case, for superimposed on the initial risk which the plaintiff voluntarily took was the negligence of the driver of the train. Referring to the *London Graving Dock* case (11), Lord Denning there said at p. 271:

> "Knowledge of the danger is only a bar where the party is free to act on it, so that his injury can be said to be due solely to his own fault."

In the instant case the passengers were free to act and I do not think that the question of negligence really arises although the plaint purported to be framed on negligence. This was no case of an invitor or contractor creating a danger, or allowing a danger to exist, and I think the case of *A. C. Billings & Sons Limited v. Riden* (12), [1958] A.C. 240 can be distinguished. In that class of case there is a duty on the invitor or licensor not to allow premises to be in such a condition as to encourage or lead to persons, though being warned and knowing of the risk, accepting the risk, having regard to human nature and how in the circumstances the great majority of people would behave. In the instant case, the state of the river was not caused by the respondent, and the driver did nothing by act or omission to encourage passengers to take the risk, There was a duty on the driver, and therefore on the respondent as a common carrier, to take care of the passengers and not to put them in danger beyond the ordinary danger inherent in motoring. The respondent was, however, in my opinion, released from that duty by the conduct of the passengers to the extent of the particular risk of attempting the crossing of the river. Had the driver been guilty of negligence in the manner in which the attempt was carried out, then he would have been in breach of his duty to take care and the respondent would no doubt have been liable, but that was not the position.

I have had the advantage of reading the judgments of my brother judges and I agree with the learned Vice-President that apart from the conclusions to which he and I have otherwise come, the evidence supports the probability that the deceased was not in fact drowned in circumstances directly connected with the accident to the bus.

I would dismiss the appeal with costs.

Newbold JA: The three main issues which arise on this appeal and cross-appeal are as follows: first, whether the deceased met his death as a result of the accident and without any novus actus interviens on his part; secondly, the nature of the liability of a common carrier to a passenger who was carried in the circumstances in which the deceased was carried; and,

thirdly, whether the finding that the deceased had consented to the risk was correct and, if so, whether the defence of volenti non fit injuria was available to the common carrier in the circumstances of this case.

As regards the first of these issue, it is not now disputed that the deceased was on bus TAA. 193 at the time of the accident, but it is submitted that after the accident the deceased reached the Mombasa bank of the river safely and that he died as a result of his own act in trying to re-cross the river to the Tanga side. The defence as filed does not specifically raise this issue, but I shall assume, though with very grave doubt, that such a defence is open to the defendant, who is the respondent in this appeal. Three eye-witnesses of the accident gave evidence. Ibrahim Dachi, who was a cultivator, gave evidence to the effect that when the accident occurred some passengers threw themselves into the water and swam and others, including the driver, remained on the roof of the vehicle. It was admitted that in previous statements this witness had not mentioned seeing any one jump from the bus. The passengers who stayed on the bus were helped across by other persons and by holding on to a rope or wire. All passengers came out on the Tanga side and he thought that all passengers had got off safely but next day he heard that one was missing. Saidi Hamadi, who was the bus driver, gave evidence to the effect that some of the passengers got on to the roof of the bus and some "passed through the water". Those on the roof were helped across either by holding on to a rope or with the assistance of others. He saw no one fall in and he was the last to get ashore. He received a report that an Indian was missing. Immanuel Mathew, who was the bus conductor, gave evidence to the effect that he felt a bang and found himself in the water and did not know how he got out. He swam to the Mombasa bank. He did not see anyone else swim and thought he was alone. When he was at the bank he saw an Indian with wet clothes climbing up the bank from the river. On that evidence the finding of the learned judge was as follows:

> "There is no evidence that the deceased died on the bus but I accept that part of the evidence outlined under issue I which is relevant as proving that he went into the river from the bus and was shortly drowned."

When dealing with issue 1 the learned judge stated:

> "The driver of this bus stated that during the rescue work an Indian said that another Indian who had been sitting next to him was missing."

It was submitted that this finding of the learned judge was very ambiguous; that it was not a finding that the deceased had died as the result of the accident; that it was equally consistent with the deceased having reached the Mombasa bank and having been drowned when trying to cross subsequently to the Tanga bank; and according to the conductor's evidence this is probably what happened. I do not agree with these submissions. I agree that the finding of the learned judge is not very clearly phrased, but in stating that there was "no evidence that the deceased died on the bus" in my view the learned judge meant no more than was indeed the fact that there was no evidence that the deceased died in the bus. In finding that the deceased "went into the river from the bus and was shortly drowned" in my view the learned judge meant no more than as a result of the accident the deceased was either thrown into the water or went into the water to swim to the bank and as a result was drowned. In either of such events the death of the deceased was due to the accident without any fault on his part. If he went into the water from the bus voluntarily, as others did, he found himself in the bus in a position of danger and if, as subsequently turned out, he adopted the wrong course his death was nevertheless the direct and foreseeable result of this accident. Even if it is accepted that an Indian who was a passenger in the bus got on the Mombasa bank there is

absolutely no evidence that this Indian was drowned when trying to re-cross the river or that the Indian was the deceased. Once it is accepted that the deceased was in the bus and that he was drowned following the accident without any specific evidence as to what happened to him between the time of the accident and his death then, in my view, the provisional onus is cast on the defendant to show that the death did not result from the accident. In my view the defendant has clearly failed to discharge that onus. There is absolutely no evidence which shows that the deceased met his death as the result of a novus actus interviens on his part and not as the result of the accident. I see no reason whatever to interfere with what I understand to be the finding of the learned judge that the deceased met his death as the result of the accident without any fault on his part.

As regards the second of the issues, the facts as found were that the deceased, who had purchased a ticket to travel by bus TA. 8926 from Mombasa to Tanga and had travelled a part of the journey in that bus, left that bus when it was held up by a flooded river to join another bus, TAA. 193, of the defendant, which was making the same journey and on which he travelled a considerable distance before the accident. It was agreed that the ticket purchased by the deceased did not authorise the change of bus and that the conductor of bus TAA. 193 had no authority to permit a non-fare-paying passenger on the bus. There was no evidence as to the terms of the licence under which the defendant operated his buses. No permission was given to the deceased by the conductor of bus TAA. 193 to travel in it, but the learned judge found that permission must be implied from the facts of the case and that the deceased was never asked to pay any fare. It was submitted that in these circumstances the deceased had terminated his contract with the defendant to be carried; that he was a trespasser on bus TAA. 193; and that the defendant did not own to the deceased the duty which a common carrier owes to his passengers. I do not agree with these submissions. The deceased was in fact a passenger on bus TAA. 193 and, disregarding for this purpose any question of the rights of the deceased to obtain alternative transport when bus TA. 8926 was unable to proceed further but other buses were able to do so, it is not suggested that he became a passenger by reason of fraud or violence; indeed the finding of the learned judge is that there was implied permission to the deceased being a passenger. It was said by Blackburn, J. (as he then was) in *Austin v. Great Western Railway Co.* (4), at p. 446:

> "the fact of his being a passenger casts a duty on the company to carry him safely".

That case and *Foulkes v. Metropolititan District Railway Co.* (13) (1880), 5 C.P.D. 157, make it clear that the duty of a common carrier to a passenger arises quite independently of any contract and exists by virtue of the relationship of passenger and carrier. This being so, as the deceased was a passenger and the defendant a common carrier the nature of the duty owed by the defendant to the deceased was the same as was owed to any other passenger who had joined the bus in normal circumstances.

As regards the third of the issues, this falls into two parts: first whether the finding of fact was correct and secondly whether the decision in law was correct. The evidence given by the bus driver, Saidi Hamadi, was to the effect that his arrived at the river at about 10.30 a.m., waited there with another bus, and that at about 12.30 p.m. the other bus crossed. His passengers then urged him to cross and he said that he would wait "until the water has gone down more". All the passengers, especially two Indians, again urged him to cross and he said it was dangerous to cross with passengers and it would be better for him to cross with the bus alone. The passengers did not agree and as they again urged him to cross he did so with the passengers. In cross-examination

he stated that he had not mentioned, when he gave evidence at the inquest proceedings, that the passengers had pressed him to go over, but he had said that he gave them a chance to get down but they all remained in the bus. The bus conductor, Immanuel Mathew, gave evidence that he did not hear anything said by the driver or the passengers before crossing the river. On this evidence the learned judge stated that he found it "impossible to believe in the circumstances" that the driver and passengers said nothing to each other and he accepted the evidence of the driver as "substantially true". It was submitted that the learned judge erred in believing the driver and not the conductor. I confess to some difficulty in seeing why the conductor's evidence was impossible to believe, especially having regard to the driver's evidence in cross-examination, but the learned judge has had the advantage of seeing, and hearing the evidence of, both witnesses on this subject. The principles on which an appeal court will disturb a finding of fact are set out in *Watt v. Thomas* (2), and *Benmax v. Austin Motor Co. Ltd.* (3), and have been followed in this court on many occasions. In essence these principles are that an appeal court will not interfere with a finding of a specific fact, as opposed to an inference from a fact specifically found, based on the credibility of witnesses, unless it is satisfied that the judge has misdirected himself or has failed to take proper advantage of his having seen and heard the witnesses. In the light of these principles I do not consider that this court would be justified in interfering with the finding of specific fact by the learned judge that he accepted the driver's evidence as substantially true. I am by no means certain, however, that in this finding of fact the learned judge intended to find as a fact that every single passenger, including the women, the children and the deceased, urged the driver to cross. It is to be noted that there was no specific finding of fact that the deceased urged the driver to cross, and the learned judge in his finding of fact and in his decision that liability in negligence had not been proved against the defendants seems to have had regard to the position of the passengers as a whole and not to the liability of the defendant to the deceased. Having made this finding of specific fact the learned judge continued as follows:

> "Further apart from what said before the bus crossed, there is nothing to contradict D. 4's evidence that as long as two hours had elapsed since his arrival and during that time the passengers must in my view be deemed to have seen for themselves the state of the river as already described and to have had the same reasonable ground for apprehension that D. 5 had. To establish the defence of volenti non fit injuria the party concerned must be shown to have appreciated the existence of danger fully and voluntarily accepted the risk. The test of voluntary acceptance is given as follows in the same edition of Halsbury's Laws of England, Vol. 28, p. 83.
>
> > 'The inference of acceptance is more readily to be drawn in cases where it is proved that the plaintiff knew of the danger and comprehended it, as, for example, where the danger was apparent or proper warning was given of it, and where there is nothing to show that he was obliged to incur it, than in cases where he had knowledge that there was danger but not full comprehension of its extent, or where, while taking an ordinary and reasonable course he had not an adequate opportunity of electing whether he would accept the risk or not.'
>
> "Applying this test I find that the danger was apparent to the passengers, that they had proper warning as well and that they had adequate opportunity of electing whether to accept the risk or not. The answer to these issues must be that liability in negligence has not been proved against defendants."

This was a claim in negligence: does the defence of volenti non fit injuria apply to a claim in negligence? Accepting the finding of fact of the learned judge as set out above, does this show that the deceased with full knowledge of the danger consented to the risk? Is it open to a common carrier in the middle of this contract of carriage to discard from his shoulders the burden of his duty to take care and to place this burden on the shoulders of his passengers? Can a common carrier, in the middle of a normal contract of carriage, say to his passengers:

> "Our contract is now terminated. If you wish to continue you must enter into a special contract under which you proceed at your own risk"?

Is there any evidence that the deceased entered into any such special contract? These are all questions which arise on this issue and in my view these are all questions involving matters of major importance with far-reaching consequences.

The defence, so far as is relevant to this issue, is pleaded as follows:

> "The defendant denies each and every averment in para. 5 of the plaint, save that the defendant's vehicle No. TAA. 193 swerved off the road slightly when crossing a river near Mtimbwani, and states that such incident did not create any danger or cause injury to any passengers in the vehicle all of whom got off the vehicle without difficulty and uninjured and were taken on to Tanga. The defendant further states that before starting to negotiate the crossing of the river the defendant's driver in charge had seen another passenger vehicle and other vehicles cross without difficulty and that, before starting, he warned all passengers that he intended to cross and that any who elected to cross in the vehicle did so at their own risk."

This defence, contained in one paragraph, I understand to be: firstly, a denial of negligence; secondly, a denial that the act of the defendant created any danger or resulted in any injury; and, thirdly, a warning of danger and a warning that any passenger who elected to cross in the bus did so at his own risk. These defences, to say the least, appear to be contradictory and it is to be noted that there is no defence of contributory negligence. Be that as it may, however, the learned judge has held that "liability in negligence has not been proved against the defendants". Does this mean that the defendant was not negligent in trying to cross? Does it mean that though the defendant may have been negligent the deceased consented to the negligence? Or does it mean that the deceased entered into a special contract with the defendant which absolved the defendant of any duty to take care and under which the deceased was carried entirely at his own risk?

If the learned judge meant to find that the defendant was not negligent in trying to cross, then, with respect, I consider such a finding completely contrary to the evidence which the learned judge has accepted. The duty of the defendant as a common carrier was to carry its passengers with reasonable speed and due care to their place of destination. It was obvious that it was dangerous to cross the river, indeed the driver himself said so. This being so, the driver in attempting the crossing was not exhibiting to his passengers that degree of care which, as the servant of the defendant, it was his duty to exhibit and, in the absence of any other defence, the defendant must be liable for the damage which results therefrom.

If the learned judge meant that though the defendant was negligent the deceased had consented to the negligence, this raise the question whether the maxim volenti non fit injuria is by itself a defence to an action of negligence in the circumstances which existed in this case and where the defendant had not pleaded contributory negligence. As was pointed out in *Dann v. Hamilton* (8), the plea of volenti non fit injuria is strictly a denial of any duty at all, and therefore

of any breach of duty. That case was one in which a passenger had voluntarily accepted to be driven under the influence of drink, with the result that the chances of an accident were substantially increased. There was an accident and it was held that the defence of volenti non fit injuria did not apply to the tort of negligence and that the passenger was entitled to recover. That case was approved by the Court of Appeal in *Slater v. Clay Cross Co. Ltd.* (9), where a person who knowingly took the risk of walking in a railway tunnel was nevertheless held entitled to recover in respect of injuries received from being hit by a train. Denning, L.J. (as he then was) said at p. 271:

> "Where knowledge of the danger is not such as to render the accident solely the fault of the injured party, then it is not a bar to the action but only a ground for reducing damages. So, here, the plaintiff's knowledge of danger is not a complete bar. It is a factor in contributory negligence."

This case in turn was referred to in the House of Lords in *Billings & Sons Ltd. v. Riden* (12), and at p. 252 Lord Reid said:

> "The conclusion to be drawn from these cases appears to me to be that there is no magic in giving a warning. If the plaintiff knew the danger, either because he was warned or from his own knowledge and observation, the question is whether the danger was such that in the circumstances no sensible man would have incurred it or, in other words, whether the plaintiff's exposing himself to the danger was a want of common or ordinary prudence on his part. If it was not, then the fact that he voluntarily or knowingly incurred the danger does not entitle the defendant to escape from liability."

With this opinion the Lord Chancellor and Lord Cohen specifically agreed. Applying these principles to the facts of this case, can it be said that the action of the deceased, and indeed of the other passengers, has resulted in a bar to any action? Can it be said that the deceased, and indeed the other passengers, have put themselves in a position in which the defendant had ceased to owe to them the duty of care which had previously been owed? For this is the result of the plea of volenti non fit injuria, and, as I have already pointed out, no defence of contributory negligence has been raised. In my view the answer to both questions is clearly no. In so far as any absence of a duty on the part of the defendant to take care may be said to arise from a special contract, I shall deal with that aspect later, but I would here point out that no such special contract is pleaded. In so far as any such absence of duty to take care may be said to arise from the finding that

> "the danger was apparent to the passengers, . . . they had proper warning as well and. . . they had adequate opportunity of electing whether to accept the risk or not",

these facts in themselves would not, in my opinion, debar the deceased and the other passenger from any claim. It is the driver of the bus who has, or should have, the expert knowledge which will enable him to determine whether or not it is safe to cross. The passengers may see the river flooded and the water rushing across the road, but there cannot be attributed to them that knowledge of the performance of the bus in those circumstances which the driver has or should have. The deceased and the other passengers may have seen the conditions but he and they are not thereby able to appreciate the full extent of the risk. As was said by Wills, J., in *Osborne v. London and North Western Railway Co.* (14) (1886), 21 Q.B.D. 220 at p. 224, for the defendant to succeed there must be a finding of fact

> "that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it".

These words were referred to with approval in the Privy Council in *Letang v. Ottawa Electric Railway Co*. (10). If the learned judge intended to find that the deceased had full knowledge of the nature and extent of the risk he ran, then this is an inference of fact from specific facts found and this court is in as good a position as the learned judge to draw or not to draw any such inference. With respect, I cannot draw any such inference from the specific facts found. As Wills, J., in the *Osborne* case (14), said, the deceased may well have misapprehended the extent of the difficulty and danger which would be encountered. It is the driver of the bus, like the captain of a ship or aircraft, who has or should have the expert knowledge to determine whether or not it is safe to cross and whether or not in attempting to cross he is exercising to his passengers that degree of care which it is his duty to exercise. Neither the captain of a ship, the captain of an aircraft, nor the driver of the bus of a common carrier can say, in my opinion with any hope of a successful defence:

> "The passengers have seen the conditions, I have warned them but they have urged me to proceed. I know it is dangerous to proceed but I shall do so at their risk and I am absolved from my duty not to put them in a position of danger."

This is exactly what the defendant is seeking to do in this case. If one uses the test referred to by Lord Reid in the *Billings & Sons Ltd*. case (12), the deceased knew the danger, either because he was warned or from his own knowledge and observation, but was the danger such that in the circumstances no sensible man would have incurred it? In my view the danger was not such that no sensible man would have incurred it. The deceased, and the other passengers, had already been greatly delayed on their journey and were naturally anxious to proceed. They had seen a similar bus cross safely, even if with difficulty. I do not consider that the urging of the driver to cross, even if it was the deceased who did the urging (a matter on which there is no evidence), and the remaining in the bus during the crossing was an action which no sensible man would have done. This being so, then, as stated by Lord Reid, the fact that the deceased voluntarily or knowingly incurred the danger does not entitle the defendant to escape liability. Unless therefore there is some special contract which absolves the defendant from liability I do not consider that the warning given by the driver and the knowledge, such as it was, of the danger by the deceased is a bar to recovery in this case.

If the learned judge meant to find that the deceased had entered into a special contract by which he was carried entirely at his own risk, I would, as I have already done, point out that no such special contract is pleaded, I have no doubt that it is possible to enter into such a special contract with a common carrier at the beginning of a journey: *Ludditt v. Ginger Coote Airways Ltd*. (5). Whether it would be possible to enter into such a special contract in the middle of a journey under a normal contract is in my view a good deal more doubtful. Assuming, however, that such a course is possible, where is the evidence in this case that such a special contract was entered into by the deceased? Was it entered into with each and every one of the passengers, men, women and children? What were its terms? Did it apply only to the crossing or to the remainder of the journey? Had the original contract terminated? What was the consideration for the special contract? In *Grand Trunk Railway Company of Canada* (15), [1915] A.C. 740, the Lord Chancellor, Viscount Haldane, delivering the judgment of the Privy Council said at p. 747:

> "A second proposition is that if the contract is one which deprives the passenger of the benefit of a duty of care which he is prima facie entitled to expect that the company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed."

Assuming that it was the deceased who pressed to cross, of which there is no evidence, there is not a little of evidence, that the deceased had entered into a special contract of which a term, express or implied, was that he should be carried at his own risk and that he absolved the defendant of its duty to carry him with due care. I confess that I am utterly unable to spell out from the facts of this case any special contract entered into by the deceased, or any other passenger, which would have the result of relieving the defendant of its duty to take care to the passengers on the bus.

On the third issue, therefore, I do not consider that the defendant has proved any facts or circumstances which have the effect in law of providing a bar to the action.

For these reasons, in my opinion, the appeal should be allowed with costs and the case should be remitted to the learned judge, or if he is not available, to another judge of the High Court of Tanganyika, for the determination of the sixth issue.

Appeal dismissed.

For the appellant:
Donaldson & Wood, Tanga
R. N. Donaldson

For the respondent:
Mohamed Husain & Co., Tanga
A. Reid and *Tahir Ali*

Laban Koti v R
[1962] 1 EA 439 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	31 July 1962
Case Number:	331/1962
Before:	Rudd, Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Criminal law – Charge – Duplicity – Wrongfully attempting to interfere with or influence witnesses in judicial proceedings – Whether charge duplex – Test of duplicity a failure of justice or prejudice to the accused – Penal Code (*Cap.* 24), *s.* 121(1)(*f*) (*K.*) – *Criminal Procedure Code* (*Cap.* 27), *s.* 137(*b*)(*i*) (*K.*).

Editor's Summary

The appellant was charged with and convicted of wrongfully attempting to interfere with or influence

witnesses in a judicial proceeding, either before or after they had given evidence, contrary to s. 121(1)(*f*) of the Penal Code. On appeal it was suggested that the charge might be bad for duplicity, firstly because it alleged that the appellant "wrongfully attempted to interfere with or influence" witnesses, and secondly because it alleged that such attempt occurred "either before or after" the witness had given evidence.

Held –

(i) in deciding whether there is duplicity in a charge the test is whether a failure of justice has occurred or the accused has been prejudiced.

(ii) interference may involve either a physical act, such as preventing a witness from appearing to give evidence, or it may involve an act of persuasion or dissuasion; the words which the appellant used to the witnesses were both persuasive and of an influential nature.

(iii) the allegation that the appellant attempted to interfere with or influence the witnesses did not amount to duplicity, as his act involved both ingredients and s. 137(*b*)(i) of the Criminal Procedure Code applied.

(iv) the appellant was left in no doubt, from the time when the first prosecution witness gave evidence, that the alleged attempt was made before the witnesses gave evidence and his defence could not, therefore, be said to have been prejudiced in any way; accordingly there was no miscarriage or failure of justice on the ground that the charge was duplex in alleging that the attempt was made either before or after the witnesses had given their evidence.

Appeal dismissed.

Case referred to in judgment:

(1) *Cherree s/o Gukuli v. R.* (1955), 22 E.A.C.A. 478.

Judgment

Rudd Ag CJ, read the following judgment of the court: The appellant appeals from a conviction under s. 121(1)(*f*) of the Penal Code of wrongfully attempting to interfere with or influence witnesses in a judicial proceeding. The offence is stated as follows in the Penal Code:

> "121 (1). Any person who –
>
>
>
> (*f*) attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he has given evidence,

in connection with such evidence; . . .

is guilty of an offence and is liable to imprisonment for three years."

The charge in this instance reads as follows:

"Laban Koti s/o Munguti. Attempting to interfere with or influence witness in a judicial proceeding contrary to s. 121(*f*) of the Penal Code.

"Particulars of Offence. Laban Koti s/o Munguti: On or about 20th day of December, 1961, at Mbooni Location in Machakos District of the Southern Province, wrongfully attempted to interfere with or influence Syokua w/o Nzimi, Mwekw w/o Muli, Ngusia w/o Ngangu and Nzumaa w/o Kitonga witnesses in a judicial proceeding, either before or after they had given evidence in connection with such evidence."

There was ample evidence to establish the fact that the appellant had wrongfully suggested collectively to the four women named in the charge that they should give false evidence in court when they were called upon to testify. The only material point of any doubt in the appeal is as to whether the charge was duplex and, if so, as to whether this would necessitate the conviction being set aside. It was suggested that the charge might be bad for duplicity in two respects. First because it alleged that the appellant "wrongfully attempted to interfere with or influence" witnesses and secondly, because it alleged that such attempt occurred "either before or after" the witnesses had given evidence.

Section 137(*b*)(i) of the Criminal Procedure Code provides as follows:

"where an enactment constituting an offence states the offence to be the doing of or the omission to do any one of any different acts in the alternative, or the doing of or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts omissions, capacities or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence; . . ."

In *Cherere s/o Gukuli v. R.* (1) (1955), 22 E.A.C.A. 478 the Court of Appeal reviewed the cases on the subject of the effect of a charge which is duplex on the point as to whether a conviction pursuant to such a charge must necessarily be set aside or whether, on the other hand, it could be cured where no prejudice has resulted. It is there stated at p. 482:

". . . the test . . . which we must apply to answer the question, what has been the effect of the defect in the charge on the trial and conviction of the appellant, must be whether there has in fact been a failure of justice."

But at p. 483 the judgment proceeds:

"In *Odda Tore's* case this court said: 'Unless this court is able to say without hesitation that the accused has not been prejudiced by the duplicity there will be no other course open to it than to quash the conviction'. We think it is impossible to say, and certainly no court has so far as we are aware ever yet said, that an accused person is not prejudiced when offences are charged in one count in the alternative; he does not know precisely with what he is charged, nor of what offence he has been convicted. It is, indeed, very difficult to say that a breach of an elementary principle of criminal procedure had not occasioned a failure of justice."

This last extract certainly suggests strongly that duplicity in a charge is nearly always a fatal defect but in our view it does not go so far as to state that it is always necessarily fatal. It says that it is very difficult, not that it is always impossible to say, that a breach of the elementary principle of criminal procedure

has not occasioned a failure of justice. The test still remains as to whether or not a failure of justice has occurred. In our opinion the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity. As regards the case before us and the allegation that the appellant attempted "to interfere with or influence" the witnesses, we think there has been no prejudice. Indeed, we think, in the circumstances disclosed by the evidence that there is no duplicity. Interference, in our view, may involve either a physical act, such as preventing a witness from appearing to give evidence, or it may involve an act of persuasion or dissuasion. In England there is the common law offence of interference with witnesses by threats or persuasion to induce them not to give evidence or not to give certain evidence. In the case before us it is clear that the words which the appellant used to the four women were both of a persuasive and of an influential nature. Hence it is that we think that in the particular circumstances of this case, the allegation that the appellant attempted to interfere with or influence the witnesses did not amount to duplicity, as his act involved both ingredients and s. 137(*b*)(i) applies.

As regards the allegation that the attempt was made "either before or after" the witnesses had given evidence it became abundantly clear at a very early stage of the trial that the alleged attempt was made before the witnesses gave evidence. This was apparent from the evidence of the first witness who was called in the lower court. Although the magistrate ultimately convicted the appellant "as charged" he made the specific finding that the appellant

> "knowing full well that P.W. 4 and P.W. 5 (who were two of those women called to give evidence respecting the charge against him) were witnesses in a judicial proceeding approached these witnesses before they had in fact given their evidence and without right or authority attempted to interfere and influence these same witnesses in relation to their evidence about to be given in the said judicial proceeding by telling them that they must give false evidence before the court".

The appellant was left in no doubt, from the time when the first prosecution witness gave evidence, as to the case which he had to meet and his defence cannot, therefore, be said to have been prejudiced in any way. We consider that in these circumstances there was no miscarriage or failure of justice on the ground that the charge was duplex in alleging that the attempt was made either before or after the witnesses had given their evidence.

The appeal against conviction is accordingly dismissed. As we do not think that the sentence is unjust, the appeal against sentence is also dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Kenya
G. A. Twelftree (Crown Counsel, Kenya)

The South British Insurance Co Ltd v Nemchand Premchand Shah and another

[1962] 1 EA 442 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	7 June 1962
Case Number:	3/1962
Before:	Sir Ronald Sinclair P, Sir Trevor Gould and Crawshaw JJA
Sourced by:	LawAfrica

[1] Practice – Appeal – Leave to appeal – Privy Council – Action dismissed on preliminary objection – Decision reversed on appeal – Interlocutory or final judgment – Eastern African (*Appeal to Privy Council*) *Order-in-Council,* 1951, *s.* 2 *and s.* 3.

Editor's Summary

An action by the respondent under an insurance policy was dismissed by the Supreme Court on a preliminary objection that an award under an arbitration clause in the policy was a condition precedent to any proceedings and that such arbitration had not taken place. This decision was reversed on appeal and the court ordered the proceedings to be remitted to the lower court to determine the issue of liability. Against this order the applicant applied for leave to appeal as of right, and the respondent contended that, as the decision of the appellate court was not a "final judgment" but an "interlocutory judgment", leave could not be granted.

Held –

(i) it was doubtful whether the judgment of the Supreme Court could be said to be final and, even if it was, the judgment of the Court of Appeal was not final.

(ii) the judgment of the Court of Appeal did not finally dispose of the rights of the parties because the court remitted the matter in dispute to the lower court for those rights to be determined; accordingly there was no appeal as of right.

Application refused.

Cases referred to in judgment:

(1) *Hill v. Fladgate,* [1910] 1 Ch. 489.

(2) *Shubrook v. Tufnell* (1882), 9 Q.B.D. 621.

(3) *Salaman v. Warner,* [1891] 1 Q.B. 734.

(4) *Bozson v. Altrincham Urban District Council,* [1903] 1 K.B. 547.

(5) *Isaacs & Sons v. Salbstein,* [1916] 2 K.B. 139.

(6) *Cogstad v. Newsum Ltd.,* [1921] 2 A.C. 528.

(7) *Hunt v. Allied Bakeies Ltd.,* [1956] 1 W.L.R. 1326; [1956] 3 All E.R. 513.

(8) *Goldring v. La Banque D'Hochelaga* (1880), 5 App. Cas. 371.

(9) *Khemaney v. Murlidhar,* [1958] E.A. 268 (C.A.).

(10) *Khemaney v. Murlidhar*, [1960] E.A. 1 (P.C.).

Judgment

Crawshaw JA: This application relates to an intended appeal to the Privy Council from an order of this court dated January 13, 1962. The history of these proceedings is that a suit under an insurance policy was filed in the Supreme Court by the respondents (hereinafter referred to as the plaintiffs) against the applicant (hereinafter referred to as the defendant) but was dismissed on a preliminary objection, the learned judge holding that no right of action arose under the policy until an award under the arbitration

clause contained in the policy had been made. The plaintiffs appealed against that decision to this court and the appeal was allowed, it being ordered that the suit should proceed. The defendant now wishes to appeal to the Privy Council against that order and the application is in the following terms:

> ". For Orders That:
>
> (1) (*a*) The applicant be at liberty as matter of right pursuant to sub-s. (*a*) of s. 3 of East African (Appeals to Privy Council) Order-in-Council, 1951, to appeal from the judgment and formal order above recited
>
> (*b*) Alternatively the applicant be granted leave to appeal from the judgment and formal order above cited pursuant to sub-s. (*b*) of s. 3 of East African (Appeals to Privy Council) Order-in-Council, 1951, on the grounds that the question involved in the appeal is one of great general and public importance.
>
> (2) The costs of this application be costs in the Privy Council appeal and be awarded to the respondents in case the appeal be dismissed for want of prosecution."

The plaintiffs contest the right of the defendant to appeal as of right and oppose leave being granted. During the hearing of the application I understood Mr. Cleasby, who appeared for the defendant, to abandon that part of his application which sought leave to appeal, and to rely only on his claim to appeal as of right.

Section 3 of the East African (Appeal to Privy Council) Order-in-Council, 1951, reads:

> "3. Subject to the provisions of this order, an appeal shall lie –
>
> (*a*) as of right, from any final judgment of the court, where the matter in dispute on the appeal amounts to or is of the value of £1,000 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards; and
>
> (*b*) at the discretion of the court, from any other judgment of the court, whether final or interlocutory, if, in the opinion of the court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty-in-Council for decision."

The amount claimed under the policy and which is in dispute on the pleadings exceeds £1,000. In s. 2 of the Order-in-Council "judgment" is defined as including "decree, order, sentence or decision".

Mr. Cleasby, as I understand him, submits that the decision of this court is a "final judgment" within the meaning of s. 3 of the Order-in-Council: that the judgment of the learned judge related to the whole suit, and not a part, and that it was the whole of that judgment which was reversed by this court: that a judgment is not interlocutory when it sets aside a judgment of the Supreme Court: that there is nothing further to be done to perfect the judgment of this court: that no decision involving a right is interlocutory excepting an order for retrial which contains no decision on the suit: that had the judgment of the Supreme Court dismissing the suit been upheld in this court, the plaintiffs would have been able to appeal to the Privy Council as of right, and that therefore a similar right must pertain to the defendant on the judgment of the Supreme Court being set aside, and that it would be wrong if one party could appeal and not the other: that if there is no right to appeal to the Privy Council at this stage, the effect would be that the suit would proceed, and if the judge found for the plaintiffs, his decision could have no reference to the subject matter of this intended appeal, and should the defendant in those circumstances

find it necessary to carry an appeal against the eventual finding of the judge to the Privy Council, the defendant would be unable to raise before the Privy Council the decision now sought to be appealed from: that the matter in dispute for the purpose of s. 3 of the Order-in-Council exceeds £1,000.

Mr. Khanna, on the other hand, submits that the decision of this court was not a "final judgment". He maintains that all this court in fact held was that the arbitration clause was no bar to the suit, and that the judgment was interlocutory, it being a necessary matter for decision before the case could be heard on its merits: that the matter in dispute in the intended appeal is incapable of monetary assessment and is different from the monetary claim itself: that this court did not declare the rights of the parties or direct the Supreme Court to find what sum is due, but merely disposed of one of the several grounds of defence: that if, after the suit is disposed of on its merits in favour of the plaintiffs, the defendant should eventually take the matter on appeal to the Privy Council, the defendant would then be able to take objection to the decision of this court, if not as of right at least with the leave of the Privy Council.

No definition of "final judgment" or "interlocutory judgment" appears in the Order-in-Council nor in our Civil Procedure Ordinance or in the rules made thereunder. Nor does a definition appear in the English Rules of the Supreme Court, and the authorities show that the English courts have at times found difficulty in deciding whether an order is final or interlocutory. In *Hill v. Fladgate* (1), [1910] 1 Ch. 489, where an order dismissing an action as frivolous and vexatious was held for the purposes of appeal to be an interlocutory order, Buckley, L.J., observed,

> "the rules are so expressed and the decisions are so conflicting that I confess I am unable to arrive to any conclusion satisfactory to my own mind as to whether this is an interlocutory or a final order".

In *Shubrook v. Tufnell* (2) (1882), 9 Q.B.D. 621, an arbitrator stated a case for the opinion of the court which provided that, if the opinion of the court should be in favour of the plaintiff then the case was to be referred back to the arbitrator, otherwise judgment was to be entered for the defendant. The question before the court was whether on the facts there was a cause of action, and the court held that there was and remitted the case to the arbitrator. On appeal it was held that this was a final order, on the basis apparently that had the appellate court differed from the court below, final judgment would have been entered for the defendant and that would have been the end of the action.

In *Salaman v. Warner* (3), [1891] 1 Q.B. 734, the defence before trial had raised a point of law that the statement of claim did not disclose a cause of action, and the divisional court dismissed the action. On appeal (the case of *Shubrook v. Tufnell* (2), was not cited) it was held that the order dismissing the action was interlocutory and not final, Lord Esher, M.R. saying:

> "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

The apparent divergence of views in the *Shubrook v. Tufnell* (2), and *Salaman v. Warner* (3), cases was brought to the notice of the appellate court in *Bozson v. Altrincham Urban District Council* (4), [1903] 1 K.B. 547. There, the action was for damages for breach of contract; the question of liability and breach only were to be tried, the rest of the case, if any, being left to an official referee. The trial court held there was no breach of contract and dismissed the action.

On appeal it was held, preferring, as the Earl of Halsbury said, the decision in the *Shubrook* case (2), to that in the *Salaman* case (3), that the order of the trial court was a final order. lord alverstone said:

> "It seems to me that the real test for determining this question ought to be this: does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order but if it does not, it is then, in my opinion, an interlocutory order."

In the 1962 edition of the Annual Practice at p. 1664, after referring to the test applied by Lord Alverstone, it is said:

> "A different test is stated in *Salaman v. Warner*, [1891] 1 Q.B. 734, namely, that an order is an interlocutory order unless it is made on an application of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute (see per DU Parcq, L.J., in *Egerton v. Shirley*, [1945] K.B. at p. 110). The latter test (accepted by Romer, L.J., in *Re Herbert Reeves & Co*. [1902], 1 Ch., at p. 33) regards the nature of the proceedings; the former (which is generally preferred) looks at the order made. 'What must be looked at is the order under appeal' (*Isaacs & Sons v. Salbstein*, [1916] 2 K.B. 139, C.A., at p. 147)."

That one must look at the order made was the view taken by the court in *Isaacs & Sons v. Salbstein* (5), [1916] 2 K.B. 139, on an appeal from an order directing a new trial. At p. 148, Pickford, L.J., there said:

> "In *Bozson v. Altrincham Urban Council*, the Court of Appeal declined to follow *Salaman v. Warner*, and said they preferred *Shubrook v. Tufnell*, but although Lord Halsbury, L.C., said he preferred it I do not think he altogether followed it. He followed it so far as to say that *Salaman v. Warner* was not right in saying that an order was final if it would, whichever side won, finally determine the litigation; he further said that the thing to be looked at was the order appealed from. In the present case the order appealed from. In the present case the order appealed from does not put a final end to the action, and this is an appeal from an interlocutory, and not from a final, order."

Swinfen Eady, L.J., referring to the divergent decisions in *Shubrook v. Tufnell* (2), and *Salaman v. Warner* (3), said at p. 147,

> "neither decision seems quite consistent with that in *Bozson v. Altrincham Urban Council*, which puts the matter on the true foundation that what must be looked at is the order under appeal."

In *Cogstad v. Newsum Ltd.* (6), [1921] 2 A.C. 528, the House (by a majority) did not follow *Shubrook v. Tufnell* (2). Lord Buckmaster, referring to the judgment of JESSEL, M.R., therein said, at p. 534,

> "he appears to assume that if an award is made in such a form that in one event a decision will make it final that constitutes a final award. I am unable to agree with this view."

Lord Buckmaster then went on to say that an award cannot be regarded as final if in certain circumstances the matter may be referred back to the arbitrator.

As it is the order appeal which must be looked at, it is not strictly necessary to look at the order of the learned judge, and I only do so to meet the argument of Mr. Cleasby that if the learned judge's order was final, so must be the order of this court in setting it aside; an argument which in my opinion is unsound. The learned judge said, "It is my view, therefore, that the plaint disclosed no cause of action". It was held in *Hunt v. Allied Bakeries Ltd.* (7), [1956] 1 W.L.R. 1326, that an order dismissing an action because it failed to disclose a cause of action is to be treated as interlocutory. In coming to this

conclusion Lord Evershed, M.R., referring to the decision in *Hill v. Fladgate* (1), (cited by him as "*In re Page*") with apparent approval, said at p. 1328:

> "After consulting with the chief registrar and looking at the case, and also after consultation with my colleagues, I am left in no doubt at all that, rightly or wrongly, orders dismissing actions – either because they are frivolous and vexatious, or on the ground of disclosure of no reasonable cause of action – have for a very long time been treated as interlocutory."

And at p. 1329:

> "It is possible that there may be cases (though no example now occurs to me and the present case is certainly not one) in which the facts would be of so special a character as to create an exception of the rule."

I do not think that any special facts are present in the instant case to take it out of the general rule. It seems a little difficult perhaps to reconcile the decision in the *Hunt* case (7), with Lord Alverstone's test in the *Bozson* case (4). Buckley, L.J., found a similar difficulty in agreeing with the other members of the court in the *Hill* case (1), where at p. 494, he said,

> "This, however, is an order in favour of the defendants and it brings this action altogether to an end. To my mind it would be reasonable to say that that is a final order. But I do not think I am entitled to found myself on that, because there have been many decisions in which orders apparently final have been treated as interlocutory."

The judgment we are concerned with, however, is not that of the learned judge but that from which leave to appeal is sought, that is the judgment of this court reversing the judgment of the court below and directing that the suit should proceed. Even if the judgment of the learned judge could be said to have been final (which in view of the more recent decisions seems doubtful), I do not think it can reasonably be said that the judgment of this court was. It does not dispose of the rights of the parties, for it is remitting the matter in dispute to the court for those rights to be determined. I would therefore refuse to make the order asked for by the defendant and award costs of the application to the plaintiffs. The question of the value of the matter in dispute does not in the circumstances arise.

Sir Trevor Gould J.A: I have had the advantage of reading the order prepared by CRAWSHAW, J.A., and agree with him that the application must be refused. It would seem evident that the word "final" as used in para. 3(*a*) of the East African (Appeal to Privy Council) Order-in-Council, 1951, is used in contradistinction to the word "interlocutory" as both words are used in para. 3(*b*) and also on the authority of such cases as *Goldring v. La Banque D'Hochelaga* (8) (1880), 5 App. Cas. 371, and other cases referred to in Privy Council Practice by Bentwich (3rd Edn.), at p. 105. That being so I think the English authorities are to be accepted as a guide, although decided in relation to different rules and enactments. The weight of those authorities, as my learned brother has found, indicates that the judgment of this court from which leave to appeal is sought is not a final judgment. There is therefore no appeal as of right and this court has not been asked to exercise its discretion under para. 3(*b*).

Counsel for the applicant submitted that if he be not permitted to appeal now to the Privy Council upon the particular point, he has been deprived of one ground of defence and will never have the opportunity of having that point decided by the Privy Council. I do not myself think that result would follow, but even if it did it would not justify this court in assigning to the word "final" a

meaning at variance with its normal meaning. Special leave may of course always be sought direct from the Privy Council.

In agreeing that the application should be dismissed I find one cause for hesitation, in that there has been one case to my own knowledge in which leave to appeal was obtained from this court and in which the construction of para. 3(*a*) now adopted was not applied. That was the case of *Khemaney v. Murlidhar* (9), [1958] E.A. 268 (C.A.), in which this court ordered a new trial on a question of damages. Leave to appeal was obtained and the appeal was duly heard by the Privy Council (10), [1960] E.A. 1 (P.C.). The judgment of this court ordering a new trial would fall into the category of interlocutory judgments on the principles now being applied. Reference to the records of the case, however, shows that no objection was offered to the making of either the conditional or final orders giving leave. There was no argument and the question now under consideration was never raised. I do not therefore consider that that case provides any ground for altering the conclusion now arrived at.

Sir Ronald Sinclair P: I have had the advantage of reading the orders prepared by my brother judges. I agree with them and have nothing to add. The application is refused with costs.

Application refused.

For the applicant:
Atkinson, Cleasby & Co., Mombasa
R. P. Cleasby and *H. V. Anderson*

For the respondent:
D. N. & R. N. Khanna, Nairobi
D. N. Khanna

Noormohamed Abdulla v Ranchhodbhai J Patel and another
[1962] 1 EA 447 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 August 1962
Case Number:	20/1961
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Costs – Security for costs – Application for further security and order for payment of past costs – Substantial delay in application – Appeal pending – Costs in court below unpaid – Order by court below to pay costs by instalments – Instalments duly paid – Discretion of court – Eastern African Court of Appeal Rules, 1954. *r.* 58, *r.* 60 *and r.* 82 *– Rules of the Supreme Court, O. LVIII, r.* 9 (5) *– Indian Civil Procedure Rules, O. XLI, r.* 10 (1).

Editor's Summary

The appellant's claim for damages for wrongful distress against the first respondent was dismissed by the Supreme Court with costs subsequently taxed at Shs. 8,640/50. The first respondent then issued execution by notice to the appellant to show cause against arrest and committal on the hearing of which the appellant was ordered to pay the costs by monthly instalments of Shs. 100/- and that in default a warrant of arrest should issue. The appellant paid the instalments regularly. About fifteen months after filing of the appeal but three months before the appeal was to be heard the first respondent applied for orders that the appellant should give security for past costs relating to the matters in question in the appeal and that such past costs should be paid within such time as the court thought fit. That the appellant was a man of little substance was not contested.

Held –

(i) the court had no jurisdiction to order payment of the costs already ordered to be paid by another court or to put a time limit upon such payment;

(ii) the power conferred by r. 60 of the Eastern African Court of Appeal Rules, 1954, to order security for payment of "past costs" includes power to order security for costs ordered to be paid in the Supreme Court;

(iii) that an order for payment of the costs by instalments had been made by the Supreme Court in execution proceedings was no legal impediment to the exercise of the power to order security under r. 60 but;

(iv) the power to order security in respect of costs ordered to be paid in the Supreme Court was one which should be sparingly exercised; and in view of the inordinate delay in making the application and since the onus on the first respondent to show that this delay did not prejudice the appellant had not been discharged, the application must be refused.

Application refused.

Cases referred to in judgment:

(1) *Brocklebank v. Lynn Steamship Co*. (1878), 3 C.P.D. 365.

(2) *Massey v. Allen* (1879), 12 Ch. D. 807.

(3) *Official Receiver and Liquidator of Sejpal Ltd. v. N. N. Chandrani*, [1961] E.A. 107 (C.A.).

(4) *Siri Ram Kaura v. M. J. E. Morgan*, [1961] E.A. 462 (C.A.).

(5) *Bhimji Anand Shah v. Hercules Insurance Co. Ltd*., E.A.C.A. Civil Appeal No. 53 of 1961 (Application) (unreported).

(6) *Lalji Gangji v. Nathoo Vassanjee*, [1960] E.A. 315 (C.A.).

(7) *Wille v. St. John*, [1910] 1 Ch. 701.

(8) *Morgan v. Hardisty* (1889), 6 T.L.R.I.

(9) *Mayor of Saltash v. Goodman* (1880), 43 L.T. 464.

(10) *Rourke v. White Mass Colliery Co*. (1876), 1 C.P.D. 556.

(11) *Farrer v. Lacy Hartland & Co*. (1885), 28 Ch. D. 482.

(12) *Aberdare and Plymouth Co. v. Hankey* (1888), 32 Sol. Jo. 644.

Judgment

Sir Trevor Gould Ag VP, read the following judgment of the court:

In this application the applicant, who is the first respondent in the appeal during the pendency of which the application has been made, seeks orders that:

"(1) security be given by the appellant for payment of past costs relating to the matters in question in the

appeal;

"(2) the past costs relating to the matters in question in the appeal be paid within such time as this honourable court shall think fit;"

and also further orders which would be consequential upon an order to give security.

By a judgment and decree of the Supreme Court of Kenya at Nairobi the appellants' claim for damages in the suit was dismissed as against the first respondent and allowed in the sum of Shs. 4,000/- and interest as against the second respondent; the appellant was ordered to pay the first respondent his costs of the suit. The costs were taxed at Shs. 8,640/50 but remained unpaid. On March 6, 1961, the appellant filed the appeal in which the present application has been made and in a callover on October 23, 1961, the appeal was by consent set down for hearing the 4th-7th September, 1962. On or about November 30, 1961, the first respondent applied for execution against the appellant by way of arrest and committal to prison and the application came on for hearing

before a judge on December 19, 1961. The appellant gave evidence which showed that although he earned a comparatively small income his commitments for family expenses and under another court order were such that he was in effect impecunious. The judge made the following order:

> "If the judgment-debtor is as hard pressed financially as would appear from his evidence, the only sensible course open to him would appear to be to file his petition in Bankruptcy. It seems to me that in the instant case the only possible course is for me to make a relatively small instalments order. The judgment debt will be payable by equal monthly instalments of Shs. 100/-, first instalment January 3, 1962, subsequent instalments 3rd of each successive month, in default of any instalment, whole outstanding amount to become due and payable forthwith and warrant of arrest to issue. Costs of application to be judgment-creditor's. L.A.
>
> Henry Mayers.
>
> Judge"

The instalments as ordered have been duly paid up to the time of this application, which was filed on June 4, 1962.

On the application before this court the fact that the appellant was a man of little substance was not contested. His own statement of his position leaves no doubt on that question and the result of execution against him has already been indicated – an order for payment of Shs. 100/- per month. If he should be unsuccessful in the appeal his position will be so much the worse. A number of grounds were relied upon by counsel on his behalf in resisting the application, but we will first dispose of one matter which appears to be entirely clear. It is common ground that the phrase "past costs" in para. 1 and para. 2 of the notice of motion above set out refers not to costs of the appeal prior to the application, but to the costs ordered to be paid in the Supreme Court. That being so we are quite unable to see that we have any jurisdiction to make the order asked for in para. 2; apart, of course, from our general jurisdiction to deal with costs on the determination of an appeal, we are unaware of any rule or other enactment which would entitle this court to order payment of costs already ordered to be paid by another court, or to put a time limit upon such payment, and counsel for the first respondent (the applicant) did not refer us to any such authority. It is not therefore necessary to consider para. 2 any further.

Concerning the application for security for past costs contained in para. 1, counsel for the appellant submitted that this court had no jurisdiction to order such security, and that if it had jurisdiction, no order should be made because (*a*) by virtue of the order of Mayers, J., the full amount of the costs was not immediately payable (*b*) three had been inordinate delay in bringing the application (*c*) important and novel points of law were involved in the appeal and (*d*) the appellant's impecunious condition had been brought about by the act of the first respondent which was in issue in the suit.

The jurisdiction of this court to order security for costs is contained in r. 60 (as amended) of the Eastern African Court of Appeal Rules, 1954:

> "60. The court or a judge or registrar may at any time, in any case where it or he thinks fit, order further security for costs to be given, and may order security to be given for the payment of past costs relating to the matters in question in the appeal."

This rule is to be read in the light of r. 58 which is as follows:

> "58. Subject to any extension of time and to any order made under r. 82 of these Rules, the appellant shall within sixty days after filing notice of appeal lodge the appeal by filing in the registry of the court four copies of

> the record of appeal, paying the prescribed fee and lodging in court the sum of fifteen hundred shillings as security for the costs of the appeal."

This rule embodies a departure from the English practice in that security for at least part of the costs is to be provided in every appeal, unless an order is made to the contrary under r. 82, relating to poor persons. The contention that this court has no jurisdiction to make the order for security for payment of the costs in the Supreme Court is based on the wording of r. 60, in which the words "past costs", it is submitted, relate only to costs incurred in the appeal prior to the application for security. In the case of *Brocklebank v. Lynn Steamship Co*. (1) (1878), 3 C.P.D. 365, on the common law side, and *Massey v. Allen* (2) (1879), 12 Ch. D. 807, in the Chancery Division. it was held that an order made during the course of an action for security for costs could cover past as well as further costs. Those were not appeals (in the firstmentioned case the plaintiff had filed a petition for liquidation and in the second the plaintiff had left the jurisdiction) and the courts were considering a matter of practice and not the interpretation of a rule. The question was whether such orders were to be limited to future costs; and Lindley, J., put it in *Brocklebank v. Lynn Steamship Co*. (1), at p. 367:

> "the common form of order is applicable to security for the whole costs, and is not limited to after accruing costs."

The question for this court is the construction of r. 60 and the cases quoted do not assist in that problem. No English case has been cited in which an order for security for costs on appeal extended to include costs ordered in the court below, but the English rule (O. 58 r. 9 (5)) empowers the Court of Appeal to order security only for the costs "of an appeal". That is the wording of our r. 58 relating to the requirement of security in every appeal, but there is a marked change in the latter part of r. 60, which empowers this court to order security "for the payment of past costs relating to the matters in question in the appeal". If the intention was not to include power to order security for unpaid costs in the court below the concluding words of the rule appear to be redundant – the rule could terminate at the phrase "past costs". The matters in question in the appeal must be the matters in question in the action (or perhaps only some of them) and the costs awarded in the court below would also normally be in question in the appeal either consequentially or, in exceptional cases, directly. The provision in r. 58 for security in every appeal appears to denote a divergence from the policy of the English rules, and that very provision would lessen the necessity for asking for security for past costs incurred in the appeal itself; if exceptional costs were being incurred in the appeal and the circumstances were otherwise appropriate it would seem that in most cases an application for further security for future costs would be adequate.

Rule 60 has been, in a number of recent cases, interpreted in the sense contended for by the first respondent. Orders for security for payment of costs awarded in the courts below as "past costs" were made by the full court in *Official Receiver and Liquidator of Sejpal Ltd. v. N. N. Chandrani* (3), [1961] E.A. 107 (C.A.), by a single judge but confirmed on reference to the full court, in *Siri Ram Kaura v. M. J. E. Morgan* (4), [1961] E.A. 462 (C.A.), and by a single judge in *Bhimji Anand Shah v. Hercules Insurance Co. Ltd*. (5), E.A.C.A. Civil Appeal No. 53 of 1961 (Application) (unreported). Counsel for the appellant contends that these decisions should not be followed as the point was not taken that "past costs" did not include costs in the Supreme Court. There is no reference to that particular question in any of the judgments but the judges forming the court in the cases mentioned cannot but have been aware of the interpretation which they were placing on r. 60. In our opinion, having heard argument on the point, the wording of that rule is wide enough to sustain that interpretation, and the absence of any equivalent provision in English practice is not sufficient reason for our adopting a different and narrower view in disregard of the normal

rule that this court is bound by its previous decisions. Although there is no corresponding English provision the existence of such a power in a court of Appeal is not unique, for by O. 41, r. 10 (1), of the Indian Civil Procedure Rules a discretion is given to an appellate court to

> "demand from the appellant security for the costs of the appeal, or of the original suit, or of both":

Code of Civil Procedure by Mulla (12th Edn.), Vol. II, p. 1193. For these reasons in our judgment we have jurisdiction to make the order now under consideration if, in the exercise of our discretion, we think fit.

The next submission on behalf of the appellant was based upon the order made by Mayers, J., that the costs be paid by instalments, in default of the payment of which a warrant for imprisonment would issue. It was submitted that the only moneys presently payable were the instalments and that no other form of execution for the full amount of the costs could be had in the Supreme Court – at least without application to that court under the liberty to apply contained in the order. It was suggested that what was sought from this court was another form of execution. This argument might have been sustained in relation to para. 2 of the notice of motion, but we have already held that we have no jurisdiction to entertain that particular application. That has no relation to our power to order security, which, as we have indicated above, extends to security for costs ordered to be paid in the Supreme Court. The position or result of execution proceedings in the Supreme Court can provide no legal impediment to the exercise of such a power conferred by the rules of this court, though (and this is a question to which we will return) it is a matter which can be considered in determining whether the court's discretion will be exercised in favour of an applicant. The order for security in such a case as this is not directed towards enforcing the payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties. In a proper case therefore the order can be made in respect of costs unpaid whatever may have been the outcome of the execution proceedings in the court below.

We pass now to the question whether an order should be made in the present case. Counsel for the first respondent contended that no regard should be had to English authorities because of the difference between the wording of the rules of this court and those in force in England, and in particular because of the absence from r. 60 of the words "in special circumstances" which appear in O. 58, r. 9 (5) of the Rules of the Supreme Court, in England. He relied also upon the presence in r. 60 of the words "at any time".

Similar submissions were dealt with by Windham, J.A., in *Lalji Gangji v. Nathoo Vassanjee* (6), [1960] E.A. 315 (C.A.), in a reference from a decision of the acting registrar of this court. At p. 317, Windham, J.A., said:

> "With regard to the first of these two submissions, it is true that the English O. 58, r. 9(5), which, unlike r. 60 of the Rules of this court, is concerned with the furnishing of initial security for costs of an appeal, and not the furnishing of further security, differs from r. 60, in that the English Rule (*a*) empowers the court to order the security only 'in special circumstances'; and (*b*) does not expressly provide, as does r. 60, that the security may be ordered 'at any time'. But, in spite of these differences in wording, I think that, even under r. 60, the burden lies on the applicant for an order for further security, as it normally lies on any applicant to a court for any relief, to show cause why that relief should be granted, and that he cannot, merely be averring that the security already deposited for costs of

> the appeal is inadequate, or that costs in the action below, ordered in his favour, have not yet been paid, impose any obligation upon the court or judge or registrar to grant his application."
>
>
>
> "Under r. 60 the court or judge or registrar has a discretion to order further security 'in any case where it or he thinks fit'. This discretion is unfettered, subject only to the implied fetter upon all such discretions, namely that they should be exercised judicially. Again, the words 'at any time' in r. 60 do not mean that a registrar is precluded from taking into account any delay on the applicant's part in making his application, as a factor to be placed in the scales whose tilt may determine whether or not he will exercise his discretion in the applicant's favour. They only mean that no amount of lateness in the lodging of an application shall in itself preclude the registrar from granting the application. This must, of course, be read subject to the specific provision of r. 19 (3) of the Rules requiring the service of notices of motion and copies of affidavits on necessary parties not less than two clear days before the hearing."

We respectfully agree with what is said there, and would add that though some differences may arise consequent upon the wider powers conferred by the rules of this court many of the principles laid down by English case law remain relevant to the judicial exercise of discretion by this court.

In the present case there has been substantial delay in making the application. The appeal was set down for hearing in October, 1961, but the first respondent did not obtain the evidence upon which he now relies until the hearing of his application for execution in December of that year. Even then he allowed nearly six months to go by before he acted. The application was heard about seven and a half weeks before the date fixed for hearing but in that period intervenes the long vacation of four weeks. It is clear law that under the English practice an application of this nature must be made promptly, as soon as practicable after the appeal is set down and not after the bulk of the costs have been incurred: *Wille v. St. John* (7), [1910] 1 Ch. 701, *Morgan v. Hardisty* (8) (1889), 6 T.L.R.I. and *Mayor of Saltash v. Goodman* (9) (1880), 43 L.T. 464. The same principle, as we have observed above, applies here. Counsel for the first respondent argued that the cost of briefing counsel is not incurred in Kenya until very shortly before the hearing. On the other hand the appellant's affidavit contains a statement that he has already incurred liability for fees of Queen's Counsel. The onus of showing that his unexplained delay did not prejudice the appellant is on the first respondent and in our opinion the onus has not been discharged.

Brief reference may be made to the two other points taken for the appellant. In his submission important and novel points of law will be in issue in the appeal. We have no reason to think that is not the case, but the authority relied upon, *Rourke v. White Mass Colliery Co*. (10) (1876), 1 C.P.D. 556, was explained as an exceptional case in *Farrer v. Lacy Hartland & Co*. (11) (1885), 28 Ch. D. 482, in which it was said that there was no practice that security would be dispensed with on the ground that an important or novel point was in issue. The last-mentioned case is the authority for the appellant's other proposition – that security will not be ordered if the appellant's impecunious circumstances arose from the allegedly wrongful act complained of in the action. The appellant, in his affidavit, alleged that this was the case here, the allegedly wrongful act being the distraint the legality of which was in issue in the action. We think that a mere assertion in such a matter is inadequate and that a certain amount of supporting detail should have been given. The allegation has not been denied, however, and, as far as it goes the argument provides some support for the

appellant's case. We are not inclined to attach much weight to it in the circumstances.

We return now to the question of the order made in execution proceedings in the Supreme Court. We have held that it is not an impediment in law to the making of an order for security. On the question whether an order should be made in the exercise of our discretion the order for instalments is relevant in that it includes an order for the issue of a warrant to arrest if default is made. This does provide some slight assurance that these costs or part of them will be paid; the instalments have been paid to date and there is no reason to suppose they will be discontinued before the appeal is disposed of. Even then, if the appellant is unsuccessful, it is unlikely that he would, as a married man with a family, prefer prison to payment. He might well, however, prefer bankruptcy, and that is a valid argument in the first respondent's favour. Nevertheless so far as the Supreme Court costs are concerned (and the application is based upon them alone) the appellant's insolvency has not been shown to be absolute, which is a point in his favour.

While we have held that we have the power to make the order asked for in this application and therefore accept that it is a power to be exercised if circumstances warrant, we have had the benefit of fuller argument than was tendered in the earlier cases, and have reached the conclusion that the power should be sparingly exercised. In England the poverty of a plaintiff is no ground for ordering security for costs in the suit (The Annual Practice, 1962, p. 1827), except in the case of a nominal plaintiff; nor have we found any case in which the costs in the court below have been included in the security on appeal. A similar rule applies to suits in India (Mulla (*supra*) Vol. II, p. 997), though in India, as noted above, an appeal court has specific power to include the costs of the suit in an order for security. In Kenya so far as we know (for the point was not mentioned in argument) security is not ordered in the Supreme Court on the ground of poverty. In the circumstances it would appear something of an anomaly if they were ordered to be secured upon appeal, though of course the principle to be applied is not the same. It is right that a litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided. But when it has been decided by the court set up by law for the purpose, other considerations enter into the question whether he should be permitted unconditionally to carry the matter further. Rule 58 of the rules of this court provides a practice divergent from that in England and indicates a more liberal approach to the question of security in that it must be provided for in all cases; on the other hand it can also be taken as an indication that the sum specified is to be regarded as sufficient in any but exceptional cases. Having regard to all these considerations the question in what circumstances an appellant should be called upon to accept the burden of providing security for the costs in the court below, as well as in the Court of Appeal, is a difficult one. It is extremely difficult to visualize a case in which he would be made to secure both sets of costs in full: the general rule in England (*Aberdare and Plymouth Co. v. Hankey* (12) (1888), 32 Sol. Jo. 644), and the rule envisaged by the automatic provision in our own r. 58 is that only a reasonable amount will be ordered. The position must therefore be looked at as a whole and applications for past costs and future costs are inter-related. If it was decided that the circumstances warranted taking into consideration the costs in the court below (and we have already said that the power should be sparingly exercised) the question would be, by how much is it reasonable to increase the amount of the security provided for in r. 58 (having regard to any orders already made).

It is not necessary for the purposes of the present case to pursue this topic further, for quite apart from the special considerations, which may apply to the question of ordering security for costs incurred in the court below, we are satisfied that on general principles the present application must be refused.

We base that decision upon the dilatoriness of the first respondent in making the application, together with the other matters which we have discussed above and which tell in favour of the appellant. We therefore dismiss the application with costs.

Application refused.

For the applicant:
D. N. & R. N. Khanna, Nairobi
D. N. Khanna

For the respondent:
E. P. Nowrojee, Nairobi

Mussa s/o Saidi v R
[1962] 1 EA 454 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	3 July 1962
Case Number:	363/1962
Before:	Spry J
Sourced by:	LawAfrica

[1] Criminal law – Attempt – Larceny – Entering unlocked motor car – Car empty – Nothing to steal – Charge of attempted stealing – Whether accused's conduct an overt act sufficiently proximate to constitute an attempt to steal – Penal Code (*Cap.* 16), *s.* 265, *s.* 269(*c*), *s.* 380 *and s.* 381 (*T.*) – *Penal Code* (*Cap.* 24), *s.* 389 (*K.*).

Editor's Summary

The appellant was observed by two police officers loitering for about an hour near a car park. He then approached one car, which was unlocked, opened the door and entered. After looking round he emerged from the car without stealing anything. He was then arrested by the police and charged with attempted stealing from a motor car contrary to s. 381, s. 269(*c*) and s. 265 of the Penal Code. The magistrate convicted the appellant holding that there was no reasonably probable explanation of his conduct other than that he intended to steal from the car anything he might find in it worth stealing. On appeal.

Held – in opening the door of a car which was not his, without authority, and entering it, the appellant's conduct amounted to an overt act sufficiently proximate to the intended offence to constitute an attempt to steal. *Mwandikwa s/o Mutisya v. R.*, [1959] E.A. 18 (K.) applied.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. John Eagleton* (1855), Dears. C.C. 515.

(2) *R. v. Ring*, 17 Cox C.C. 491.

(3) *Mwandikwa s/o Mutisya v. R.*, [1959] E.A. 18 (K).

(4) *R. v. Johnson* (1864), Le. & Ca. 489.

Judgment

Spry J: The appellant was charged with attempted stealing from a motor car contrary to s. 381, s. 269(*c*) and s. 265 of the Penal Code (Cap. 16). He was convicted and sentenced to imprisonment for seven months. He now appeals against conviction and sentence.

The case against the appellant was that he was observed by two police officers loitering at a place where cars were parked near Kunduchi beach; that after about an hour he approached one car, which was unlocked, opened the door

and entered the car. After looking round, he emerged from the car, when he was arrested by one of the police officers. Evidence was given by the officer who made the arrest and by the owner of the car, who testified that the car was his, that the appellant had no authority to enter it and that he had left nothing in the car.

The appellant neither gave nor called evidence. He made an unsworn statement in which he denied that he stole anything. The learned resident magistrate accepted the evidence of the police officer. He then considered with great care whether the facts as proved constituted the offence charged.

The petition of appeal is a reiteration of the appellant's contradiction of the prosecution evidence.

The principles of law involved are very simple but it is their application that is difficult. If the appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. (Penal Code, s. 380). The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence.

The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that the act must be of such a character as to be incompatible with any other reasonable explanation. Secondly, even if the intention is established, the act itself must not be too remote from the alleged intended offence.

In the present case, the court accepted the prosecution evidence that the appellant, after loitering for an hour near the car, opened the car door, entered the car, and after looking round emerged again from it. As I have said, the appellant offered no explanation which might justify or excuse his action but merely denied the truth of the evidence. On these facts, the learned resident magistrate held that there was no reasonably probable explanation of the accused's conduct other than that he intended to steal from the car anything he might find in it worth stealing. In my opinion, there was no other conclusion open to him.

The second question is whether the actions of the appellant were sufficiently proximate to the offence. Parke, B., in *R. v. John Eagleton* (1) (1855), Dears. C.C., 515 at p. 538, said:

> "Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are".

It appears to me that in opening the door of a car which was not his, without authority, and entering it, the appellant was doing an act very proximate to the alleged intended offence. I think there is an irresistible inference that had there been some article of value in the car the very next act of the appellant would have been to take and asport it.

It is curious that there appears to be no reported English case on attempted larceny, except *R. v. Ring* (2), 17 Cox C.C. 491. There is, however, a Kenya case which was not cited either in the lower court or before me. This is the case of *Mwandikwa s/o Mutisya v. R.*, (3) [1959] E.A. 18 (K.). The facts in that case were that the accused was arrested while attempting to pick the lock of a motor car. He was convicted of attempting to steal various articles that were in the car. In dismissing his appeal, Sir Ronald Sinclair, C.J. (as he then was), said:

> ". . . The offence occurred at night in a car park and it may well be the case that the appellant did not know exactly what was in the car, or if he did it might not have been his intention to steal all the articles that were in the car, but these are not matters which afford any defence. It is clear from the

> pickpocket cases that even if the car was completely empty, nevertheless if the appellant did not know that and had opened the car with intent to steal some of the contents which he expected it would contain, he would be guilty of attempted theft as would a pickpocket who put his hand, for the purpose of theft, into a pocket which turned out to be empty.
>
> "The only point of any difficulty in this case, is whether or not the attempt to open the door of the car was, in the circumstances, immediately connected with his attempt to steal, so as to amount in the circumstances to an attempt at theft.
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> "In the instant appeal we consider that the circumstances show that if the appellant had not been discovered, the attempt to open the door of the car with intent to steal some or all of its contents, was an act which would have been followed immediately and as part of the same continuous uninterrupted transaction, by an actual theft. The appellant's attempt to open the door of the car was done with the intent of then and there committing theft.
>
> "In our opinion, it was an act which was immediately and not merely remotely connected with the intended theft and it was an act which went far beyond mere preparation. It was an attempt to carry out and complete his intention, which would indeed have been completed if he had not been interrupted by being discovered by the owner.
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> "Reverting to the definition in the Penal Code, we are satisfied that the appellant intended to steal and that he began to put his intention into execution by means adapted to its fulfilment and that he manifested his intention by an overt act, namely, the attempt to force open the door of the car. This act was immediately and not merely remotely connected with the offence which he intended to commit."

This was a Kenya case but the decision of the court was based on s. 389 of the Kenya Penal Code, which is expressed in terms exactly similar to s. 380 of the Penal Code of Tanganyika. It is not binding on this court, but has the highest persuasive value, particularly since it was tried by a bench of two judges.

The only real difference between *Mwandikwa's* case (3), and the present appeal is that in the former the accused was interrupted before he could carry out his purpose, while in the present case the attempt failed for lack of any property capable of being stolen. It might perhaps be said that the attempt to pick the lock of a car is clearer evidence of a criminal intent then merely entering an unlocked car.

As the learned resident magistrate observed, it is not necessary for the prosecution to specify the property intended to be stolen, since the thief himself may have no specific property in mind but may intend to steal anything he can find of value. (*R. v. Johnson* (4), 1864 Le. & Ca. 489). Nor is the fact that an intended theft is frustrated by lack of property capable of being stolen any defence to a charge of attempted theft; this is clear from the second and third paragraphs of s. 380.

The learned resident magistrate was satisfied that there could be no reasonable doubt that the intention of the appellant was to steal from the car. I consider that he was fully justified in reaching that conclusion. He was satisfied, as I am, adopting the reasoning in *Mwandikwa's* case (3), that there was an overt act sufficiently proximate to constitute an attempt, as distinguished from a mere preparation, to steal.

There is one other matter to which I must refer. At the close of the case for the prosecution, the learned resident magistrate recorded that he found no case to answer. He has filed an affidavit to the effect that, having written this, he did not deliver it, as on second thoughts he believed that there was a case to answer; he intended to strike out what he had written but by an oversight failed to do so. It is quite clear that the case proceeded on the basis that there was a case to answer and that the appellant was in no way prejudiced. I am quite satisfied that this occasioned no failure of justice.

The sentence is not excessive.

The appeal is dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika
K. R. K. Tampi (Crown Counsel, Tanganyika)

Harabu s/o Abdallah v R
[1962] 1 EA 457 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	14 May 1962
Case Number:	193/1962
Before:	Weston J
Sourced by:	LawAfrica

[1] Criminal law – Arraignment of accused – Practice – Charge of possession of property suspected of having been stolen or unlawfully obtained – Whether failure by accused to account satisfactory to court for his possession is an essential ingredient of offence – Procedure to be adopted on taking plea – Criminal Procedure Code (*Cap*. 20), *s*. 24, *s*. 203 (1) *and s*. 206 (*T*.) *– Penal Code* (*Cap*. 16), *s*. 312 (*T*.).

Editor's Summary

The appellant was detained by the police under s. 24 of the Criminal Procedure Code which authorises the police, inter alia, to search vehicles in which it is suspected anything stolen may be found and was later charged under s. 312 of the Penal Code of having in his possession property suspected of having been stolen or unlawfully obtained. When asked to plead the accused said "I plead guilty". The magistrate entered this plea and convicted the appellant. On appeal

Held –

(i) under s. 312 of the Penal Code it is incumbent on the court to adopt on arraignment of an accused a procedure different from that appropriate to other charges under the Penal Code since it is only upon failure by the accused to account for possession of the property to the satisfaction of the court that the offence is complete:

(ii) a person charged under s. 312 of the Penal Code cannot simply say in answer to the charge, "I plead guilty"; the appellant's arraignment was bad in law because the magistrate had in effect entered a plea of guilty for an offence that had not yet been committed;

(iii) the substance of a charge under s. 312 of the Penal Code consists of the allegations that the accused was detained as a result of the exercise of powers conferred by s. 24 of the Criminal Procedure Code and that the accused was then in possession of or conveying property which was reasonably suspected of having been stolen or unlawfully obtained;

(iv) the proper procedure on arraignment on a charge under s. 312 ibid. is (*a*) to put the substance of the charge to the accused and then to ask him whether

he admits or denies the truth of it; (*b*) if the accused does not admit the truth of these allegations in unequivocal terms the court should enter a plea of "not guilty" and proceed to hear the evidence of the prosecution;

(v) if the court is satisfied on such evidence that prima facie the allegations mentioned have been proved the accused should be asked to make his defence in terms of s. 206 of the Criminal Procedure Code and the court should explain to the accused that so far as his possession or conveyance of the property is concerned the onus is upon him to satisfy the court on a balance of probabilities that such property was not stolen or unlawfully obtained;

(vi) in cases where the accused admits the truth of the charge under s. 312 ibid. the court should further question him to find out whether he wishes to explain how he came by the property and should inform him that in the absence of any explanation at all, a plea of "guilty" will be entered; it is only if the accused declines in unequivocal terms the opportunity thus afforded to him that it is proper for the court to enter a plea of "guilty";

(vii) where the accused does not in unequivocal terms decline to make an explanation or where the accused indicates that he wishes to explain his possession or conveyance of the property the court must enter a plea of "not guilty" and proceed in all respects as if the accused had not admitted the truth of the charge.

Appeal allowed. Conviction and sentence set aside.

Case referred to in judgment:

(1) *R. v. Msengi s/o Abdullah* (1952), 1 T.L.R. (R.) 107.

Judgment

Weston J: The appellant, who had been detained on March 10, 1962, as a result of the exercise of powers conferred by s. 24 of the Criminal Procedure Code, was brought before the district court of Dar-es-Salaam district at Dar-es-Salaam on March 13, 1962, charged under s. 312 of the Penal Code with having in his possession a wrist watch valued at Shs. 150/- which was reasonably suspected of having been stolen or unlawfully obtained.

The material part of the record of the proceedings on March 15, reads as follows:

"Charge read over and explained to accused who is asked to plead.

Plea of accused (in his own words) 'I plead guilty.' Entered as a plea of 'Guilty.'

Facts and Sentence on March 17, 1962. Accused remanded in custody until then."

The material part of the record of proceedings on March 17, reads as follows:

"Opondo (for prosecution): The accused was arrested on March 10, 1962, at about 10.30 a.m. along Uhuru Street, Dar-es-Salaam, for being in possession of a wrist watch (Pronto) which was suspected to have been stolen or unlawfully obtained – he could not account for it. The police officer acted under s. 24, C.P.C. The accused was then taken to Central Police Station and charged.

Accused: I admit this."

The appellant was convicted and sentenced to six months' imprisonment. He appealed against both

conviction and sentence, the first ground of appeal being “that I pleaded guilty as I was innocent”, and this was followed by further grounds which amounted to an explanation of how the appellant came by the watch, and a complaint that the appellant had given this explanation to the

police but the court

> "did not weigh the statement between police and myself otherwise I would not have been sentenced."

I heard the appeal on May 9, 1962, and learned Crown counsel conceded that the appellant had not been properly arraigned. I thereupon quashed the conviction, set aside the sentence, and ordered a retrial. I now give my reasons for so doing.

In the first place I find it difficult to conceive how the appellant could have given the answer which he is recorded as having given if the procedure laid down in s. 203 (1) of the Criminal Procedure Code had been followed. Under this provision an accused person is not to be asked whether he pleads guilty or not guilty but whether he "admits or denies the truth of the charge".

Secondly, and more important, s. 312 of the Penal Code reads as follows:

> "Any person who has been detained as the result of the exercise of the powers conferred by s. 24 of the Criminal Procedure Code and is brought before a court charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such court of how he came by the same, is guilty of a misdemeanour."

Quite apart therefore from the terms of s. 203 (1) of the Criminal Procedure Code, it is abundantly clear that a person charged under this section cannot properly say in answer to the charge, "I plead guilty", for there is no guilt until after he has failed to give an account to the satisfaction of the court of how he came by the property mentioned in the charge. Such failure is an essential ingredient of the offence. The appellant's arraignment was bad in law because the learned magistrate in effect entered a plea of guilty in respect of an offence that had not yet been committed (see *R. v. Msengi s/o Abdullah* (1) (1952), 1 T.L.R. (R.) 107 at p. 114).

The wording of s. 312 of the Penal Code makes it incumbent upon the court to adopt on arraignment a procedure different in some respects from that appropriate in the case – as far as I know – of every other charge brought under the Penal Code. The proper procedure is this. The substance of the charge should be put to the accused and he must be asked by the court whether he admits or denies the truth of it. The substance of the charge consists of the allegations (*a*) that he was detained as the result of the exercise of the powers conferred by s. 24 of the Criminal Procedure Code and (*b*) that he was then in possession of or conveying property which was reasonably suspected of having been stolen or unlawfully obtained. If the accused does not admit the truth of these allegations in unequivocal terms, the court should enter a plea of "not guilty" and proceed to hear the evidence of the police officer who detained the accused as to the arrest, and that officer will produce the property the subject matter of the charge. If the court is satisfied by such evidence that prima facie the allegations mentioned have been proved, it will call upon the accused to make his defence in terms of s. 206 of the Criminal Procedure Code; and the court will, in particular, explain to the accused that in so far as his possession or conveyance of the property the subject matter of the charge is concerned; the onus is upon him to satisfy the court on balance of probabilities that such property was not stolen or unlawfully obtained.

But if when the accused denies the truth of the charge a plea of "not guilty" is to be entered, it does not follow that when he admits its truth a plea of "guilty" is to be recorded. This is because, as we have seen, the accused's admission of the truth of the charge merely goes to the allegations that he was arrested under s. 24 of the Criminal Procedure Code and that he was then in possession of or conveying the property the subject matter of the charge. There is yet that other

ingredient of the offence to which reference has been made about which the court has heard nothing, namely, the accused's explanation of how he came by the property, on the failure of which to satisfy the court only is the offence committed. Accordingly where the accused admits the truth of the charge, the court should further question him to find out whether or not he wishes to explain how he came by the property and inform him that in the absence of any explanation at all, a plea of "guilty" will be entered. It is only if the accused declines in unequivocal terms the opportunity thus afforded to him that it is proper for the court to enter a plea of "guilty" and proceed to sentence. Where the accused does not in unequivocal terms decline to make an explanation or where he indicates that he wishes to explain his possession or conveyance of the property the subject matter of the charge, the court must enter a plea of "not guilty" and proceed in the manner hereinbefore set out in all respects as if he had not admitted the truth of the charge. This is because where the accused has joined issue with the Crown, the Crown must formally prove even such matter as may have been admitted by the accused.

Appeal allowed. Conviction and sentence set aside.

The appellant in person.

For the respondent:
The Attorney-General, Tanganyika
N. D. MacLeod (Crown Counsel, Tanganyika)

The Attorney-General v George Polycarp Akoko Mboya
[1962] 1 EA 460 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	18 June 1962
Case Number:	267/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

(By way of Case Stated)

[1] Execution – Attachment – Warrant of attachment addressed to limited company – Company not an authorised court broker – Director of the company a broker – Warrant of attachment served on director – Attachment levied by director personally – Whether levying of attachment unlawful – Civil Procedure (*Revised*) *Rules*, 1948, *O. XXI*, *r*. 20 (2) (*K*.) – *Rules of Court Part X*, *r*. 3 (*K*.).

Editor's Summary

The respondent was a judgment-debtor against whom an order had been made for attachment of his

property. The warrant of attachment was addressed to a limited company. The company was not an appointed court broker but a director, one S., was an authorised court broker and the warrant was served on him for execution. When S. went with the warrant and members of his staff to the respondent's office to attach the office furniture and effects the respondent objected to the attachment and when S. insisted upon attempting to levy the attachment, the respondent pushed one of the staff from the office and threw a chair at another thereby causing him actual bodily harm. The respondent was charged with common assault, assault causing bodily harm and wilfully obstructing a court officer. The magistrate held that in order to succeed the prosecution must prove that the warrant was addressed to S. and as it was not so addressed there was no case to answer. On appeal by way of case stated,

Held –

(i) under O. XXI, r. 20 (2) of the Civil Procedure (Revised) Rules, 1948, it is not necessary that the proper officer should himself execute all warrants sent to him and he may deliver it to an officer for execution; accordingly the levying of the attachment by S. was not unlawful.

(ii) the magistrate had erred in holding that the warrant must be addressed to S. and that there was no case to answer.

Appeal allowed. Dismissal of the three counts and discharge of the respondent set aside. Case remitted to the trial magistrate with a direction to reopen the hearing and proceed with it in accordance with law.

Case referred to in judgment:

(1) *Rhodes v. Hull* (1875), 26 L.J. Ex. 265.

Judgment

Rudd Ag CJ, read the following judgment of the court: This is an appeal by the Crown by way of case stated against dismissal at the close of the case for the prosecution of a charge containing three counts against the respondent on the ground that there was no case to answer.

The respondent was a judgment-debtor against whom an order had been made for attachment of his property in execution of a money decree against him. The warrant was addressed to "Leo's Auction Mart Limited, Court Brokers, Nairobi". This company had never been appointed as a court broker but one of its directors, N. R. Sisodia, was a duly appointed court broker. According to the evidence for the prosecution the warrant was passed to Sisodia for execution. He went with it to the respondent's office to attach the office furniture and effects under the warrant. The respondent objected to the attachment but Sisodia insisted in attempting to levy the attachment, then the respondent pushed one of Sisodia's men from the office and threw a chair at another of Sisodia's men thereby causing him actual bodily harm. The respondent was charged with common assault, assault causing bodily harm and wilfully obstructing a court officer.

The trial magistrate found that in order to succeed the prosecution had to prove that the warrant was addressed to Sisodia and that as it was not so addressed there was no case to answer on any of the grounds. He held further that the warrant came into the hands of Sisodia as a director of the company and he relied on the case of *Rhodes v. Hull* (1) (1875), 26 L.J. Ex. 265 as showing that a warrant addressed to a certain officer cannot be executed in his absence by another officer. The relevant provisions of law are contained in O. XXI of the Civil Procedure (Revised) Rules, 1948, and Part X of the Rules of Court which are to be found in the Laws of Kenya, 1948, Vol. V at p. 437. Under r. 3 of the Rules of Court:

> "Any court issuing a warrant of attachment or order for sale may direct the warrant or order to be executed by such person as it thinks fit: Provided that in the absence of any special reason it shall be executed by a court broker or other person holding an official broker's licence: And provided that the court may, for good reason to be recorded by it, commit the carriage of a sale to the advocate for the party applying for such order of sale. No compensation for loss of the executing officer's time over and above the fees, charges and out-of-pocket expenses referred to in these rules, shall be granted."

The appropriate Civil Procedure Rule is to be found in O. XXI, r. 20, sub-r. (2) which reads as follows:

> "(2) Every such process shall bear date the day on which it is issued, and shall be signed by the judge or such officer as the court may appoint in this behalf, and shall be sealed with the seal of the court and delivered to the proper officer to be executed."

With regard to the case of *Rhodes v. Hull* (1), execution in England is in form quite different from what it is in this Colony. In England a writ is delivered to the sheriff for execution but, in point of fact, of course, the sheriff does not himself personally levy execution under a writ of *fieri facias*, this being done by his officers or bailiffs. In *Rhodes v. Hull* (1), apparently a warrant was issued to a particular officer or bailiff and was executed by another. It was held that the execution was bad. But in this country execution follows the Indian model and our O. XXI, r. 20, sub-r. (2) follows the form of the Indian O. XXI, r. 24, sub-r. (2). Under the Indian law the officer to whom a warrant is delivered for execution under this rule may deliver it to his subordinate for execution. It is not necessary that the proper officer should himself execute all warrants sent to him: See Mulla on the Code of Civil Procedure (10th Edn.), p. 733 and the cases there cited.

Under r. 3 of the Rules of Court the court may direct the warrant or order to be executed by such person as it think fit. A limited company is in law a person and while we do not consider it desirable that warrants for execution should be directed to a company we cannot say that in law this is impossible. The warrant was in fact issued to Leo's Auction Mart Limited; it was delivered for actual execution to a director of that company who was, in fact, a duly authorised court broker. In the circumstances we consider that the levying of the attachment by Sisodia was not unlawful. It follows from this that the court below was in error when it held that the warrant had to be addressed to Sisodia and that there was no case to answer on each of the three counts of the charge. In view of this we do not consider it necessary to answer the other questions set out in the case stated. The dismissal and discharge of the defendant are set aside and the case is remitted to the lower court with a direction to reopen the hearing and proceed with it in accordance with law.

Appeal allowed. Dismissal of the three counts and discharge of the respondent set aside. Case remitted to the trial magistrate with a direction to reopen the hearing and proceed with it in accordance with law.

For the appellant:
The Attorney-General of Kenya
J. P. Webber (Deputy Public Prosecutor, Kenya)

For the respondent:
S. M. Amin, Nairobi

National House Limited v The Kenya Farmers' Association (Co-operative) Limited

[1962] 1 EA 463 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	2 March 1962
Case Number:	1175/1961

Before: Rudd Ag CJ

Sourced by: LawAfrica

[1] Chose in action – Part of a debt – Equitable assignment of part of debt – Proceeds of sale of crop to become payable to grower – Action by assignee in own name – Whether joinder of assignor necessary – Judicature Act, 1873, *s*. 25 – *Law of Property Act*, 1925, *s*. 136 – *Indian Transfer of Property Act*, 1882, *s*. 3 *and s*. 130.

[2] Practice – Parties – Equitable assignment of part of debt – Assignment of proceeds of sale of crop to become payable to grower – Action by assignee in own name – Whether joinder of assignor necessary – Judicature Act, 1873, *s*. 25 – *Law of Property Act*, 1925, *s*. 136 – *Indian Transfer of Property Act*, 1882, *s*. 130.

Editor's Summary

By a letter written by D. to the defendants, D. requested the defendants to pay Shs. 25,000/- to the plaintiffs when the proceeds of a crop became available for payment. The defendants wrote to the plaintiffs confirming that when D.'s accounts with them came into credit as a result of crop deliveries they would pay the plaintiffs a sum of Shs. 25,000/- subject to D.'s indebtedness to the defendants and to the Land Bank being cleared. When the plaintiffs in their own name sued the defendants, the latter submitted as a preliminary point that the plaintiffs were not entitled to do so without joining D. as a party. It was common ground that similar assignments of other parts of the total credit for crop deliveries of the same planting season were made to other parties.

Held –

(i) the transfer of actionable claims so as to allow the transferee to sue in his own name without joining the transferor as a party is governed by s. 130 of the Indian Transfer of Property Act; the definition of an actionable claim in s. 3 of the Act refers to a debt, not to part of a debt, and therefore a single assignment of part of a debt is not a transfer of an actionable claim within s. 130 of the Act.

(ii) as the assignment of part of a debt was only a transfer of part of an actionable claim, s. 130 of the Act had no application to the instant case, and therefore the substance of the common law and the doctrines of equity applied.

(iii) the assignment operated as an equitable assignment of part of a debt and, as the debt was a legal one, it could only be enforced by an action in the name of the assignor and all other parties interested must be joined as parties.

Order accordingly.

Cases referred to in judgment:

(1) *In re Steel Wing Company Ltd*., [1921] 1 Ch. 349.

(2) *Walter & Sullivan Ltd. v. Murphy & Sons Ltd*., [1955] 1 All E.R. 843.

(3) *William Brandt's Sons & Co. v. Dunlop Rubber Co. Ltd*., [1905] A.C. 454.

Judgment

Rudd Ag CJ: This is an action on the basis of an equitable assignment to the plaintiff of part of a debt to become due by the defendant to

one Dahlgren which Dahlgren assigned to the plaintiff by letter which read as follows:

> "When the money from the second planting season 1958 (crop February, 1959) becomes available for payment I shall be grateful if you will please pay Shs. 25,000/- out of the total amount direct to Messrs. National House Limited, P.O. Box 1238, Nairobi."

It was addressed to the defendants with a copy to the plaintiffs and signed by Dahlgren himself.

On receipt of this letter the defendants wrote to the plaintiff confirming that when Dahlgren's accounts with them came into credit as a result of crop deliveries for the 1958 second planting season they would pay the plaintiffs Shs. 25,000/- subject to Dahlgren's indebtedness to the defendants and to the Land Bank being cleared. The plaintiff company sues the defendants in its own name without joining Dahlgren as a party. I understand that similar assignments of other parts of the total credit in respect of the crop deliveries of the same planting season were made to other parties who as yet have not been made parties to the action.

The defendants take the point that the plaintiff company is not entitled to sue the defendants in its own name without impleading Dahlgren as a party. The point was agreed to be treated as a preliminary point so that if it should succeed the position might be remedied by addition or substitution of parties.

It is clear that Dahlgren's letter constituted an assignment of part of the total debt that was expected to arise in his favour as a result of the crop deliveries in question to the defendants. In English law it would be an equitable assignment of part of the debt. It would not be an assignment within s. 25 of the Judicature Act, 1873 or s. 136 of the Law of Property Act, 1925. See *In re Steel Wing Company Limited* (1), [1921] 1 Ch. 349 and *Walter & Sullivan Limited v. Murphy & Sons Limited* (2), [1955] 1 All E.R. 843. I think there is no question but that in English law the plaintiff would have to sue in the name of his assignor and join any other assignees of other parts of the debt who have not been paid, *Walter & Sullivan Limited v. Murphy & Sons Limited* (2). In Kenya, however, the transfer of actionable claims so as to allow the transferee to sue in his own name without joining the transferor as a party is governed by s. 130 of The Indian Transfer of Property Act as applied to the Colony. This section is not in the same terms as either s. 25 (6) of the Judicature Act, 1873, or s. 136 of the Law of Property Act, 1925. It reads as follows:

> "130 (1) The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:
>
> "Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.
>
> "(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

> "*Exception*: Nothing in this section applies to the transfer of a marine or fire policy of insurance."

The expression "actionable claim" is defined in s. 3 of the Act as meaning:

> " 'Actionable claim' means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional, or contingent;"

The definition of an "actionable claim" refers to a debt, not to part of a debt. Further, s. 130 of the Transfer of Property Act refers to transfer of an actionable claim, not the transfer of a part of an actionable claim. The statutory law in England corresponding to s. 130 of the Transfer of Property Act, that is to say s. 25 (6) of the Judicature Act, subsequently replaced by s. 136 of the Law of Property Act, refer to:

> "Any absolute assignment (not purporting to be by charge only) of any debt or legal chose in action . . . "

These words have been held not to include the assignment of part of a debt, see *In re Steel Wing Company Limited* (1), and *Walter & Sullivan v. Murphy & Sons Limited* (2).

In India there appear to be conflicting decisions on the point in connection with the Transfer of Property Act and I am at some disadvantage inasmuch as I have not had access to all the relevant Indian judgments.

In *In re Steel Wing Company Limited* (1), Lawrence, J., said at p. 356:

> "In my opinion the contention that in an action by an assignee of part of a debt the court would require the persons entitled to the remainder of the debt to be parties is well founded."

and, at p. 357:

> "The main reason why an assignee of a part of a debt is required to join all parties interested in the debt in an action to recover the part assigned to him is in my opinion because the court cannot adjudicate completely and finally without having such parties before it. The absence of such parties might result in the debtor being subjected to future actions in respect of the same debt, and moreover might result in conflicting decisions being arrived at concerning such debt."

These views were adopted and applied in *Walter & Sullivan Limited v. Murphy & Sons Limited* (2) where the assignor of part of a debt sued for the balance due to him over and above the amount assigned by him. It was held that he must join the assignee as a party.

A creditor who is owed a single debt cannot himself sue to recover piecemeal in several actions. He can only sue for a part of the debt if he is prepared to waive the rest, which is not the case where a part only of the debt has been assigned. In my opinion this rule applies as much in Kenya as it does in England.

I think it would be onerous and wrong to subject a debtor to the liability of several actions in respect of different parts of the same debt without his consent. It seems to me clear from the English decisions that an action on a debt cannot be split up into several actions on several parts of the debt. It follows from this that a single assignment of part of a debt is not a transfer of

an actionable claim within s. 130 of the Transfer of Property Act. It is a transfer of part of an actionable claim. Such an assignment is not a transfer of an actionable claim which the assignor had immediately before the assignment, it results in the creation of two claims out of one original claim, and neither of the two claims thereby created is actionable by itself separately from the other.

For these reasons I consider that the assignment of part of a debt is not a transfer of an actionable claim within the meaning of the Indian section. The section has no application, it does not extend or apply to the case, the substance of the common law and the doctrines of equity therefore apply. The assignment operates as an equitable assignment of part of a debt and as the debt is a legal one it can only be enforced by action in the name of the assignor and all other parties interested must be joined as parties. In exceptional circumstances where the party entitled to require the participation of the assignor in the action does not require his participation it seems that his participation can be dispensed with. *William Brandt's Sons & Co. v. Dunlop Rubber Co. Ltd.* (3), [1905] A.C. 454, but that is not the case here.

Order accordingly.

For the plaintiff:
Patel & Patel, Nairobi
Bryan O'Donovan, Q.C., and *M. M. Patel*

For the defendant:
Kaplan & Stratton, Nairobi
J. A. Couldrey

Bakari s/o Bakari v R
[1962] 1 EA 466 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	9 May 1962
Case Number:	195/1962
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Criminal law – Conveying property suspected of having been stolen – Police trap set for accused at shop – Property brought to shop for sale – Accused arrested inside shop – Whether accused detained in course of journey – Penal Code (*Cap*. 16), *s*. 312 (*T*.) – *Criminal Procedure Code* (*Cap*. 20), *s*. 24 (*T*.) – *Metropolitan Police Act*, 1839, *s*. 66.

[2] Criminal law – Sentence – Order for police supervision – Conviction for conveying property suspected of having been stolen – Offence punishable by two years' imprisonment – Whether order

lawful – Penal Code (*Cap*. 16), *s*. 312 (*T*.) – *Criminal Procedure Code* (*Cap*. 20), *s*. 308 (*T*.).

Editor's Summary

The appellant was detained as a result of a police trap, the police suspecting that the appellant had in his possession, or was conveying, a sewing machine which they believed had been stolen or unlawfully obtained. Acting on information received the police arranged with a shopkeeper that he should buy the sewing machine from the appellant, if the latter came to him wishing to dispose of it. Next day two police constables went to the shop, one hiding himself inside the shop and the other hiding outside. On the same day the appellant having previously agreed the price with the shopkeeper brought the sewing machine to the shop, and while he was taking it out of a gunny bag he was arrested under s. 24 of the Criminal Procedure Code by the police constable who was inside the shop. The appellant was charged and convicted of conveying property suspected of having been stolen contrary to s. 312 of the Penal Code and was sentenced to two years' imprisonment and ordered to be

under police supervision for a period of two years upon his release therefrom. On appeal the court considered whether the appellant had been detained in the course of a journey and the order for police supervision.

Held –

(i) the appellant when detained in possession of the sewing machine was in the course of a journey, that is to say, a journey to the shop, although the arrest took place at the terminus of the journey.

(ii) the reason the police constable suspected the appellant was relevant to whether the accused was legally detained, but it was not relevant to the charge itself once he had been brought before the court in exercise of the powers vested in the police by s. 24 of Criminal Procedure Code.

(iii) the order for police supervision was not lawful as one of the conditions precedent to making such an order is that the offence must be punishable with imprisonment for three years or upwards while in the instant case the offence was punishable with a maximum of two years' imprisonment.

Appeal dismissed. Sentence varied.

Case referred to in judgment:

(1) *Willy v. Peace*, [1950] 2 All E.R. 724.

(2) *R. v. Msengi s/o Abdullah* (1952), 1 T.L.R. (R.) 107.

(3) *R. v. Fisher* (1875), 32 L.T. 22.

(4) *Brannan v. Peek*, [1947] 2 All E.R. 572.

Judgment

Mosdell J: The appellant was convicted in the district court of Bagamoyo at Bagamoyo on March 2, 1962, of conveying property suspected of having been stolen contrary to s. 312 of the Penal Code. The property found in the possession of the appellant, which was suspected of having been stolen, was a sewing machine, remarked upon by the trial magistrate as being

> "an old machine, apparently in a poor state of repair and does not look as if it had been used for a long time."

The appellant was sentenced to two years' imprisonment and ordered to be under police supervision, upon his release therefrom, for a period of three years. The appellant had eleven previous convictions. He has appealed against both conviction and sentence.

This is another of those troublesome cases which arise under s. 312 of the Penal Code which reads:

> "Any person who has been detained as the result of the exercise of the powers conferred by s. 24 of the Criminal Procedure Code and is brought before a court charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such court of how he came by the same, is guilty of a misdemeanour."

Section 24 of the Criminal Procedure Code reads as follows:

> "Any police officer may stop, search and detain any vessel, boat, aircraft or vehicle in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained, may be found and also any person who

may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained."

As the result of a police trap the appellant was detained, the police suspecting that he had in his possession, or was conveying a sewing machine which they suspected had been stolen, or unlawfully obtained. The manner in which the appellant was apprehended arose thus: acting on information received from an informer the police arranged with an Indian, called Pyarali, that he should buy a sewing machine from the appellant, if he later came to him wishing to dispose of it. This occurred on February 6, 1962, and on the following day one Constable Julius went with Constable Iddi to Pyarali's shop, the former hiding himself inside the shop the latter hiding outside it. At about 9 a.m. the appellant came to the shop and informed Pyarali that he had a sewing machine to sell and asked, according to Pyarali, Shs. 150/- for it. Pyarali agreed to buy it and told the appellant to bring it. The appellant went away and came back, apparently at 10 a.m., with the sewing machine in a gunny bag. He brought it to the front of the shop and Pyarali told him to take it to the store, the door of which Pyarali opened. As the appellant started to open up the gunny bag Constable Julius appeared and arrested him under the provisions of s. 24 of the Criminal Procedure Code, suspecting that the sewing machine had been stolen.

On February 8, the appellant was brought before Corporal Samuel at the police station at Bagamoyo who charged him with an offence contrary to s. 312 of the Penal Code and to whom he made a warned and cautioned statement in the following terms:

> "I Bakari s/o Bakari has (*sic*) has understood the charge framed against me and I don't wish to say anything by now (*sic*) I shall say when the owner of the said machine is traced."

In the trial court, after the relevant provisions of the law had been explained to him and the appellant had been put upon his defence, he elected to make an unsworn statement in which he said that on February 7, 1962, he went to a person called Kondo. That he told Kondo a young relative of his had died and that he wanted to sell or pawn his sewing machine to get money for dealing with the death. That Kondo told him that he would find somebody who would buy it. As a result of this conversation with Kondo the appellant went to see Pyarali with the results hereinbefore set forth.

The only account that the appellant gave in the trial court as to his possession of the sewing machine was that the sewing machine was his. A statement which, of course, falls far short of satisfying a court of how he came by it.

The question arises in this case as to whether it can be stated that the appellant was detained in the course of a journey. In the case of *Willy v. Peace* (1), [1950] 2 All E.R. 724, a man went from a street to a police station to report a police-officer who had been questioning him in the street. While in the station his conduct aroused suspicion and he was searched by a detective constable acting under the authority of s. 66 of 2 and 3 Vict. Cap. 47 – the Metropolitan Police Act, 1839 (a section similar to s. 24 of the Criminal Procedure Code) but nothing was found on him. In an action for damages on the ground that the plaintiff at the time of the search was not in a street but in a house, that is a police station, and thus the rights of the constable to search did not apply, it was held that the right to search existed not only while the plaintiff was in the street but while the plaintiff was in the course of a journey.

The position is that the search does not have to be in a street but the search of an individual or of a vehicle at any time in the course of a journey is permissible, if the circumstances are such that it can be thought at the time that an article suspected of having been stolen is being conveyed. In *R. v. Msengi s/o Abdullah* (2) (1952), 1 T.L.R. (R.) 107, at p. 111, reference is made to the case of *R. v. Fisher* (3) (1875), 32 L.T. 22. In that case it appears that a police constable

received certain information about an individual whom he saw and followed, and upon the individual leaving the road and entering a house he was there arrested, and in that case it was held that s. 66 of the Metropolitan Police Act, 1839, applied. It is stated, inter alia, in the judgment in the *Msengi* case (2):

> "In this case, be it noted, the constable saw the suspect on the road and it is possible that the section would not apply where the suspect is seen on a road by a person other than a constable but searched and detained within a house by a constable acting on information."

In his judgment the magistrate referred to *Fisher's* case (3), quoted in *Msengi's* case (2), and remarked that the difference between the facts in Fisher's case (3), and in the instant case was that while in *Fisher's* case (3) one constable saw the accused carrying the property into the house and the same constable followed him and arrested him, in the instant case one constable outside the shop saw the accused approach and enter the shop while another constable inside the shop, acting in conjunction with the one outside, saw the appellant on entering the shop and immediately arrested him. The magistrate was of the opinion that this difference was immaterial and found that the possession of the appellant was ejusdes generis with conveying.

It seems to me that it can be justifiably said that the appellant when arrested in possession of the sewing machine was in the course of a journey, that is to say a journey to Pyarali's shop, albeit the arrest took place at the journey's terminus. In this case one might ask why Constable Julius suspected the sewing machine of having been stolen and as to whether evidence as to why his suspicions were aroused should have been given. In this connection some observations in the judgment in *Msengi's* case (2), are relevant and with them I respectfully agree. It is there stated at p. 112:

> "To bring an accused in a case under the section lawfully before the court, and for the accused to be called upon for an account, it must be shown to the court that he was in possession of or conveying something reasonably suspected of having been stolen or unlawfully obtained as that is the charge before the court. It may be thought that the police officer must give his reasons for his search to justify jurisdiction. That is not so. The mere fact of the accused being before the court in possession of some article in the circumstances covered by s. 24 of the Criminal Procedure Code vests jurisdiction in the court. If an accused is brought before the court in circumstances which justify the court in calling upon him for an explanation it will be difficult for him to suggest that he is not properly before the court. The reason why the police officer suspected the accused is relevant to whether the accused was legally stopped and searched but it is not relevant to the charge itself once he has been brought before the court in exercise of the powers vested in the police by s. 24 of the Criminal Procedure Code. Evidence of why the police stopped and searched the accused may be inadmissible in law, and even if admissible extremely prejudicial to the accused. For instance, the evidence may be hearsay, the evidence being that of an informer, and the details of such evidence is (*sic*) inadmissible, it being prohibited under s. 125 of the Indian Evidence Act. It is possibly also inadmissible under s. 124. Even if the evidence is sought in cross-examination, it is possible it may be prohibited to be given (*sic*) by law. Moreover, the court is required to assume that all official acts required to be done are correctly done until the contrary is shown."

I am of the opinion, therefore, that in the instant case the appellant was properly convicted of an offence contrary to s. 312 of the Penal Code. I refrain from dealing at length with the question of the desirability of the police action which occurred in the instant case. It cannot be stated that the police committed

an offence for the purpose of getting evidence of an offence committed by somebody else, or that the police persuaded someone to commit an offence. The trap can, therefore, be regarded as legitimate and does not lay itself open to such criticisms as were expressed of the police action in *Brannan v. Peek* (4), [1947] 2 All E.R. 572, by Lord Goddard, L.C.J., as he then was.

Nevertheless, I cannot refrain from an expression of some surprise that the police should have gone to the length they did in order to trap the appellant. The sewing machine was not new and appears to have been in a poor state of repair. The seriousness of the appellant's offence cannot compare with that committed by a person who, for example, illicitly deals in diamonds or coffee when a trap may be necessary to catch an offender committing a serious breach of the law which is difficult to detect.

As regards sentence, two years' imprisonment was a very heavy one in the circumstances in spite of the appellant's previous convictions. In my view it was manifestly excessive.

In sum, then, I dismiss the appeal against conviction. I set aside the sentence of two years' imprisonment and in lieu thereof I sentence the appellant to twelve months' imprisonment with effect from the date hereof. The order for police supervision cannot stand. It is set aside. An offence contrary to s. 312 of the Penal Code is a misdemeanour and hence punishable with a maximum of two years' imprisonment. Under s. 308 of the Criminal Procedure Code one of the conditions precedent to a lawful police supervision order is that the instant conviction must be one punishable with imprisonment for a term of three years' or upwards. That condition has not therefore been fulfilled.

Appeal dismissed. Sentence varied.

The appellant in person.

For the respondent:
The Attorney-General, Tanganyika
A. M. Troup (Crown Counsel, Tanganyika)

Leteyo Ole Butunoi v R
[1962] 1 EA 470 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	23 July 1962
Case Number:	420/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Criminal law – Sentence – Conviction of unlawful possession of stock in proclaimed district – Recovery of fine – Statutory authority for recovery of fine imposed for theft by distress on accused's family and sub-tribe – Distress to issue if fine not paid by accused – Conviction of unlawful possession of

stock in proclaimed district – Whether order lawful for levy of distress on accused's family and sub-tribe if fine not paid – Stock and Produce Theft Ordinance (*Cap*. 206), *s*. 3, *s*. 4 *and s*. 10 (1) (*K*.).

Editor's Summary

The appellant was convicted of unlawful possession of stock in a proclaimed district, contrary to s. 10 (1) of the Stock and Produce Theft Ordinance and was sentenced to imprisonment and a fine of Shs. 1,000/-. The magistrate made a further order that if the fine was not paid within three months, a distress warrant should be sent to the Provincial Commissioner for endorsement, and the fine levied on appellant's family and sub-tribe under s. 4 of the Ordinance. By s. 3 of the Ordinance when any African is fined on conviction of theft of stock, the court may, unless the fine is paid within a specified time, issue a

warrant for levy of fine by distress and sale of any moveable property of the offender or of the offender's family, sub-tribe or tribe. Under s. 10 (1) any person convicted of unlawful possession of stock in a proclaimed district is liable "to the penalties prescribed for theft". On appeal the court considered whether, in the case of a person sentenced under s. 10 (1) to pay a fine, the fine may be recovered under the provisions of s. 3 and s. 4.

Held –

(i) section 10 (1) of the Stock and Theft Ordinance only says that the person convicted of unlawful possession of stock shall be subject "to the penalties prescribed for theft"; if the legislature intended that the recovery of any fine imposed under s. 10 (1) should be under the provisions of s. 3 and s. 4, such intention should be manifested by plain words.

(ii) section 3 and s. 4 of the Ordinance do not apply to convictions under s. 10 (1) and accordingly the magistrate's order as to recovery of the fine should be set aside.

Appeal against conviction and sentence dismissed. Magistrate's order as to recovery of the fine set aside.

Judgment

Rudd Ag CJ, read the following judgment of the court: The appellant was convicted of the offence of unlawful possession of stock in a proclaimed district, contrary to s. 10 (1) of the Stock and Produce Theft Ordinance, Cap. 206, Laws of Kenya, and was sentenced to one year's imprisonment and a fine of Shs. 1,000/-. We are of the opinion that the evidence fully supports the conviction and that the sentence is not unjust. The appeal against conviction and sentence is accordingly dismissed.

However, in relation to the fine imposed, the learned magistrate made the following order:

> "If the fine is not paid within three months, under the provisions of s. 4 of Cap. 206, a distress warrant should be sent to the Provincial Commissioner for endorsement, and the fine levied on his (the appellant's) family and sub-tribe."

By s. 3 it is provided as follows:

> "Whenever any African (including a Somali) is sentenced to pay a fine on conviction of theft of stock or produce, the court passing sentence may, unless the fine is paid within the time limited by the court for such payment, issue a warrant for the levy of the fine by distress and sale of any moveable property of the offender or of the offender's family, sub-tribe or tribe."

By s. 4 of the Ordinance it is provided that when a warrant has been issued and

> "no or insufficient moveable property of the offender shall be found to satisfy the fine",

the Provincial Commissioner of the Province in which the family, sub-tribe or tribe of the offender is resident may endorse the warrant for execution against any members of the offender's family, against the inhabitants of the village where the stock was found, and against any members of the sub-tribe or tribe to which the offender belongs. It is to be noted that s. 3 has effect in respect of any African convicted of stock theft. Section 10 (1) of the Ordinance creates the offence of unlawful possession of stock in a proclaimed district and provides that any person convicted of this offence shall be liable "to the penalties prescribed for theft". The question thus arises as to whether, in the case of

a person sentenced to pay a fine under this section, the fine may be recovered under the provisions of s. 3 and s. 4.

A statute must be interpreted strictly, especially where it may seek to encroach on the rights of the subject, whether as regards person or property. It is stated by Maxwell on Interpretation of Statute, (11th Edn.) at p. 276 that:

> "It is presumed, where the objects of the Act do not obviously imply such an intention, that the legislature does not desire to confiscate the property or to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly if not in express words at least by clear implication and beyond reasonable doubt."

Section 3 and s. 4 of the Ordinance make provision for a method of recovery of a fine in the case of a person convicted of stock theft. The provisions are of a drastic nature affecting the property of individuals not directly connected with the offence. Those persons are in effect made specifically liable to penalties for the wrong of a neighbour or one of their family or tribe. Section 10 (1) does no more than say that a person convicted of unlawful possession of stock shall be subject to the penalties prescribed for theft. It is he who is subject to these penalties, which are imprisonment and/or fine. If it was the intention of the legislature that the recovery of any fine imposed should be under the provisions of s. 3 and s. 4, it should have made its intention clear beyond reasonable doubt. As the wording of sub-s. (1) stands, we do not consider it right to imply a possible intention which is not manifested by plain words with the effect of encroaching upon the property of a subject other than the convict. In our view, s. 3 and s. 4 do not apply to convictions under s. 10 (1), and we set aside the magistrate's order as to recovery of the fine. There can, of course, be no objection to the recovery of the fine by the issue of a distress warrant against the property of the appellant in accordance with the provisions of the Criminal Procedure Code.

Appeal against conviction and sentence dismissed. Magistrate's order as to recovery of the fine set aside.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Kenya
G. A. Twelftree (Crown Counsel, Kenya)

Santana Fernandes v Kara Arjan & Sons and others
[1962] 1 EA 473 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	5 July 1962
Case Number:	55/1961
Before:	Mosdell J
Sourced by:	LawAfrica

Costs – Interest – Whether interest on costs payable without specific order – Indian Code of Civil Procedure, 1908, *s*. 34 *and s*. 35 – *Civil Proceedings* (*Interest on Judgment Debts*) *Rules*, 1956, *r*. 1, *r*. 2, *r*. 3(*T*.) – *Civil Procedure Ordinance* (*Cap*.5), *s*. 26 *and s*. 27 (*K*.).

Editor's Summary

The plaintiff's suit against the third defendant was dismissed and the first defendant was ordered to pay the costs of the third defendant. After the first defendant had made a payment on account of costs the third defendant applied for execution against the first defendant for the balance and claimed interest on the costs. The first defendant then applied for dismissal or setting aside of the application for execution on the ground, inter alia, that the third defendant was not entitled to interest on the costs as he had not obtained an order giving interest as required by s. 35 (3) of the Indian Code of Civil Procedure.

Held –

(i) rule 3 of the Civil Proceedings (Interest on Judgment Debts) Rules, 1956, which must be read together with s. 34 and s. 35 of the Indian Code of Civil Procedure, only lays down the rate of interest; under sub-s. 3 of s. 35 interest on costs is left to the discretion of the court.

(ii) the award of costs did not amount to a "judgment debt" as defined in r. 2 of the Civil Proceedings (Interest on Judgment Debts) Rules, 1956, and the Civil Proceedings (Interest on Judgment Debts) Rules, 1956, were not applicable; further s. 35 (3) specifically overruled any possible application of s. 34 (2) to interest on costs in the absence of a specific order. *Shadi Ram Mohindra v. B. C. Mohindra*, [1957] E.A. 708 (K.) applied.

(iii) the court had made no order that interest was to be payable on the costs awarded to the third defendant.

Application for execution dismissed.

Case referred to in judgment:

(1) *Shadi Ram Mohindra v. B. C. Mohindra*, [1959] E. A. 708 (K.).

Judgment

Mosdell J: This is an application by the first defendant for an order that the application for execution against the first defendant filed by the third defendant on June 6, 1962, be rejected, set aside or dismissed with costs on the following grounds:

"(i) that the application includes a claim for interest on costs to which the third defendant is not entitled in law or in fact;

(ii) that the application claims payment of the sum of Shs. 2,199/-being the balance of costs due to the third defendant which has (*sic*) been undertaken to be paid by the advocates for the first defendant when the latter's bill against the third defendant in Civil Reference No. 1 of 1962 is taxed on June 26, 1962;

(iii) that the application for execution is an abuse of the process of the court – and on further grounds and reasons to be offered."

The facts, so far as they are relevant, are as follows. On September 30, 1961, this court gave judgment dismissing the claim of the plaintiff against the third defendant, with costs to be paid by the first defendant. The bill in question was taxed by the deputy registrar who disallowed Shs. 10,000/- of the Shs. 20,000/- claimed as an instructions fee in his ruling dated February 27, 1962. On May 7, 1962, the latter taxation was referred to myself by the third defendant for review on the grounds that the learned deputy registrar had erred in allowing the said instructions fee at only Shs. 10,000/-. On May 18, 1962, I gave my ruling on the reference when the application of the third defendant was dismissed with costs to the first defendant. After abortive correspondence between the advocates for the first and third defendants, on June 6, 1962, the third defendant's advocates filed an application for attachment of certain moveable property of the first defendant, claiming that the third defendant was entitled to Shs. 2,751/05 alleged to be due as follows:

Bill taxed on 26.2.62	Shs.	12,199/00
Interest at 6% from 29.9.61 to 1.6.62		491/05
	Shs.	12,690/05
Less paid		10,000/00
	Shs.	2,690/05
Filing costs		36/00
Advocates' costs		25/00
	Shs.	2,751/05

The item "Less paid Shs. 10,000/00" relates to the payment made on May 20, 1962, by the first defendant's advocates to the advocates for the third defendant of Shs. 10,000/- on account of the latter's taxed costs. In the affidavit of Mr. Dodd for the first defendant, filed in support of the present application, it is alleged in para. 18 that the claim for interest from September 29, 1961, is misconceived as:

> "(*a*) it relates to a period part of which was prior to the judgment referred to in para. 2 hereof"
>
> (that is the judgment given on September 30, 1961, hereinbefore referred to);
>
> "(*b*) it has no foundation in fact and is contrary to law and equity; and
>
> (*c*) no payment of costs could be made until its (*sic*) amount was determined by taxation and the subsequent ruling on reference."

It was further alleged in para. 19 of the said affidavit

> "that no order of the court has been obtained by the third defendant giving interest on costs as required by s. 35 (3) of the Civil Procedure Code".

It is necessary to set forth the relevant provisions of s. 34 and s. 35 of the Indian Code of Civil Procedure and the Civil Proceedings (Interest on Judgment Debts) Rules, 1956. The latter (hereinafter called "the Rules") read as follows:

> "1. These Rules may be cited as the Civil Proceedings (Interest on Judgment Debts) Rules, 1956, and shall apply to the High Court and all courts subordinate thereto.
>
> "2. 'Judgment debt' means the aggregate sum adjudged, namely, the principal sum and in addition any interest adjudged on such principal sum

for any period prior to the institution of the suit, together with any further interest adjudged from the date of filing the suit to the date of delivery of the judgment at such rate as the court deems reasonable.

"3. The rate of interest on judgment debts from the date of the delivery of the judgment until the same shall be satisfied shall be six shillings per centum per annum."

Section 34 of the Civil Procedure Code (hereinafter called "Section 34") reads as follows:

"(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the court thinks fit.

"(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have refused such interest, and a separate suit therefore shall not lie."

Section 35 ibid (hereinafter called "Section 35") reads as follows:

"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court, and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

"(2) Where the court directs that any costs shall not follow the event, the court shall state its reasons in writing.

"(3) The court may give interest on costs at any rate not exceeding six per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

The relevant part of the order of this court made on September 30, 1961, reads as follows:

"I award the third defendant costs against the first defendant on the higher scale, and I certify that third defendant's case is fit for two counsel."

It was the burden of Mr. Dodd's argument for the applicant that s. 34 and s. 35 had to be read together with the Rules and that the judgment of this court given on September 30, 1961, referred solely to costs making no mention of any interest thereon. The applicable provisions were to be found in s. 35, and, in spite of the provisions of the Rules, as this court had made no order that interest was to be paid on the costs, such interest could not be claimed. Mr. Dodd referred to the case of *Shadi Ram Mohindra v. B.C. Mohindra* (1), [1957] E.A. 708 (K.), where it was held that as s. 27 (2) of the Civil Procedure Ordinance of Kenya specifically dealt with interest on costs it over-ruled any possible application of s. 26 (2) ibid to interest on costs in the absence of a specific order. Section 26 (1) of the Civil Procedure Ordinance of Kenya is in terms similar to those contained in sub-s. (1) of s. 34, but sub-s. (2) of s. 26 just referred to differs from sub-s. (2) of s. 34 in that whereas the latter provides that where the decree is silent with respect to the payment of further interest on the aggregate sum

awarded from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have refused such interest, in the former it is provided that where the decree is silent with respect to the payment of further interest on such aggregate sum from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at six per cent. per annum. Section 27 of the Civil Procedure Ordinance of Kenya is in terms similar to s. 35 with the addition of (*a*) a proviso at the end of sub-s. (1) of the former which is irrelevant for present purposes and which in any case has the same meaning as sub-s. (2) of s. 35, and (*b*) the words "or judge" which in s. 27 follow the words "the Court". The reasoning for the decision, however, in the *Mohindra* case (1), is applicable to the facts of the instant case in that both by s. 27 (2) of the Civil Procedure Ordinance of Kenya and s. 35 (3) the matter of interest on costs is left to the discretion of the court. Moreover, as held in the *Mohindra* case (1), as s. 27 (2) of the Civil Procedure Ordinance of Kenya specifically overrules any possible application of s. 26 ibid to interest on costs in the absence of a specific order, so s. 35 (3) does likewise qua s. 34 (2) – indeed the *Mohindra* case (1), is an even more persuasive authority in that under s. 28 (2) of the Civil Procedure Ordinance of Kenya interest on the "aggregate sum", where the decree is silent as to such interest, is deemed to have been ordered by the court at six per cent. per annum, whereas under s. 34 (2), where the decree is silent with reference to interest on such aggregate sum, the court shall be deemed to have refused such interest. I think the contentions of Mr. Sayani for the third defendant, the respondent to the present application, stem from a fundamental misconception of the meaning of r. 3 of the Rules. Mr. Sayani appears to hold the view that the latter rule makes it mandatory for interest on judgment debts at the rate of six shillings per cent. per annum to be paid from the date of the delivery of the judgment until the same shall be satisfied. In my view, this is not so. Rule 3 must be read together with the provisions of s. 34 and s. 35. All that r. 3 does, in my view, is to lay down that the rate of interest (if awarded on judgment debts) shall be six shillings per cent. per annum. The definition of "judgment debt" in r. 2 of the Rules does not specifically cover a case such as the instant one where the judgment of the court relates to costs only. Nor does s. 34. In the instant case there was "no aggregate sum adjudged". Costs were merely awarded to the third defendant. Assistance in finding an answer to the question whether interest on the costs awarded by this court on September 30, 1961, can be legally be claimed can be obtained, I think, from the answers to the two following questions:

(1) Was interest on the costs awarded, when the order of September 30, 1961, dismissing the claim against the third defendant was made?

(2) Does r. 3 of the Rules lay down, in effect, that interest on a judgment debt from the date of the delivery of the judgment until the same shall be satisfied shall always be deemed to have been granted at the rate of six shillings per cent. per annum on the assumption that the term "judgment debt" can embrace an order for costs only?

It is quite clear that on September 30, 1961, this court made no order that interest was to be payable on the costs awarded to the third defendant, so the answer to the first question is in the negative. A claim for interest thereon could not in any case be made for any period prior to September 30, 1961. As regards the second question, in my view the answer is also in the negative, as even assuming that the costs awarded on September 30, 1961, amount to a "judgment debt" as defined in r. 2 (and I do not think they can), r. 3 must be read together with s. 34 and s. 35, s.-s. (3) of which latter section leaves the matter of interest on costs to the discretion of the court. Moreover, if the Rules be regarded as being inapplicable to the instant case, there being no "judgment debt" as defined in r. 2, one is still left with the provisions of s. 35, in particular sub-s. (3) thereof,

which leaves the matter of interest on costs to the discretion of the court, and which, as I have already stated, specifically overrules any possible application of s. 34 to interest on costs. I find then that the third defendant is not entitled to interest for any period on the costs taxed at Shs. 12,199/-.

The question arises as to what order I should now make. Mr. Dodd has submitted that I should dismiss the third defendant's application for execution, with costs, and make an order that the third defendant is to be satisfied with Mr. Dodd's undertaking that the third defendant's costs will be paid by him, as advocate for the first defendant, when the latter's costs against the third defendant under Civil Reference No. 1 of 1962, have been taxed. It is noted that they were due to be taxed, according to para. 2 of the present application, on June 26, 1962. I do not see how I can direct Mr. Sayani, for the third defendant, to accept such an undertaking by Mr. Dodd.

It is noted that Mr. Sayani's application for execution has been made prior to the issue of a decree, and I understand that this, not infrequently, is the practice. At the first hearing of the present application on June 13, 1962, I adjourned the matter in order to enable Mr. Sayani to file a counter-affidavit, and I ordered that a decree was not to be issued until my decision on the application had been given. For the guidance of practitioners in the future, I would state that the issue of a decree is a prerequisite to an application for the execution thereof under O. 21, r. 11 of the Civil Procedure Code.

I consider it unnecessary for me to advert to the correspondence which passed between Mr. Dodd and Mr. Sayani in this and other related matters, but I cannot refrain from observing that some degree of co-operation between the advocates concerned would have rendered the present application unnecessary. However, perhaps something more than the mere ventilation of personal animosity has been achieved in that this ruling may furnish some guidance on the question of interest on costs, both to practitioners and to the taxing officer of this court.

In sum, then, I dismiss the present application for execution, with costs free of interest. This, of course, does not mean that a further application for execution cannot be made if the third defendant so desires, and the circumstances so permit.

Application for execution dismissed.

For the first defendant:
Dodd & Co., Dar-es-Salaam
H. G. Dodd

For the third defendant:
Sayani & Co., Dar-es-Salaam
N. R. Sayani

Mwangi s/o Mauchu v R
[1962] 1 EA 478 (SCK)

Division: HM Supreme Court of Kenya at Nairobi

Date of judgment: 18 June 1962

Case Number: 241/1962

Before: Rudd Ag CJ

Sourced by: LawAfrica

[1] Criminal law – Molestation – Dissuasion or attempted dissuasion of a person from dealing with complainant's shop – Whether apprehension of violence necessary to cause alarm – Meaning of "alarm" – Penal Code (*Cap.* 24), *s.* 239 (*K.*).

Editor's Summary

The appellant had dissuaded or attempted to dissuade another person from dealing with the complainant's shop because the complainant had refused to let premises as an office for a branch of a political party and also possibly because the complainant had refused to transport members of the party in his lorry. The appellant having been charged with molestation, the complainant in evidence stated that his business had fallen off greatly, which he attributed to the appellant having told people not to buy from him. The magistrate found that the appellant's motive was to coerce the complainant into compliance with the wishes of the party as expressed by the appellant and held that the appellant's action was done with intent to prevent the complainant from carrying on his lawful business and of causing him to cease business. He also held that the action of the appellant must have been taken with intent to cause alarm to the complainant and that the alarm must be that of a good citizen that he or his family might suffer personal violence. He found such intent proved and convicted the appellant of molestation under s. 239 of the Penal Code. On appeal,

Held –

(i) the appellant may have intended to try to force the complainant out of business but it was doubtful whether the appellant could be said to have acted with intent to cause the complainant to omit to do any act which he was legally entitled to do.

(ii) the word "alarm" is not a term of art but of common speech and everyday use, and it must receive, therefore, a reasonable and sensible interpretation according to the context in which it appears; sub-s. (2) and sub-s. (3) of s. 239 of the Penal Code indicate that the word "alarm" is to be construed in a general sense, and its meaning is not to be restricted to the narrow meaning assigned to it in *Agnew v. Munro* (1891), 28 Sc. L.R. 335.

(iii) the complainant was alarmed by an apprehension of injury to his business as a result of the boycott brought about by the appellant with that intent, and the conviction under s. 239 (3) could be supported on the ground that the appellant intended to cause alarm to the complainant.

Appeal dismissed. Sentence varied.

Cases referred to in judgment:

(1) *Gibson v. Lawson*, [1891] 2 Q.B. 545.

(2) *Agnew v. Munro* (1891), 28 Sc. L.R. 335.

Judgment

Rudd Ag. CJ, read the following judgment of the court: The appellant appeals from a conviction under s. 239 (3) of the Penal Code

of molestation and sentence of eighteen months' imprisonment in respect thereof. Section 239 of the Penal Code reads as follows:

> "239 (1) Any person who intimidates or molests any other person is guilty of an offence and is liable to imprisonment for a term not exceeding three years.
>
> "(2) A person intimidates another person who with intent to cause alarm to that person or to cause him to do any act which he is not legally bound to do or omit to do any act which he is legally entitled to do, causes or threatens to cause unlawful injury to the person, reputation or property of that person or anyone in whom that person is interested.
>
> "(3) A person molests another person who, with intent as aforesaid, dissuades or attempts to dissuade, by whatever means, anyone from entering or approaching or dealing at any premises at which that person carries on trade or business or works or otherwise from dealing with that person, or with any person by whom that person is employed, in the course of his trade or business, or watches and besets any premises where that person resides or works or carries on trade or business or happens to be, or the approaches to such premises, or persistently follows that person or anyone in whom that person is interested from place to place, or interferes with any property owned or used by, or deprives of or hinders in the use of such property, that person or anyone in whom that person is interested.
>
> "(4) Nothing in sub-s. (3) of this section shall apply to any peaceful picketing which is lawful under the provisions of any law relating to trade unions or trade disputes within the meaning of the Trade Unions Ordinance, 1952."

It was proved that the complainant carried on the trade of a butcher at Mweiga in his own shop there. On January 23, 1962, he received a letter from the appellant which being translated was to this effect:

> "Karugi Chairman Youth Wings,
>
> D. M. Mathenge Secretary,
>
> Mwangi Mauchu KANU Mweiga.
>
> 23.1.62.
>
> To.
>
> Mr. Irungu s/o Kihuni,
>
> All Kanu members in Mweiga Division have agreed that the above three people will speak to them during the meeting and they are the people who deal with Kanu affairs in all Mweiga area. They have said that you are to provide an office for Kanu; you will let it to us and that you will have to provide it within this week, before they stand and explain to the public in the field how the matter stands.
>
> All these have been written down to speak and to show where the troubles are. They will therefore have to speak as usual.
>
> Kenyatta and Freedom and Kanu."

On the same day the appellant came to the shop and asked the complainant if he had received a letter which the appellant had sent. The complainant said that he had received the letter but that he could not let the appellant have the office as he had no room to spare. Subsequently the complainant received another letter which was not produced in evidence and he received another visit from the appellant who asked him whether he was repenting. He said that unless he repented he "would have to see" (– be answerable to) the public of Mweiga. The complainant maintained his refusal. On February 2 the appellant again wrote to the complainant; on this occasion demanding that the

complainant should transport the members of the Kanu Youth Wing, who would pay cash, to Nanyuki in the complainant's lorry. This letter was written by the appellant as "Mweiga Chairman, Kanu". The complainant refused to provide his lorry for this purpose. It was further proved that on or about February 8 the appellant told one Thairu s/o Ngari that the complainant's shop was closed, meaning that people were to refuse to buy in the complainant's shop. It is quite clear from the evidence that the appellant was persuading or attempting to persuade Thairu s/o Ngari from dealing with the complainant at his shop. It is equally clear that one reason why the appellant wished to dissuade Thairu from dealing with that shop was because the complainant had refused to let an office to the Kanu Branch and possibly because he also refused to transport members of the Kanu Youth Wing in his lorry. The magistrate held that the appellant's motive was to coerce the complainant into complying with the wishes of Kanu as expressed by the appellant. The complainant said that his business had fallen off greatly in the month of February and attributed this to the fact that the appellant had told people not to buy from him.

The question arises as to whether the appellant's action in dissuading Thairu from continuing to deal with the complainant was done with any of the three intents specified in sub-s. (2), that is:

(1) To cause alarm to the complainant; or

(2) to cause him to do any act which he was not legally bound to do; or

(3) to omit to do any act which he was legally entitled to do.

The trial magistrate held that under this sub-section the alarm must be alarm at violence. He said

> "that is the type of alarm which was necessary under the Conspiracy and Protection of Property Act, 1875: see *Gibson v. Lawson* [1891] 2 Q.B. 545 and *Agnew v. Munro* (1891), 28 Sc. L.R. 335, where it was stated to be 'the alarm of a good citizen that he or his family may suffer personal violence'".

The magistrate went on to say:

> "As regards the second type of intent the accused hoped to coerce the P.W. 1 into complying with the wishes of Kanu as expressed through the accused. However that was his motive in doing these acts and of course it is important to distinguish motive from intent. They are closely related but distinct. I prefer to look at the third type of intent sufficient to establish the charge namely to cause Irungu to omit to do something he was legally entitled to do. Now Irungu was legally entitled to carry on his lawful business in Mweiga. The behaviour of the accused was done with the intent of preventing him so doing and of causing him to cease business. That intent is sufficient to support the charge. I find some (though admittedly slight) support for this in *R. v. Ahmed D. G. Jibrain* [1958] E.A. 107 (C.A.). See also *William Sebugenyi v. R.*, [1959] E.A. 411 (U.)."

It is not clear that at the time when the appellant sought to persuade Thairu s/o Ngari to discontinue dealing with the complainant, he was still persisting in the demand that the complainant should make available an office for the Kanu branch and transport for its members. No other demand has been shown to have been in existence at that time. We, therefore, share the doubts which the magistrate appears to have entertained that it was proved that the appellant instituted the boycott with intent to cause the complainant to do any specific act which he was not legally bound to do. But we also doubt that the appellant could be said to have acted with intent to cause the complainant to

omit to do any act which he was legally entitled to do. He may have intended to try and force the complainant out of business but we think that that is not the same as to cause an omission to carry on business. We think, however, that the conviction can be supported on the ground that the appellant intended to cause alarm to the complainant.

In our opinion the case of *Gibson v. Lawson* (1), [1891] 2 Q.B. 545 is not material on that issue nor do we think that *Agnew v. Munro* (2) (1891), 28 Sc. L.R. 335 is in point. The report of *Agnew v. Munro* (2), is not available to us but it would appear that the dicta in that case, to which the magistrate referred, arose in this way – the question was as to the meaning of the word "intimidation" in the context in which it appears in the Conspiracy and Protection of Property Act, 1875. It fell to the court to decide that question and in doing so the court gave a definition of the word "intimidation" in which the word "alarm" was used by the court which there-upon provided its own interpretation as to the meaning of "alarm" as used in its definition of "intimidation", stating it to be the alarm of a good citizen that he or his family may suffer personal violence. In our opinion such a restricted definition of the word "alarm" does not necessarily apply when construing the provisions of s. 239 of the Penal Code. The word "alarm" is not a term of art – it is a word of common speech and everyday use, and it must receive, therefore, a reasonable and sensible interpretation according to the context in which it appears. Reference to the Oxford English Dictionary will show that the word can be used in a much more general sense than the restricted meaning given in *Agnew v. Munro* (2), and in our opinion, the provisions of sub-s. (2) and sub-s. (3) indicate that it was to be construed in a more general sense in this section, otherwise it is difficult to understand how a person could cause unlawful injury to a person's property or hinder him in the use of his property or dissuade another form dealing with him with intent to alarm him. In our view, the complainant was alarmed by an apprehension of injury to his business as a result of the boycott brought about by the appellant with that intent. This does not amount to an apprehension of personal violence to himself or his family, but, as we have said, we are of the opinion that the word "alarm" as used in the section is not restricted to the narrow meaning assigned to it in *Agnew v. Munro* (2).

We accordingly dismiss the appeal against conviction.

On the point of sentence although we agree with the learned trial magistrate that the offence was serious, in view of the fact that the appellant had no previous convictions we consider that the sentence was excessive and reduce it to nine months' imprisonment.

Appeal dismissed. Sentence varied.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Kenya
G. A. Twelftree (Crown Counsel, Kenya)

Gulu K Nanji v R
[1962] 1 EA 482 (HCT)

Division: High Court of Tanganyika at Dar-es-Salaam

Date of judgment: 9 July 1962

Case Number: 393/1962

Before: Weston J

Sourced by: LawAfrica

[1] Street traffic – Defective vehicle – Brakes, steering and mechanical condition defective – Vehicle used on road – Owner charged with permitting vehicle to be driven whilst defective – Mens rea – Whether knowledge that vehicle defective must be proved – Meaning of word "permit" – Traffic Ordinance (*Cap.* 168), *s.* 43(*a*) *and* (*d*), *s.* 70 (*T.*) *– Traffic Rules, r.* 49 *and r.* 69 (*T.*) *– Motor Vehicles* (*Construction and Use*) *Regulations*, 1951, *reg.* 101 *– Traffic Ordinance*, 1953, *s.* 103 (5) (*K.*) *– Transport Licensing Ordinance* (*Cap.* 237), *s.* 24 (*K.*).

Editor's Summary

The appellant was convicted on three counts severally alleging that he had permitted a motor vehicle to be driven whilst the brakes, steering and mechanical condition were defective. The magistrate held that there was no question of mens rea in the three counts. On appeal it was argued inter alia that mens rea in the sense that the appellant knew the brakes and steering were defective had to be established before the appellant could be properly convicted as charged.

Held –

(i) the word "permit" in the context of s. 43 of the Traffic ordinance does not import a state of mind and the words "unless the following conditions are complied with" restricts the meaning of the word "permit" to the act or fact of permitting only; the subjective mental element is excluded by these words.

(ii) the words "unless the following conditions are complied with" in s. 43 estop the appellant from pleading that he did not know that the conditions had not been complied with; the Traffic Ordinance constitutes an absolute prohibition against permitting the user of a motor vehicle which in fact does not comply with the condition mentioned.

(iii) in view of the terms of r. 49 of the Traffic Rules the third count disclosed no offence known to law.

Conviction on first and second counts affirmed. Conviction on third count quashed.

Cases referred to in judgment:

(1) *James & Son v. Smee*, [1954] 3 All E.R. 273.

(2) *Hutchings v. Giles*, [1955] Crim. Law Rev. 784.

(3) *John Nzoli v. R.*, [1961] E.A. 575 (K.).

(4) *Alimohamed Osman v. R.* (1952), 1 T.L.R. (R.) 391.

(5) *Remat Nanji Ahmed v. R.*, [1959] E.A. 804 (T.).

Judgment

Weston J: The appellant was convicted in the district court of Dar-es-Salaam District at Dar-es-Salaam on a charge consisting of three counts alleging (*a*) that he permitted a motor vehicle to be driven with defective brakes contrary to s. 43(*a*) and s. 70 of the Traffic Ordinance (first count), (*b*) that he permitted a motor vehicle to be driven with defective steering

contrary to s. 43(*d*) and s. 70 of the Traffic Ordinance (second count), and (*c*) that he permitted a motor vehicle to be driven when not in proper mechanical repair contrary to r. 49 of the Traffic Rules and punishable under s. 70 of the Traffic Ordinance (third count). He was fined Shs. 250/- on the first count, Shs. 250/- on the second count, and Shs. 100/- on the third count, and these fines have been paid. This is an appeal out of time by leave of this court against the conviction and sentence.

I think the third count can be disposed of without much difficulty. Rule 49 of the Traffic Rules reads as follows:

> "It shall be the duty of every owner and driver of a public service, heavy duty or commercial vehicle at all such times as it is in use to keep such vehicle in good mechanical repair."

It seems to me therefore that the third count discloses no offence known to law, and for this reason the conviction on this count cannot be sustained. Accordingly I hereby quash it and order that the fine imposed in respect of it should be refunded to the appellant. I would observe further in passing that contravention of r. 49 of the Traffic Rules is punishable not under s. 70 of the Traffic Ordinance as charged but under r. 69 of the Traffic Rules.

With regard to the first two counts, however, the matter is more difficult. The facts are these. The appellant owned three vehicles. The one mentioned in the charges was due to go on safari on the morning of February 22, 1962, at about 9 o'clock. It was not at that time roadworthy, and the appellant was so informed by the driver. The appellant did not send the vehicle to a garage because he was in a hurry. He directed his driver to make the necessary repair, and this the driver did, assisted by a turnboy. The vehicle eventually set out on the road at about 1 o'clock in the afternoon, carrying a number of passengers and driven by the driver who had repaired it. Shortly after this the vehicle was involved in an accident. It had to stop on a hill to let another vehicle pass, whereupon it rolled back and overturned. The driver was killed. The wreck was inspected by a vehicle inspector the next day and was found to have defective brakes and steering. In passing judgment the learned magistrate said this:

> "There is no question at all of 'mens rea' in the three counts brought against the accused. To 'permit' has been held in an English case to mean inter alia 'failure to take proper steps to prevent'. That reference escapes me at the moment. The accused attempted to delegate his responsibilities to others who on their own evidence had no skill whatever."

Mr. Grimble, who appeared for the appellant, contends that in this passage the learned magistrate misdirected himself in point of law. Mens rea in the sense that the appellant knew the brakes and steering were defective had to be established before he could be properly convicted as charged. Learned counsel cited authorities which I must now consider.

In *James & Son v. Smee* (1), [1954] 3 All E.R. 273, Mr. Justice Parker, as he then was, delivering the judgment of the majority, Lord Chief Justice Goddard, Mr. Justices Cassels, Lynskey and Parker, with Mr. Justice Slade dissenting, held on appeal – and I quote from the headnote:

> "The appellants could not be guilty of 'permitting' a user in contravention of the regulation (i.e., the offence charged) unless it were proved that some person, for whose criminal act they were responsible, 'permitted', as opposed to 'committed', the user in contravention of the regulation; that, as there was no evidence that the appellants had knowledge of any facts constituting user in contravention of the regulation, they did not permit such user, and accordingly the conviction should be quashed."

In the later case of *Hutchings v. Giles* (2), [1955] Crim. Law Rev. 784 a Queen's Bench Divisional Court consisting of Lord Goddard, Chief Justice, and Mr. Justices Ormerod and Glyn-Jones, heard an appeal against conviction on facts which have remarkable similarity to those in this case, and it was held that:

> "Although, if H. had been charged with 'using' the vehicle in its defective condition he would have been properly convicted, the charge of 'permitting' its use had not been made out as, since the decision in *James & Sons v. Smee* [1955] Crim. Law Rev. 42 by which the court considered itself bound, it was necessary, in order to substantiate the charge of 'permitting the use' for the prosecution to prove knowledge of the defects and in the present case the justices had found only that he should have had knowledge of the defects."

The Lord Chief Justice indeed said that:

> "In view of the decision in *James & Son v. Smee* the police would be well advised in circumstances of this sort to avoid, wherever possible, the use of this much-canvassed word 'permit' and, where a vehicle is being driven by a servant on the master's business to charge the master with the substantive offence of using the vehicle."

Nearer home, Her Majesty's Supreme Court of Kenya, Sir Ronald Sinclair, Chief Justice (as he then was) and Mr. Justice Rudd (as he then was), in *John Nzoli v. R.* (3), [1961] E.A. 575 (K.) applied the principle in *Smee's* case (1), when called upon to interpret the legislation of Kenya corresponding to the provisions of Tanganyika law which I have before me.

Now these are formidable authorities indeed, and would at first sight appear to cast doubt on the correctness of the decisions of this court in *Alimohamed Osman v. R.* (4) (1952), 1 T.L.R. (R.) 391, and *Remat Nanji Ahmed v. R.* (5), [1959] E.A. 804 (T.) but if the law with which the English and Kenyan Courts were concerned is examined, it becomes clear, in my view, what the explanation is for these apparently divergent decisions.

The law which the English courts were called upon to interpret is contained in reg. 101 of the Motor Vehicles (Construction and Use) Regulations, 1951, the material words in which read as follows:

> "If any person permits to be used on any road a motor vehicle in contravention of or fails to comply with any of the preceding regulations contained in Part III of these regulations he shall for each offence be liable to a fine not exceeding £20."

The Kenyan law follows the English form. Thus s. 103 (5) of the Kenya Traffic Ordinance, 1953, reads:

> "Any person who permits the use of any vehicle in respect of which any prohibition or restriction is in force other than in conformity with any conditions or for such purpose as may have been specified shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding shillings four thousand or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment."

and s. 24(*a*) of the Transport Licensing Ordinance of Kenya reads as follows:

> "Any person who drives or uses a goods vehicle, motor vehicle or ship in contravention of any of the provisions of this Ordinance, or being the owner of such vehicle or ship permits it to be so used, and any driver or other person in charge of any vehicle or ship, in respect of which any class

> of licence has been granted under this Ordinance, who drives or uses such vehicle or ship in contravention of any condition of such licence, or being the owner of such vehicle or ship permits it to be so used, shall be guilty of an offence against this Ordinance."

The relevant words in s. 43 of the Traffic Ordinance under which the appellant here was charged read as follows:

> "No person shall permit a motor vehicle to be used on a road unless the following conditions are complied with"

and then the conditions are set out.

Speaking of the provision of law before the English court, Mr. Justice Parker said this, at p. 278:

> "The appellants were, however, charged with permitting the use in contravention of reg. 75 which, in our opinion, at once imports a state of mind. The difference in this respect was pointed out as long ago as 1894 by Collins, J., in *Somerset v. Wade*, where he distinguished an absolute prohibition against a licensee selling to a drunken person and a prohibition against permitting drunkenness. In the latter case he must be shown to have known that the customer was drunk before he can be convicted."

and with these words I most respectfully agree. But as I read s. 43 of the Traffic Ordinance they do not in my judgment apply to the interpretation of that provision; and in particular the word "permit" in the context does not "at once import a state of mind". I think that the effect of the words "unless the following conditions are complied with" restricts the meaning of the word "permit" to the act or fact of permitting only, and that the subjective mental element is excluded by these words. In short, in my judgment, the words "unless the following conditions are complied with" estop, if I may so put it, the appellant from pleading that he did not know the conditions were not complied with. The provision of Tanganyika law before me I hold constitutes an absolute prohibition against the act of permitting the user of a motor vehicle which in fact does not comply with the conditions mentioned.

For these reasons I think learned Crown Counsel's submission that *Alimohamed Osman's* case (4), and *Remat Nanji Ahmed's* case (5), are good authority for the learned magistrate's statement of the law which I have quoted is valid.

It follows that Mr. Grimble's third ground of appeal, that – and I quote –

> "on the weight of the evidence the prosecution failed to prove that the appellant knew that the vehicle was defective as charged when it commenced its journey and that the appellant had not taken all reasonable precautions to see that the vehicle was in a roadworthy condition"

does not call for consideration as going to the validity of the appellant's conviction on the first and second counts of the charge sheet.

The submission, however, is relevant in connection with the appeal against sentence. I find myself unable to accept that there was not sufficient evidence to justify the learned magistrate's finding of fact on this point. This was, on that evidence, in my judgment clearly a case to which Mr. Justice Parker's words in *Smee's* case (1), at p. 278 applied:

> "Knowledge in this connection includes the state of mind of a man who shuts his eyes to the obvious or allows his servant to do something in the circumstances where a contravention is likely not caring whether a contravention takes place or not."

In the result I hold that the appellant was rightly convicted on the first and second counts of the charge, and his appeal in so far as it relates to those counts must fail. Nor can I see any ground for intervention by this court in the matter of sentence, which was, in the circumstances, reasonable if not lenient. The appeal against sentence, therefore, is also dismissed.

Conviction on first and second counts affirmed Conviction on third count quashed.

For the appellant:
R. S. Grimble, Dar-es-Salaam

For the respondent:
The Attorney-General, Tanganyika
M. G. K. Konstam (Crown Counsel, Tanganyika)

Omari s/o Ramadhani v R
[1962] 1 EA 486 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	27 July 1962
Case Number:	5/1962
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Criminal law – Trial – Witness called by court – Right of court to call witnesses after defence case closed – Limitation upon exercise of right – Witnesses called to establish a certain fact – Another recalled to clear up doubts on evidence – Whether course adopted by court irregular – Penal Code (*Cap.* 16), *s.* 265 *and s.* 271 (*T.*) – *Criminal Procedure Code* (*Cap.* 20), *s.* 151 *and s.* 346 (*T.*) – *Criminal Procedure Code* (*Amendment*) *Ordinance*, 1960 (*T.*).

Editor's Summary

The appellant was tried on a charge of theft and convicted. After the defence case had closed the magistrate recalled one witness to clear up certain doubts in his mind and, to establish certain facts, also called two witnesses who had not given evidence previously. On appeal against conviction and sentence it was submitted that the magistrate was not entitled to call all or any of these witnesses.

Held –

(i) the calling of witnesses after the close of the defence should be limited to cases where something had arisen ex improviso, which no human ingenuity could foresee; in the instant case the witnesses were not so called.

(ii) the magistrate had acted irregularly in recalling one witness and in calling two others to give evidence after the close of the defence, but the appellant was not in any way prejudiced thereby, and the irregularity was remediable under s. 346 of the Criminal Procedure Code.

(iii) when a court of its own volition calls a witness in a criminal case, the prosecution and the accused should be given an opportunity of examining such witness, and although no such opportunity was given no prejudice was occasioned to the appellant.

Appeal dismissed.

Cases referred to in judgment:

(1) *Hussein s/o Salehe v. R.* (1954), 2 T.L.R. (R.) 91.

(2) *R. v. Dora Harris*, [1927] 2 K.B. 587.

(3) *R. v. Williams Evans Wallwork*, 42 Cr. App. R. 153.

(4) *R. v. Lulakomba s/o Mikwalo and Another* (1936), 3 E.A.C.A. 43.

Judgment

Mosdell J: The appellant was convicted in the District Court of Tanga at Tanga on May 28, 1962, of theft by servant contrary to s. 265 and s. 271 of the Penal Code. His co-accused was acquitted. The appellant was sentenced to twelve months' imprisonment. He is now appealing.

The particulars of offence alleged that the appellant and his co-accused

> "on the 21st day of April, 1962 at Bombo Area, within Tanga Township, being employees of the Government hospital, did steal three (3) kilos ground-nuts the property of their employer valued at Shs. 5/60".

A variety of points have been taken on the appellant's behalf by Mr. Jhaveri, some of which raise questions of difficulty. Others do not raise any difficulty at all, and I propose to deal with these first.

[*The learned judge after disposing of those points which are of no reportable interest, continued:*]

Let us now pass to matters which raise some difficulty. The record discloses that after the appellant had given an unsworn statement, his co-accused had given evidence, and Jumanne s/o Shauri had done likewise, the court adjourned the case in order that one Ali s/o Habeti should be called as a witness. At the adjourned hearing on the following day Ali s/o Habeti gave evidence, being recorded as a witness for the defence. The learned resident magistrate then considered that he ought to call the matron to give evidence as to whom she found present when she arrived on the scene. On being informed that the matron was urgently required at the hospital, and deciding that she would be summoned for another day, the learned resident magistrate decided to recall Edith Klapprott "to clear up some doubts in my mind". The latter then gave evidence, and a week later at the resumed hearing the Matron Mary How gave evidence.

The question arises as to whether the learned resident magistrate was entitled to call all or any of these witnesses. I think the calling of Ali s/o Habeti can be disposed of quite shortly in that, when cross-examined, the appellant's co-accused stated

> "One Ali who works at the hospital would say he was sent to fetch me from the W.C.".

He was regarded, quite rightly in my opinion, by the learned resident magistrate as a defence witness on behalf of the appellant's co-accused.

Was the learned resident magistrate correct, however, in recalling Edith Klapprott and calling Mary How the matron after the defence case had been concluded? In this connection s. 151 of the Criminal Procedure Code is relevant. It reads as follows:

> "151 (1) Any court may, at any stage of an inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.
>
> "(2) The power created by sub-s. (1) shall be exercised in the same circumstances and subject to the same limitations as the power created by s. 540 of the Indian Code of Criminal Procedure, 1898."

The latter sub-section, however, was repealed by the Criminal Procedure Code (Amendment) Ordinance, 1960, being Ordinance No. 24 of 1960. The effect of s. 151 of the Criminal Procedure Code was

considered in the case of *Hussein s/o Salehe v. R.* (1) (1954), 2 T.L.R. (R.) 91, when Harbord, J., held that in

spite of the wide terms of the section the same limitation should be placed on the exercise of the rights thereunder as was placed on the exercise of similar rights in similar circumstances in English law, in order that injustice to an accused might not be engendered. Harbord, J., adopted the passage in Archbold's Criminal Pleading, Evidence and Practice (32nd Edn.) at p. 507 which stated:

> "In a criminal trial the presiding judge has the right to call a witness not called either by the prosecution or the defence and without the consent of either if in his opinion this course is necessary in the interests of justice; but, in order that injustice should not be done to a prisoner, the calling of such a witness after the close of the case for the defence should be limited to cases where something has arisien on the part of the prisoner ex improviso, which no human ingenuity could foresee."

This followed the decision in the case of *R. v. Dora Harris* (2), [1927] 2 K.B. 587.

It is clear, I think, in the instant case that the learned resident magistrate did not recall Edith Klapprott and call Mary How because something had arisen ex improviso which no human ingenuity could foresee, for Edith Klapprott was recalled, as was stated by the learned resident magistrate when he decided to recall her, "to clear up some doubts in my mind". Moreover, Mary How was called, as the learned resident magistrate put it, "to give evidence as to who she found present when she arrived". There was no question that the identity of the person who poured the ground-nuts from a tin into the bag held by the appellant would not be raised by the defence, for Mary How deposed in her evidence

> "But Jumanne then spoke up and said that he himself had called Omari to grind the nuts",

so that even before the arrival of the police on the scene it was clear that there would be some dispute as to whether the appellant's co-accused or Jumanne was the pourer of the ground-nuts.

Mr. Troup for the Crown submitted that, apart from the fact that the decision of Harbord, J., was not binding on me, its persuasive authority had been considerably lessened not only by the deletion of sub-s. (2) of s. 151 of the Criminal Procedure Code but also by the later decision, of the Court of Criminal Appeal in England, in *R. v. Williams Evans Wallwork* (3), 42 Cr. App. R. 153. It was there held, inter alia, by Goddard, L.C.J., as he then was, who delivered the judgment of the Court, that a judge has power even after the close of the case for the prosecution himself to call any witness who he thinks can throw material light on the case.

I do not think that the decision in this case on this point overrules the previous decision on it in *R. v. Dora Harris* (2). It is unnecessary to set out the facts in the *Wallwork* case (3). Suffice it to state that after the close of the case for the prosecution the learned trial judge was of the opinion that it was highly desirable that the step-grandfather of the child in respect of whom the offence had been committed should have been called. The learned trial judge took the view that as the case for the prosecution had been closed further witnesses could not be called for the prosecution or by himself. It is stated in the judgment of Goddard, L.C.J.:

> "The learned judge took the view, and I think learned counsel took the view, that as the case for the prosecution had been closed, further witnesses could not be called for the prosecution, and, in our view, they could not have been called for the prosecution unless after the case for the defence some point had arisen which took the prosecution by surprise, when, according

> to the decided cases, evidence in rebuttal could have been given. The learned judge took the view that he could not call the witness. With all respect to the learned judge, this court does not take that view. This court takes the view that in a criminal trial – and I emphasise a criminal trial because it is different in civil proceedings – if the presiding judge, whether he is a judge of assize or chairman of quarter sessions, is of opinion that some person ought to be called who can throw material light on the subject, in his discretion he may call him and examine him himself. However, that was not done, but another very long discussion took place partly in the absence and partly in the presence of the jury, and the learned judge did comment on the fact and told the jury that it was perhaps unfortunate that the step-grandfather had not been called and, as he put it, could not now be called."

I think the learned Lord Chief Justice was referring to the powers of a judge to call a witness after the close of the case for the prosecution but before the defence had been embarked upon. I do not consider that the decision in *Wallwork* (3), is in any way inconsistent with the decision in *Dora Harris* (2). With respect, I think the decision of Harbord, J., in *Hussein s/o Salehe v. R.* (1), is still good law.

So far as I am aware the observation of the Court of Appeal for Eastern Africa in *R. v. Lulakomba s/o Mikwalo and Another* (4) (1936), 3 E.A.C.A. 43 at p. 45 still stands unshaken. It is as follows:

> "The impropriety of the Court in permitting the prosecution to call or itself calling a witness after the defence has closed, where it is not sought to correct something arising ex improviso, has been commented upon by this court in more than one case, and notably in *R. v. Newmark* (1934), 1 E.A.C.A. 162, where the principle laid down in such matters in *R. v. Harris*, 20 Cr. App. R. 86 was discussed and followed."

So, then, it appears that the learned resident magistrate acted irregularly in recalling Edith Klapprott and in calling Mary How to give evidence after the close of the defence, but in my view the appellant and his co-accused were not in the slightest degree prejudiced thereby.

I would add, however, that when a court, of its own volition, calls a witness in a criminal case, the prosecution and the accused should be given an opportunity of examining such witness. Though the appellant and his co-accused were afforded an opportunity of questioning Edith Klapprott when she was recalled, it does not appear that the prosecution was afforded such an opportunity, nor does it appear that either the prosecution or either of the two accused were afforded an opportunity of questioning Mary How when she was called to give evidence as a court witness. Again I do not think that the slightest prejudice was thereby occasioned to either the appellant or his co-accused. These irregularities are remediable under the provisions of s. 346 of the Criminal Procedure Code.

Mr. Jhaveri submitted in his final address in reply to that of Mr. Troup that not only should the appellant and his co-accused have been afforded an opportunity of cross-examining Mary How but they had a right to call further evidence.

In my view there is no validity in this submission. The right of an accused when a court witness is giving evidence is limited to questioning that witness. The fact that a witness is called by the court to give evidence does not entitle an accused to adduce further evidence.

In view of the foregoing the appeal against conviction is dismissed.

As regards sentence, the appellant had three previous convictions of a similar character, and although the value of the stolen ground-nuts was small and the

last of the appellant's previous convictions was in 1951 and he was therefore treated by the learned resident magistrate as a first offender, the learned resident magistrate took a serious view of the offence, because it amounted to the theft of food from the sick. The learned resident magistrate further commented in his observations re sentence:

> "Hospital staff must be trusted. If they break that trust I consider it the duty of the court to impose a deterrent penalty so that those who are like minded may think twice.

I see no reason for reducing the sentence. The appeal against sentence is also dismissed.

Appeal dismissed.

For appellant:
K. L. Jhaveri, Dar-es-Salaam

For the respondent:
The Attorney-General, Tanganyika
A. M. Troup (Crown Counsel, Tanganyika)

Abdallah s/o Salum v R
[1962] 1 EA 490 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	13 June 1962
Case Number:	287/1962
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Criminal law – Charge – Failure to comply with requirements of police supervision order – Ingredients of offence – Whether failure by accused to show court that he had tried his best to act in conformity with law an essential ingredient of offence – Criminal Procedure Code (*Cap*. 20), *s.* 309(1)(*a*), *s.* 310 (*T.*) *– Penal Code, s.* 312 (*T.*).

Editor's Summary

The appellant was convicted of failure to comply with the requirements of s. 309(1)(*a*) and s. 310 of the Criminal Procedure Code in respect of a police supervision order, that he should report to the police during a period specified in the charge. Upon being charged with this offence the appellant said that the charge was true, and that he had not reported as he should have done as he was seeking work. The magistrate treated this as and entered a plea of guilty. On appeal against sentence only the court considered whether failure by the accused to show that he had tried his best to act in conformity with law

is an essential ingredient of the offence under s. 310.

Held –

(i) the words of s. 310 of the Criminal Procedure Code do not make failure by the accused to account satisfactorily to the court that he had tried his best to act in conformity with law an essential ingredient of an offence under s. 310.

(ii) the appellant's words in answer to the charge indicated that s. 310 must have been explained to him although the record did not expressly so state; accordingly the appellant's plea was rightly entered as one of guilty to the charge and the appellant was rightly convicted.

Appeal dismissed.

Case referred to in judgment:

(1) *Harabu s/o Abdallah v. R.*, [1962] E.A. 457 (T.).

Judgment

Sir Ralph Windham CJ: This is an appeal against sentence only, the appellant having pleaded guilty to an offence contrary to s. 310 of the Criminal Procedure Code, namely failure to comply with the requirement of s. 309(1)(*a*), in respect of a police supervision order, that he should report to the police during a period specified in the charge. Before considering the question of sentence, however, I must examine the question whether the appellant's plea to the charge was properly entered as one of guilty, in the light of a recent judgment of this court in *Harabu s/o Abdallah v. R.* (1), [1962] E.A. 457 (T.). In that judgment the correct procedure was laid down for taking a plea to a charge under s. 312 of the Penal Code. That section provides as follows:

> "312. Any person who has been detained as the result of the exercise of the powers conferred by s. 24 of the Criminal Procedure Code and is brought before a court charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such court of how he came by the same, is guilty of a misdemeanour."

It was held by Weston, J., that, upon the wording of s. 312, failure by the accused to give an account to the satisfaction of the court of how he came by the property is an essential ingredient of an offence under the section, so that a plea of guilty cannot forthwith be entered against an accused who, charged under it, says – "I plead guilty", because no offence has yet been committed and admitted unless and until, after being given the opportunity by the court of explaining how he came into possession of the property, he thereupon declines in unequivocal terms to do so. Only then, it was held, can his plea properly be entered as one of guilty. With that decision upon s. 312 of the Penal Code I am, with respect, in entire agreement. But the question is whether the same procedure ought to be followed in the case of a charge under s. 310 of the Criminal Procedure Code before a plea can properly be entered as one of not guilty to the charge. Section 310 reads as follows:

> "310. If any person subject to police supervision who is at large in the Territory refuses or neglects to comply with any requirement prescribed by the last preceding section or by any rule made thereunder, such person shall, unless he proves to the satisfaction of the court before which he is tried that he did his best to act in conformity with the law, be guilty of an offence and liable to imprisonment for a term not exceeding six months and on a second or any subsequent conviction to imprisonment for a term not exceeding twelve months."

The point for determination is whether, by virtue of the words –

> "unless he proves to the satisfaction of the court before which he is tried that he did his best to act in conformity with the law"

in s. 310, failure to adduce such proof is made an essential ingredient of the offence under that section, in the same way as failure by an accused to give an account to the satisfaction of the court of how he came by the property concerned was held to be an essential ingredient of an offence under s. 312 of the Penal Code, by virtue of the words

> "and who shall not give an account to the satisfaction of such court of how he came by the same".

In my view the words in s. 310 do not, as the words in s. 312 do, make failure to adduce proof to the court's satisfaction into an essential ingredient of the offence. Section 312 defines the offender as one who must satisfy all of three requirements:

> "any person who has been detained . . . and (who) is brought before a court charged . . . and who shall not give an account . . .".

Clearly that must be so; for the mere fact of having been detained and charged could not, without more, make a man guilty of any offence. Section 310, on the other hand, puts the last of the conditions in the form of an exception to what is already prima facie a complete offence, into which exception the accused may bring himself at the trial if he will, the burden being upon him to do so. By pleading guilty, he foregoes the opportunity of seeking to bring himself within the exception. That is the effect of the words: "such person shall, unless he proves . . ., be guilty of an offence". The position is the same as where an accused is charged, for example, with being in possession of instruments of house-breaking by night; under s. 298(*c*) of the Penal Code, "without lawful excuse, the proof of which is on him". There, as here, an accused, upon the charge being explained to him, may admit it, and his plea may forthwith be entered as one of guilty of the offence charged. I would add that, although s. 310 does not expressly so provide, the proof "to the satisfaction of the court" that the accused did his best to act in conformity with the law need only be proof upon a balance of probability, as in a civil case, and not necessarily proof beyond a reasonable doubt.

In the present case the appellant, upon being charged, pleaded:

> "The charge is true. I did not report as I should have done as I was seeking work."

This was forthwith entered as a plea of guilty. I consider that it was properly so entered. The appellant's words in answer to the charge indicate that s. 310 must have been explained to him, although the record does not expressly state that it was read out and explained. And it is to be observed that the appellant's explanation of why he failed to report does not suggest that he "did his best to act in conformity with the law". But it was not necessary for him to have offered any explanation, in pleading to the charge, before a plea of guilty could properly be entered against him. Had he, after the section had been explained to him, stopped short at the words: "The charge is true; I did not report as I should have done", for this would have constituted a plea of guilty to the charge, for the reasons that I have set out. I therefore hold that the appellant's plea was rightly entered as one of guilty to the charge and that he was rightly convicted on it.

With regard to sentence, the appellant was sentenced to imprisonment for six months. The maximum sentence under s. 310 for a second or subsequent conviction is twelve months. The appellant admitted two previous convictions for similar offences against police supervision orders, for each of which he was sentenced to two months' imprisonment. I do not therefore consider the present sentence to have been manifestly excessive, and it will stand. The appeal is dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika
G. A. Konstam (Crown Counsel, Tanganyika)

Yusuf Musa and another v R

[1962] 1 EA 493 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	29 June 1962
Case Number:	72 and 73/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Criminal law – Practice – Trial – No witnesses present – Charge dismissed – Fresh charge later brought in same terms – Whether dismissal of charge is a bar to subsequent prosecution for same offence – Penal Code (*Cap.* 24), *s.* 202 *and s.* 307(*a*) (*K.*).

Editor's Summary

A charge against the appellants of shopbreaking and theft contrary to s. 307(*a*) of the Penal Code was dismissed under s. 202 of the Penal Code as no prosecution witnesses appeared at the hearing. Subsequently when a fresh charge was brought against the appellants in the same terms and for the same offence the magistrate convicted them. On appeal it was submitted that the dismissal of the charge under s. 202 had the effect of preventing the prosecution from proceeding on a fresh charge in the same terms and for the same offence as the charge which had been previously dismissed.

Held – a dismissal of a charge under s. 202 of the Penal Code constitutes a bar to a subsequent prosecution for the same offence.

Appeal allowed. Convictions and sentences set aside.

Cases referred to in judgment:

(1) *Re an Application by Ajit Singh*, [1959] E.A. 782 (K.).

(2) *R. v. Jiwan Nathu and Amrik Singh* (1944), 11 E.A.C.A. 62.

Judgment

Rudd Ag CJ: read the following judgment of the court:

The appellants appeal from a conviction of shopbreaking and theft contrary to s. 307(*a*) of the Penal Code on a charge which was signed by the magistrate concerned on January 2, 1962.

The appellants had previously been brought before the same court on December 19, 1961, to answer a charge against them of the same offence. This charge was framed in the same terms as the charge which was signed on January 2, 1962. On 19.12.61 both the appellants were duly charged and pleaded not guilty and the prosecution was adjourned to December 23, 1961, on which date the charge was dismissed under s. 202 of the Penal Code as no witnesses were present.

The main point in the appeals is whether the dismissal under s. 202 of the Penal Code had the effect of preventing in law the prosecution from proceeding afresh on January 2, 1962, on a fresh charge in the

same terms and for the same offence as the charge which had been dismissed under s. 202.

Section 202 corresponds to the old s. 200 which was considered by Rudd, J., in *Re an Application by Ajit Singh* (1), [1959] E.A. 782 (K.) and by the Court of Appeal in *R. v. Jiwan Nathu and Amrik Singh* (2) (1944), 11 E.A.C.A. 62, in which the Court of Appeal expressed the view per Whitley, C.J., that a dismissal under this section would not be a bar to subsequent proceedings on a charge in the same terms for the same offence. As, however, Rudd, J., pointed out in

the matter which came before him the views expressed by Whitley, C.J., in *R. v. Jiwan Nathu and Amrik Singh* (2), were obiter.

Rudd, J, came to a different conclusion and considered that such a dismissal would constitute a bar to a subsequent prosecution for the same offence, but he decided the matter before him on another ground, namely, that the remedies of mandamus and certiorari are in the discretion of the court and refused to exercise such discretion in favour of the applicant.

In our opinion the view expressed by Rudd, J., is the correct view and we refer to the report for a statement on the reasons on which it is based which we accept and adopt.

If a public prosecutor appears and wishes to safeguard the right to bring further proceedings he should apply for leave to withdraw under s. 87 of the Criminal Procedure Code with a resulting discharge under that section and the court will have to decide as to whether or not to allow the withdrawal or to grant the discharge in those terms. Alternatively the prosecutor can apply for an adjournment as provided in s. 202 and the court can consider as to whether to allow it or not. These courses amply protect the Crown's rights but it is clearly right that an accused person should not be subjected to repeated criminal prosecution for the same offence where the complainant and his witnesses do not appear and, in our opinion, s. 202 provides the remedy for that. Were it otherwise the prosecutor could evade the necessity for obtaining the leave of the court to allow him to withdraw under s. 87 by instructing the complainant not to attend and thereby obtain a dismissal under s. 202 so evading the requirements of a withdrawal under s. 87 that he should have instructions from the Attorney-General or the leave of the court.

For these reasons we allow the appeals, set aside the convictions and sentences and order the discharge of the appellants.

Appeal allowed. Convictions and sentences set aside.

The appellants did not appear and were not represented.

For the respondent:
The Attorney-General, Kenya
J. R. Hobbs (Crown Counsel, Kenya)

Ojede s/o Odyek v R
[1962] 1 EA 494 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	29 March 1962
Case Number:	5/1962
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Sir Trevor Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Sheridan, J.

[1] Criminal law – Evidence – Impeaching credit of witness – Statement by witness to police – Statement not strictly proved at trial – Statement put in evidence despite objection by witness – Necessity for strict proof of statement – Evidence Ordinance (*Cap.* 9), *s.* 143 *and s.* 153 (3) (*U.*).

Editor's Summary

The appellant was convicted of murder on circumstantial evidence. At the trial a statement made by a defence witness to the police was without proper proof put in evidence and used to discredit the witness. There was no note on the record that she had identified the document and at the trial the witness had refused to admit part of the contents of the statement and challenged its interpretation. On appeal,

Held –

(i) as the witness was illiterate, the statement had been recorded in another language through an interpreter and the witness had patently challenged both the contents and interpretation of the statement, strict proof was called for, if it was to be used to discredit her evidence.

(ii) the respondent should have called the recording officer and the interpreter to prove the statement, but in the present case the failure to do so had not occasioned a miscarriage of justice.

Appeal dismissed.

Judgment

Sir Trevor Gould JA: read the following judgment of the court:

On January 19, 1962, the appellant was convicted in the High Court of Uganda at Lira of murdering William Ogwang at Akucha village in the Northern Province on or about August 12, 1961. His appeal in this court was heard and dismissed on March 15, 1962, and we now give our reasons for that decision.

The body of the deceased was found on the morning of August 13, 1961, in a shop which he had managed on behalf of his brother Eryasafu Ogoo and in which he slept alone. The deceased was a cripple and was in the habit of sleeping in the shop, which was a single-storey building with two doors and two wooden windows, all of these were found to be locked on the inside with the exception of one window which was unfastened, and there was evidence, which was accepted, that it was of sufficient size to admit an adult person. The deceased died from haemorrhage following three blows on the head apparently from a heavy iron bar.

The evidence connecting the appellant with the crime was circumstantial. He had some reason to bear enmity against those connected with the shop, for it was established that Peter Ochen, a brother of the deceased, had been making love to Pilisikira Akello, one of the appellant's wives and that there had been a quarrel at the shop in consequence, at which the appellant and the deceased were present. One witness testified that a direct threat was made by the appellant to the deceased on that occasion, but though the assessors believed that witness the learned judge was in doubt, the benefit of which he gave to the appellant. On August 16, 1961, the two houses of the appellant were searched, a wooden box being found under a bed in one of them and some bicycle valve tubing and a packet of blue in another. The owner of the shop, Eryasafu Ogoo, identified these articles as being missing from the shop. He had reported the theft of a wooden cash box containing Shs. 200/- (but not of the other articles) to the police before the box was found, but the learned judge was not satisfied that he had described it in detail to the police before it was shown to him. Another witness, however, made a positive identification of the box and selected it from three which were placed before him. That was Livingstone Ogwang, who had worked as a tailor on the verandah of the shop in question for six years prior to January, 1960. The deceased, he said, kept money in it, and the witness himself used it. The appearance of the box is such as to render it readily identifiable.

In a cautioned statement in answer to a charge of murder the appellant denied any complicity and said that the wooden box was his; he had bought it from Anzilo Ojok. In a further statement to the resident magistrate at the preliminary inquiry he said that the box had been made by Ojok. He maintained this in an unsworn statement at his trial. The Crown, however, called one Angelo Ojok as a witness and it was not disputed that he was the person referred to by the appellant. He said that he used to see the appellant

during his stay in Gulu in February, 1961, but denied that he made any wooden box for the appellant, or

that he was capable of making such a box. He was a fundi for measuring plots and knew nothing of carpentry.

Two further witnesses gave evidence touching the matter of the wooden box. One, called by the Crown, was Pilisikira Akello, the above-mentioned wife of the appellant. She said that on a Saturday night (August 12, 1961, was a Saturday) the appellant left the house and returned at about 2 a.m. with the box, which she identified. The other witness was Aironga, who was called by the appellant and is the other of his two wives. She said in evidence that the appellant, when he was staying with Ojok, gave him a piece of wood and from it Ojok made the wooden box in question.

Upon the whole of the evidence both assessors and the trial judge were satisfied of the guilt of the appellant and he was convicted. A full examination of the record of the proceedings, however, revealed one aspect of the evidence which occasioned us some concern, though it was not a matter which was included in the memorandum of appeal. When Aironga was cross-examined she admitted that she had made a statement to the police and that it had been read over to her and thumb-marked by her. Presumably the document was then produced and shown to her, as the trial judge's note reads "(marked exhibit L)", though there is no note that she admitted or identified the actual document. The note of the cross-examination then continues:

> "I never said to the police that I didn't know about the cash box. I was speaking in Acholi and they did not understand very well."

That is obviously a refusal to admit part of the contents of the document and a challenge to its interpretation. The statement was nevertheless regarded by the trial judge as having been proved, and in dealing with her evidence in his judgment he said:

> "The accused was supported by Aironga (D.W.1), his senior wife, but she was clearly improving on her previous statement to the police that she did not know about the box. She was a pathetic witness who was doing her best to save her husband."

What we take exception to is the fact that the statement was put in evidence and used to discredit the witness without having been properly proved. Section 143 of the Evidence Ordinance (Cap. 9, of the Laws of Uganda, 1951) provides:

> "143. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant, to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

This section merely lays down (in the second portion thereof) a condition precedent to the proof of the previous statement in writing; it does not dispense with proof, which is in fact called for in s. 153 (3) of the same Ordinance and which ought, in the present case, to have been effected by the Crown calling the recording officer and the interpreter. It may be that in some cases, if no language difficulty intervened, such a statement could be proved by the admission of the particular witness that he had said what was written and signed the statement, though it appears unlikely that it would then be necessary to put the statement in at all. That was not the present case. The witness was illiterate, the statement was recorded in another language through an interpreter and the witness was patently challenging the content and interpretation. It was a case which called for strict proof of the document, if it was desired to use it.

In view of this departure from the rules of evidence it was necessary for us to consider whether any miscarriage of justice had resulted therefrom. Had the

question turned upon the evidence of the two wives only, that would undoubtedly have been the case, but the court and assessors plainly accepted the denial of Ojok that he had made the box and the identification thereof by Livingstone Ogwang (and in the case of the assessors, by Eryasafu Ogoo). Aironga's evidence and that of the appellant was completely incompatible with that of the Crown witnesses mentioned and acceptance of the latter precluded acceptance of the defence story as a reasonable possibility, irrespective of the previous contradictory statement of Aironga.

We were satisfied that no miscarriage of justice ensued and permitted the conviction to stand.

Appeal dismissed.

For the appellant:
J. W. R. Kazzora, Kampala

For the respondent
The Attorney-General, Uganda
J. M. Long (Crown Counsel, Uganda)

Balwantrai D Bhatt v Tejwant Singh and another
[1962] 1 EA 497 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	28 July 1962
Case Number:	21/1962
Before:	Sir Ronald Sinclair P, Sir Trevor Gould Ag VP and Newbold JA
Sourced by:	LawAfrica

(Reference to the full court under r. 19 (6) of the Eastern African Court of Appeal Rules, 1954, from a decision of a single judge.)

[1] Appeal – Practice – Application for extension of time for lodging appeal – Affidavit in support – No statement in affidavit showing merits of appeal – Due diligence in other respects shown by applicant – Whether application competent – Eastern African Court of Appeal Rules, 1954, *r*. 9 (1), *r*. 19 (6) *and r*. 58.

Editor's Summary

Although the affidavit in support of an application for extension of time for lodging an appeal did not contain a statement of the merits of the appeal in accordance with the practice of the court in considering applications made under r. 9 of the Court of Appeal Rules, a single judge of the court granted the extension sought. A reference to the full court was then applied for since the grant of the application

appeared to conflict with an earlier decision of the court.

Held –

(i) the rule of practice requiring the inclusion of a statement of the merits of an intended appeal in an affidavit supporting an application for extension of time for lodging appeal was not intended in any way to fetter the discretion of a judge of the Court of Appeal when determining under s. 9 (1) of the Eastern African Court of Appeal Rules, 1954, whether "sufficient reason" had been shown for extending the time for lodging appeal, where the "sufficient reason" in the particular application was delay attributable entirely to the courts and in no way the fault of the applicant.

(ii) the rule of practice laid down in *B. D. Shah v. D. Jamnadas & Co. Ltd.*, [1959] E.A. 838 (C.A.) was general but none the less salutary and advocates should comply with it in all cases, both for the full information of the court and because failure to observe it might result in the application for an extension of time for lodging an appeal being refused.

Reference dismissed.

Case referred to in judgment:

(1) *B. D. Shah v. D. Jamnadas & Co. Ltd*., [1959] E.A. 838 (C.A.).

Judgment

Sir Trevor Gould Ag VP, read the following judgment of the court: This is an application to the full court under r. 19 (6) of the Eastern African Court of Appeal Rules, 1954, to have varied, discharged or reversed a decision of Crawshaw, J.A., in Chambers granting an application for an extension of time for lodging an appeal to this court from a judgment and decree of the Supreme Court. Having heard argument we indicated our opinion that the extension had been rightly granted and ordered a further extension until July 28, 1962; the cost of the applications both to Crawshaw, J.A., and to the full court to be in the appeal provided the appeal was filed within the time allowed, but otherwise to be paid by the applicant for the extension.

The main purpose of the reference to the full court appears to have been the settlement of a point of practice arising out of the decision of this court in *B. D. Shah v. D. Jamnadas & Co. Ltd*. (1), [1959] E.A. 838 (C.A.). That case was one of an application for an extension of time for lodging an appeal and in the course of his judgment (with which the other members of the court agreed) Corrie, Ag. J.A., at p. 840 said:

> "Finally it is objected that the nature of the case which gives rise to the application should have been stated. This is in my view the most substantial ground of objection. The object of including r. 9 in the rules of court is to ensure that the strict enforcement of the limitations of time for filing documents prescribed by the rules shall not result in a manifest denial of justice. It is thus essential, in my view, that an applicant for an extension of time under r. 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the court to determine whether or not a refusal of the application would appear to cause injustice."

In the present case the affidavit in support of the application did not contain a statement of the kind referred to in the judgment of Corrie, Ag. J.A., but Crawshaw, J.A., distinguished the case of *Shah v. Jamnadas* (1), from the present one in that the applicant in *Shah v. Jamnadas* (1), had been dilatory but that in the instant case the applicant had done all he possibly could have done to obtain the necessary record of appeal.

This is merely an example of a case, now of frequent occurrence, in which the intending appellant is unable to lodge his appeal within the period of sixty days allowed by r. 58 of the rules of this court, because through pressure of work the Supreme Court is unable to complete in time the typing of the copies of the notes of proceedings or other documents which form a necessary part of the record of appeal. If the intending appellant (in the ordinary case by his legal representatives) has exercised all due diligence and done all in his power to obtain the necessary copies of documents in time, but has been prevented from doing so because the Supreme Court has not been able to supply them, it would in the absence of other special circumstances be a denial of justice not to extend the specified period. He would have been deprived of his right of appeal, which in the type of case now under consideration is an absolute one, through circumstances which, though the fault of no one, are attributable to the courts and beyond the intending appellant's control.

That is a very special class of case. The rule laid down in the passage above quoted from *Shah v. Jamnadas* (1), is a general but none the less salutary one, and advocates would be well advised to comply with it in all cases, both for the full information of the court and because failure to observe it may well result in their application being refused. But what was said in that case was not, we are satisfied, intended to be in any way a fetter on the discretion of a judge of this court when he is determining under r. 9 (1) whether "sufficient reason" has been shown for extending the time for appeal, where the "sufficient reason" in the particular application is a delay attributable entirely to the courts and in no way the fault of the applicant.

For these reasons we were of opinion that the order made by Crawshaw, J.A., was correctly made in the exercise of his discretion.

Reference dismissed.

The applicant in person.

For the respondents:
Khanna & Co, Nairobi
D. N. Khanna

R v Musa s/o Usawale
[1962] 1 EA 499 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	19 April 1962
Case Number:	55/1962
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Criminal law – Sentence – "Previous conviction" – Whether date of previous conviction must be prior to date of subsequent offence – Criminal Procedure Code (*Cap*. 20), *s*. 11 (*T*.).

Editor's Summary

The accused was charged in a district court with burglary and theft committed on March 8, 1962. In another case in the same court the accused was charged with burglary and theft committed on March 3, 1962. On April 2, 1962, the magistrate convicted the accused in both cases and in sentencing the accused he treated the conviction in the first case as a previous conviction. In revision,

Held –

(i) to constitute "a previous conviction" the date of the first conviction must be previous to the date of

the subsequent offence.

(ii) the reason for so interpreting "a previous conviction" is that since a previous conviction weighs against leniency, it must be clear to the court that the sentence for a previous conviction has not deterred the accused from committing another offence.

Sentence set aside and shorter sentence ordered.

Judgment

Mosdell J: The accused was apparently convicted and sentenced on April 2, 1962, in the district court of Iramba at Kiomboi of burglary and theft committed on March 8, 1962 (Case No. 138 of 1962) and on March 3, 1962 (Case No. 139 of 1962). When sentencing the accused in the latter case the magistrate treated the conviction in Case No. 138 as a "previous conviction". In fact it was not. To be a "previous conviction" not only must the accused have been convicted previously but the date of the previous conviction must be prior to the date of the offence in the case being dealt with or in other words – the date of the former conviction must be previous to the date of the present offence. In Case No. 139 this was not so. The date of the offence in Case No. 139 was March 3, 1962. The date of the conviction

in Case No. 138 was April 2, 1962. The reason for the above-mentioned interpretation of "previous conviction" is, of course, that a previous conviction, and the sentence following thereon, weighs against leniency in a succeeding case because it has not deterred the accused from committing another offence, but, the deterrent effect of a conviction and sentence cannot begin to operate on an accused's mind unless he has been convicted and sentenced before he commits another offence. When sentencing the accused in Case No. 139 the purported previous conviction in Case No. 138 must have weighed in the magistrate's mind against leniency.

Some reduction of sentence in Case No. 139 is, therefore, called for.

I therefore set aside the sentence of twelve months' imprisonment on each count to be served concurrently in Case No. 139 and in substitution therefor order that the accused be imprisoned for nine months on each count to be served concurrently. Section 11 of the Criminal Procedure Code does not appear to have been complied with.

Sentence set aside and shorter sentence ordered.

V D Chandaria and another v T D Ghadially
[1962] 1 EA 500 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	2 July 1962
Case Number:	69/1961
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Kenya – Miles, J.

[1] Damages – Joint tortfeasors – Assessment – Separate award of damages against each tortfeasor – Whether separate awards made on wrong principle – Proper court to assess damages – Law Reform (*Miscellaneous Provisions*) *Ordinance*, 1956, *Part III* (*K.*) *– Law Reform* (*Married Women and Tortfeasors*) *Act*, 1935, *Part II.*

Editor's Summary

The respondent claimed damages from each of the appellants on the ground that each of them had separately assaulted and falsely imprisoned him. For assault and battery the trial judge assessed and awarded damages against the first appellant of Shs. 10,000/- and against the second appellant of Shs. 15,000/-. In respect of false imprisonment the judge assessed and awarded the same damages against each appellant as for assault and battery. On appeal it was submitted that the assessment of damages separately against each appellant was wrong in principle.

Held –

(i) as the appellants were joint tortfeasors in respect of all the torts alleged there should be one award against them jointly and severally for the total general damages resulting from their joint torts.

(ii) the judge was not entitled to award separate damages against each of the joint tortfeasors and, since the judge was the proper person to make a single assessment of damages, the proper course was to remit the case to him for a fresh assessment.

Case remitted to the trial judge for a fresh assessment of damages.

Cases referred to in judgment:

(1) *The Koursk*, [1924] P. 140.

(2) *Heydon's case*, 77 E.R. 1150.

(3) *Greenlands Ltd. v. Wilmshurst and Others*, [1913] 3 K.B. 507.

The following judgments were read:

Judgment

Crawshaw JA: The appellants have appealed against the judgment of the Supreme Court awarding to the respondent general damages against them severally for assault and battery and wrongful imprisonment and in addition a sum of Shs. 1,807/- against them jointly and severally. The respondent alleged in his plaint that on the night of January 31, 1959, he was forcibly abducted by the first appellant and taken to the premises of Thika Wax Works Ltd. where the first appellant assaulted him, took from him Shs. 1,807/- in cash and forcibly detained him there; that the second appellant also assaulted him there, received the Shs. 1,807/- from the first appellant and then in restraint of the respondent's liberty forced him into a motor-car, drove him away and on reaching a certain place pushed him out of the car and left him. In his evidence the respondent said that the abduction consisted of his being caught from behind as he was walking down the street, lifted into a motor-car and driven to the Wax Works. He said that it was after the first appellant had assaulted him there and taken the money from him that the first appellant telephoned the second appellant who shortly afterwards arrived. The appellants filed a joint defence which in effect constituted a total denial that either of them had been involved in the alleged incident at all. In evidence the first appellant admitted that he was a director of the Wax Works and the second appellant that he was managing director.

The learned judge in a long judgment reviewed the evidence exhaustively and in the main accepted the evidence of the respondent. He found that the second appellant was the "prime mover" in the affair, and for that reason, presumably, gave the heavier damages against him. The appellants in their memorandum of appeal complained that the learned judge should not on the evidence as a whole have found that the appellants were concerned in the matter, nor, having so found, was he justified in finding that the second appellant was the prime mover, and that anyway the damages awarded against each of the appellants were excessive.

Mr. Salter for the appellants addressed us at some length on the questions of fact, but we did not call on Mr. Nazareth, who appeared for the respondent, to reply thereon. We were satisfied that the trial judge was fully entitled to come to the conclusions thereon which he did, apart perhaps from his allocation of blame.

Mr. Salter at the hearing of the appeal asked leave, which we granted, to add a new ground,

> "That the judge was wrong in principle in assessing damages separately against each appellant.",

and I think it will be convenient to deal with this submission first. The learned judge did not make a single total award and then apportion it between the appellants, but after giving reasons why the damages should be heavy he said, before making any award:

> "So far as the apportionment is concerned, the view I take on the whole evidence is that this was a concerted

conspiracy on the part of both defendants, carefully planned and contrived. The second defendant is the older of the two brothers. He handled the financial side of the companies and I have no doubt that he was the prime mover in this affair.

"I assess the damages as follows:

As against the first defendant,

Shs. 10,000/- for assault and battery,

Shs. 10,000/- for false imprisonment.

As against the second defendant,

Shs. 15,000/- for assault and battery,

Shs. 15,000/- for false imprisonment.

"There will be judgment for the plaintiff for these amounts."

It is abundantly clear and is not in dispute that the effect of the judgment was to make the liability of each appellant for the general damages awarded several but not joint. Although normally it would obviously be more to a person's interest to obtain an award in his favour made joint as well as several, Mr. Nazareth has in this appeal (we are informed that the sums awarded are already secured) attempted to justify the nature of the order of the learned judge by pointing out that in the plaint separate torts are alleged against each appellant independently, and that though the same damnum resulted, it was produced by different injuriae for which each appellant is separately responsible, and he argued that the judge was entitled to assess damages separately for each tort and separately against each appellant. Rather inconsistently, in my opinion, with those submissions he argued that in effect the judge awarded Shs. 50,000/- and how he apportioned it was another matter; that the word "apportionment" means a division of a whole: that the learned judge had set out each appellant's separate responsibility for the different incidents and that it was competent for him to assess a single sum of Shs. 50,000/- in respect of those incidents jointly, then apportion that sum between them, and that is notionally what the learned judge did.

Had the learned judge awarded Shs. 50,000/- against the appellants jointly, then in the circumstances and in the manner contemplated in Part III of the Law Reform (Miscellaneous Provisions) Ordinance, 1956, which is similar to Part II of the English Law Reform (Married Women and Tortfeasors) Act, 1935, he could have found, as between themselves, the contribution each should make to the whole as he thought equitable having regard to the extent of the responsibility of each for the damage; but that is neither what he did not purported to do. The learned judge was not addressed by counsel on the question whether liability in the circumstances could be separate, or whether it must be joint and several. Although he referred to the event as a concerted conspiracy, planned and contrived, he had earlier in his judgment, prior to the consideration of damages, specified the physical responsibility of each appellant for the separate incidents of false imprisonment and assault and he must I think have had this in mind, together with what he considered was the chief part played by the second appellant, when he awarded separate damages against each. It may be, one cannot say, that the learned judge had in mind total damages of Shs. 50,000/- as appropriate for the whole transaction, and that he then considered separately the degree of responsibility of each appellant, but the fact remains that he made no single award, let alone one in respect of which the appellants were jointly held liable.

It is possible for a party to be liable jointly with another for one item of damage and separately for another item of damage. In Clerk and Lindsell on Torts (12th Edn.), para. 182 at p. 99, it is said,

"persons whose respective shares in the commission of a tort are done in furtherance of a common design"

are joint tortfeasors, and this statement of the law was approved in *The Koursk* (1), [1924] P. 140. I understood Mr. Nazareth to agree that the second appellant

would be liable in tort equally with the first appellant for the abduction even though the second appellant was not present; apart from conspiracy, the second appellant showed common design in himself assaulting the respondent, in taking the Shs. 1,807/- from the first appellant, and in his subsequent actions. Mr. Nazareth did not I think go so far as to suggest that they were not joint tortfeasors throughout even though they acted separately in part, nor do I think he could have done so in view of the plaint and of the finding of the learned judge (against which there is no cross-appeal). The plaint, which perhaps was not particularly well constructed, did not expressly plead conspiracy or common intent. It alleged separately the wrongful acts of each appellant and asked for damages against them separately in respect of those acts, but in the prayer the extension of their liability for the acts of each other was also alleged, in effect, by the respondent asking for judgment against them jointly and severally.

From the authorities it is clear that as the appellants were joint tortfeasors the court could not legally award damages against them separately. In Mayne and Mcgregor on Damages (12th Edn.), para. 1006 at p. 843, under the heading, "Where the defendants are joint wrongdoers and some have acted maliciously or more maliciously than others", it is said:

> "Only a single judgment for damages may be entered against joint wrongdoers sued together, the award being for the whole damage suffered by the plaintiff. This rule applies to joint contractors and joint tortfeasors, despite the difference that, while joint contractors are jointly liable and the plaintiff must sue all together, joint tortfeasors are jointly and severally liable and the plaintiff in one action may sue one, some or all. Difficulties arise as to the amount of the award to be made in this single judgment where the existence of malicious conduct aggravates the damage, by way of increased injury to the plaintiff's feelings, or lets in the possibility of an award of exemplary damages, and only some of the joint wrongdoers have acted maliciously or some have acted more maliciously than others".

The paragraphs go on to consider the difference between exemplary and aggravated damages and the rules to be applied in assessing a single figure in the case of joint tortfeasors. In Glanville L. Williams on Joint Torts and Contributory Negligence it is said at p. 63,

> "The rule at common law is that where joint tortfeasors are sued together not more than a single judgment can be rendered against those who are held liable",

and at p. 64,

> "It is a consequence of the single-judgment rule that the court has no power to sever the plaintiff's total damages and enter judgments for different amounts against the different defendants. This is so even though the issues against the different defendants are tried separately",

and at p. 70,

> "The plaintiff is forbidden to take several judgments for apportioned parts of his damages even if he wishes to do so".

Both Mayne and Glanville Williams cite *Heydon's* case (2), 77 E.R. 1150, as authority for the rule, and that case is referred to in *Greenlands Ltd. v. Wilmshurst and Others* (3), [1913] 3 K.B. 507 where Vaughan Williams, L.J., says "there must be one judgment and one assessment of damages". As mentioned above, assessment of the rate of contribution is now competent in certain circumstances under the provisions of the Law Reform (Miscellaneous Provisions)

Ordinance, 1956, but those provisions do not alter the rule that there must initially be one assessment of damages.

The question of quantum of damages was raised in the memorandum of appeal and argued before us. In view however of the wrong method adopted by the learned judge in awarding damages, I do not think that the quantum can properly be considered on this appeal, for it does not necessarily follow that had the learned judge awarded damages on the right principle he would have come to an overall figure of Shs. 50,000/-. This court has not infrequently interfered with an assessment of damages on appeal where a trial judge has followed a wrong principle, but in the instant case the position is somewhat unusual, for no single assessment has been made which we can consider. Mr. Nazareth has submitted that if the separate award of damages is held to be wrong in principle the case should be remitted to the trial judge for assessment of a single figure. Mr. Salter on the other hand submits that the damages having been assessed on a wrong basis the whole amount comes under review by this court and that we have jurisdiction to make assessments. For the reason I have given I think that Mr. Nazareth's submission is the right one and that the trial judge (if available as we were informed he would be) is the proper person to make the assessment or assessments. He has seen the witnesses, has formed an impression of the malice present in the acts of the appellants and of the respondent's physical injuries and mental distress. I would comment that, with due respect to the learned judge, I can see on the evidence little reason to distinguish between the appellants as regards rates of contribution, should the learned judge be asked to assess the same. Both counsel agreed that separate assessments can be made for (*a*) assault and battery, and (*b*) false imprisonment, although the damages for each of these torts can be combined.

I would therefore remit the case to the learned judge for reassessment of damages on the lines indicated and for the hearing of further argument should the parties desire to be heard. As to costs, the appellants failed on the merits but have succeeded in challenging the method of assessment of damages, which is no unimportant matter. I would accordingly make no order as to costs of this appeal.

Sir Ronald Sinclair P: I agree with the conclusions of the learned Justice of Appeal. It is common ground that on the evidence which the learned trial judge accepted the appellants were joint tortfeasors in respect of all the torts alleged. In those circumstances I think it is clear that there should be one judgment against the appellants jointly and severally for the total general damages resulting from their joint torts. If the learned judge had made one assessment of such damages, instead of assessing damages separately against each appellant, I do not think it can be said that he would necessarily have arrived at the same total sum. I therefore agree that the case must be remitted to the learned judge for reassessment of damages as indicated. There will be an order in the terms proposed by the learned Justice of Appeal.

Sir Alastair Forbes VP: I also agree that there ought to be one judgment for the total general damages assessed against the appellants jointly and severally, and that in the circumstances of this case the matter must be remitted to the learned judge. I agree with the proposed order.

Case remitted to the trial judge for a fresh assessment of damages.

For the appellants:
C. W. Salter, Q.C. and *Ralph C. de Souza*, Nairobi

For the respondent:
J. M. Nazareth, Q.C. and *E. P. Nowrojee*, Nairobi

Antoine Ernesta v R
[1962] 1 EA 505 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	7 August 1962
Case Number:	54/1962
Before:	Sir Ronald Sinclair P, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles – Rassool, Ag. J.

[1] Criminal law – Perjury – Evidence – Admissibility – Testimony given in language other than that of the court – Trial judge acting as interpreter without being sworn – Testimony not recorded by judge but by court official – Record of testimony produced by court official at trial for perjury – Trial judge not called as witness at trial for perjury – Whether record of testimony admissible – Supreme Court (*Record of Evidence*) (*No*. 2) *Rules*, 1955 (*S*.) – *Criminal Procedure Code* (*Cap*. 77), *s*. 172 *and s*. 175 (*S*.) – *Evidence Ordinance* (*Cap*. 81), *s*. 12 (*S*.) – *Indian Evidence Act*, 1872, *s*. 80 *and s*. 91 – *Seychelles Judicature Order-in-Council*, 1903, *cl*. 13 (2) (*S*.) – *Promissory Oaths Ordinance*, 1955 (*S*.) – *Capital Offences Order-in-Council*, 1903, *cl*. 8 (*S*.).

Editor's Summary

The appellant's conviction of perjury rested entirely upon the production of the record of a criminal case wherein he had given testimony which was alleged to be false. The appellant's testimony in that case was given in a language other than that of the court and had been translated into the court's language by the trial judge upon whose direction it was taken down in writing by the registrar of the court. The trial judge had not been sworn as an interpreter, and he was not called as a witness at the appellant's trial for perjury. At the trial for perjury the registrar produced the record of the criminal case but gave no direct evidence as to the testimony given by the appellant. The main ground of appeal against conviction was that no proper evidence had been given of the false testimony with which he was charged.

Held –

(i) it is essential that, when a witness gives evidence in a language other than the language of the court the evidence must be interpreted into the language of the court for the purpose of being taken down into writing; and where on completion it is in fact read over to the witness it must be interpreted to him in the language in which he gave his evidence.

(ii) in the absence of specific statutory provision authorising evidence given in another language to be taken down without an interpreter in the language of the court, a record in the language of the court of what a witness was alleged to have said in another language was not admissible to prove the testimony of that witness unless either the record disclosed that the evidence of the witness was interpreted through a sworn interpreter of the court or the person who acted as interpreter is called

to give evidence.

(iii) it is normally undesirable that a judge should act as an interpreter; but if in special circumstances he undertakes the duties of an interpreter, he should administer the interpreter's oath to himself.

(iv) in a charge of perjury it is essential that the record of the testimony which is the subject matter of the charge should be legally admissible and such as leaves no doubt as to it being an accurate record of that testimony.

(v) to accept as a safe foundation for a conviction of perjury a record in English of what a witness said in another language without either the record disclosing that English was the result of the sworn interpretation or the interpreter

being called would be contrary to the basic principles on which criminal justice is administered.

Obiter. – The production of a record containing the testimony of a witness taken in accordance with the law is evidence of the testimony given by witness.

Appeal allowed. Conviction quashed and sentence set aside.

Cases referred to in judgment:

(1) *Bapoo v. R.* (1931), 1 T.L.R. (R.) 663.

(2) *R. v. Atkinson* (1943), 10 E.A.C.A. 119.

(3) *R. v. Sarwan Singh* (1954), 21 E.A.C.A. 183.

(4) *R. v. Mbara bin Petro* (1936), 3 E.A.C.A. 110.

(5) *Kashandago v. R.* (1953), 20 E.A.C.A. 174.

(6) *R. v. Attard*, 43 Cr. App. R. 90.

(7) *R. v. Kelly and Maloney*, 3 Cox C.C. 75.

Judgment

Newbold JA, read the following judgment of the court:

On April 17, 1962, the appellant was convicted by the Supreme Court of Seychelles of perjury and was sentenced to nine months' imprisonment. The appellant now appeals to this court against such conviction and sentence on a number of grounds, one of which, in effect, is that no proper evidence has been given of the false testimony with which he was charged.

The appellant was a witness in case No. 40 of 1961, in which Karl St. Ange was prosecuted for a criminal offence. In the course of his testimony in that case the appellant, according to the record of that case, denied having said in a statement to Police Sergeant Naiken:

> "Mon ti arrete travaille le 10 Decembre 1960 ainsi que tous les autres travailleus qui ti pe travaille dans chemin a Anse Gaulettes."

and stated:

> "I did not tell the police that after December 10 I stopped working for Government."

The appellant was subsequently charged with perjury and, in brief, the particulars of the offence were that the appellant, being a witness in the case against Karl St. Ange, knowingly gave false testimony that he did not, in the statement to Police Sergeant Naiken, say that after December 10 he stopped working for Government. At the appellant's trial Sergeant Naiken was called and gave evidence of taking a signed statement in the Creole language from the appellant, which statement was put in as an exhibit and contained the words which the appellant is alleged in his testimony to have denied saying. A certified translation of this statement is attached to the appeal record. The trial judge accepted this evidence and this being so there was sufficient evidence to prove the falsity of any testimony to the contrary.

In order to prove what testimony the appellant gave at the trial of Karl St. Ange, at the appellant's trial the registrar of the Supreme Court was called. He stated that on the direction of the Chief Justice,

who was the trial judge in the case against Karl St. Ange, he took down the evidence given in that case; that the appellant spoke in Creole and that he, the registrar, recorded the evidence of the appellant as translated in English by the Chief Justice; and that he produced the record. It is to be noted that the evidence of the registrar is not that he heard what the appellant said and recorded

in English what the appellant said, but merely that he recorded in English what the Chief Justice translated as being the testimony of the appellant. The registrar thus gave no direct evidence as to the testimony given by the appellant and, as no other witness did so, the evidence of what testimony the appellant gave at the trial of Karl St. Ange rests entirely upon the record of that case which, as has been stated, was produced by the registrar and marked as an exhibit in the trial of the appellant. According to that record the registrar was appointed by the Chief Justice

> "to take down the evidence in writing in this case in my presence and hearing and under my personal direction and superintendence, under s. 2 of the Supreme Court (Record of Evidence) (No. 2) Rules, 1955".

So far, at least, as the appellant's testimony is concerned, the record does not disclose that any interpreter was appointed or used or, indeed, that the appellant gave his evidence in any language other than the English language in which it is recorded. In the record it appears that the appellant stated in his testimony:

> "I did not tell the police that after December 10 I stopped working for Government,"

and at the end of the appellant's testimony there is the statement: "Read out to the witness in court. Correct. "followed by the signature of the Chief Justice.

In these circumstances it is necessary to consider whether the record of a criminal case containing evidence purporting to have been given by a witness can be used in the trial of this witness for perjury to prove the testimony which the witness is alleged to have given; and, if so, whether in the circumstances of this case the record of the prosecution of Karl St. Ange can be so used, it having been proved that such record is one not of what the witness said but of what the Chief Justice translated as being what the witness said in another language.

Section 175 of the Criminal Procedure Code (Cap. 77 of the Laws of Seychelles) provides that a judge of the Supreme Court shall, in accordance with rules, take down or cause to be taken down the evidence given before him. Rule 2 of the Supreme Court (Record of Evidence) (No. 2) Rules, 1955, provides inter alia, that the evidence shall be taken down in writing in the language of the court under the personal direction of the judge and shall from part of the record. The position thus is that in the Seychelles, as in the territories of East Africa, there is a specific statutory requirement that evidence should be taken down in writing and as so taken down shall form part of the record. To this extent the law of Seychelles with regard to evidence is different from the law of England, which latter law, subject to any provision in force in Seychelles, is by s. 12 of the Evidence Ordinance (Cap. 81 of the Laws of Seychelles) made applicable to Seychelles. There is a line of cases in this court (in *Bapoo v. R.* (1) (1931), 1 T. L. R. (R.) 663; *R. v. Atkinson* (2) (1943), 10 E.A.C.A. 119; and *R. v. Sarwan Singh* (3) (1954), 21 E.A.C.A. 183) which seem to make it clear that in East Africa, by virtue of provisions similar to s. 175 and r. 2 referred to above, the testimony of a witness may be proved by production of the record. This position seems to have been reached without regard to the provisions of s. 80 of the Indian Evidence Act (of which no specific similar provision exists in Seychelles). Further, there are cases which suggest that under s. 91 of the Indian Evidence Act (of which no specific similar provision exists in Seychelles but which is similar in some respects to the best evidence rule of English law) the record of the evidence if taken in accordance with the law is the best evidence of the testimony of the witness. We had the assistance of Mr. Twelftree, who appeared for the Crown, but as no counsel appeared at the appeal for the appellant the matter was not fully argued. Without finally coming to a conclusion on the matter, we are

prepared to accept for the purposes of this appeal that the production of a record containing the testimony of a witness taken in accordance with the law is evidence of the testimony given by the witness. Whether such evidence is the best evidence of such testimony and whether it can be rebutted we leave for consideration on another occasion, as the matter does not arise in this case.

The next question is whether the record of case No. 40 of 1961 can be used to prove the fact that the appellant gave false testimony in that case. It appears from the evidence of the registrar that the appellant gave his evidence in the Creole language and that the evidence so given was interpreted by the Chief Justice and that no sworn interpreter was used. Clause 13 (2) of the Seychelles Judicature Order-in-Council, 1903, provides that the clerk attached to the judge shall, as the judge may think fit, be required to discharge the duties of interpreter and translator of English into Creole patois and vice versa; and the Promissory Oaths Ordinance, 1955 (No. 21 of 1955), provides that interpreters shall take certain oaths before the Chief Justice. As the Rules referred to earlier require the evidence to be taken down in the language of the court and as the record is in English, it would appear that, except when capital offences are being tried (see cl. 8 of the Seychelles Capital Offences Order-in-Council, 1903), the language of the Supreme Court is English. Section 172 of the Criminal Procedure Code does not appear to deal with the position of interpretation from the point of view of a witness and we are aware of no specific statutory provision in the Seychelles, but as the language of the court is English it would seem essential that when a witness gives evidence in a language other than the language of the court the evidence must be interpreted into the language of the court for the purpose of being taken down into writing; and where on completion it is in fact read over to the witness it must be interpreted to him in the language in which he gave his evidence. This, of course, is quite separate from any interpretation which may be necessary for the accused at a trial.

The record in case No. 40 of 1961 does not disclose as it should do, that the appellant gave evidence through an interpreter. The evidence of the registrar is that the appellant spoke in Creole and that the Chief Justice dictated what the registrar wrote in English. There is no evidence that when the evidence of the appellant was read back to him it was interpreted into a language which the appellant understood.

There are a number of decisions of this court that an extra judicial statement recorded by a magistrate in English but taken through an interpreter is inadmissible hearsay evidence unless the interpreter is called (see *R. v. Mbara bin Petro* (4) (1936), 3 E.A.C.A. 110, and *Kashandago v. R.* (5) (1953), 20 E.A.C.A. 174); and a like decision on a similar point has been given recently in England: see *R. v. Attard* (6), 43 Cr. App. R. 90. Unless there is specific statutory provision authorising evidence given in another language to be taken down without an interpreter in the language of the court, we consider that a record in English of what a witness is alleged to have said in another language is not admissible to prove the testimony of that witness unless either the record discloses that the evidence of the witness was interpreted through a sworn interpreter of the court or the person who acted as interpreter is called.

On this appeal the record in case No.40 of 1961 does not disclose that any sworn interpreter was used nor that the evidence recorded in English was read over to the appellant in his own language. The evidence is that the record consists of what was dictated by the Chief Justice, who has not been called to prove that the record truly shows what the appellant said in Creole. We consider it normally undersirable that a judge should act as an interpreter; if in special circumstances he does undertake the duties of an interpreter, he should administer the interpreter's oath to himself: see *R. v. Kelly and Maloney* (7), 3 Cox C.C. 75.

It is in our view essential in a charge of perjury that the record of the testimony which is the subject of the charge should be legally admissible and such as leaves no doubt as to it being an accurate record of that testimony. In our view to accept as a safe foundation for a conviction of perjury a record in English of what a witness said in another language without either the record disclosing that the English was the result of sworn interpretation or the interpreter being called would be contrary to the basic principles on which our criminal justice is administered.

Having regard to our view on the ground of appeal relating to the record we consider it unnecessary to examine in detail the other grounds of appeal, but there would not appear to be substance in any of them.

For these reasons the appeal is allowed, the conviction quashed and the sentence set aside.

Appeal allowed. Conviction quashed and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Seychelles
G. A. Twelftree (Crown Counsel, Kenya)

Chimanbhai Purshottam Patel v R.

[1962] 1 EA 509 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	23 July 1962
Case Number:	478/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Criminal law – Theft by conversion – Accused a bankrupt – Official Receiver trustee of accused's property – Income of property collected and outgoings paid by accused – Balance deposited in safe of third party – No concealment of collection of rent or payment of outgoings – Balance of income over expenditure handed over with complete account – Whether fraudulent intention established.

Editor's Summary

The appellant was charged with theft by conversion of Shs. 10,620/-, the property of the Official Receiver. The appellant was one of four partners who presented petitions in bankruptcy and on November 2, 1960, a receiving order was made against him and the Official Receiver was constituted receiver of his property. On June 21, 1961, he was adjudicated bankrupt and the Official Receiver became his trustee in bankruptcy. The four partners were registered owners of a plot on which there was

a building, parts of which were let to tenants, and though this property was disclosed in the statement of affairs of the appellant, the Official Receiver took no action to realise the property or to collect the rents until about February 20, 1962, when, as a result of certain information he sent for the appellant who frankly admitted that he had been collecting the rents from the property and paying the outgoings. The receipts and payments were collected and paid by the appellant between November 2, 1960, and February 22, 1962, and the balance of income over expenditure was deposited with a certain firm in Nairobi. On March 1, 1962, the appellant took a police officer to that firm and there handed over the sum of Shs. 3,625/- representing the balance, taken from a safe, together with an account of income and expenditure, receipt books and receipts. The trial magistrate convicted the appellant of theft by fraudulent conversion of the whole sum of Shs. 10,620/- received by him after the receiving order. On appeal,

Held –

(i) there could not be a valid conviction of theft by conversion in respect of the moneys received before the adjudication.

(ii) the moneys paid out for the outgoings were, in a sense, converted but these conversions were reasonable and necessary to enable income to continue to be derived from the property; these payments would only be fraudulent if the appellant had determined to keep the balance of the income for himself.

(iii) the fact that the appellant kept the money intact and returned it with a satisfactory account promptly on demand, raised a real doubt that he had not finally made up his mind to keep the money for himself, and the onus of proof of this was on the Crown.

Appeal allowed. Conviction and sentence set aside.

Judgment

Rudd Ag CJ, read the following judgment of the court: The appellant appeals from a conviction of theft in the sense of conversion of Shs. 10,620/-, the property of the Official Receiver, between November 2, 1960, and February 22, 1962. Subject to the question of what inferences should be drawn from the facts proved and admitted, the facts of the case were not in dispute. The appellant was one of four partners who presented petitions in bankruptcy and on November 2, 1960, a receiving order was made against the appellant and the official receiver was constituted receiver of his property. On June 21, 1961, the appellant was adjudicated bankrupt and the Official Receiver became his trustee in bankruptcy. The four partners were the registered owners of a plot on which there was a building, parts of which were let to tenants. This property was disclosed in the list of assets in the statement of affairs, but the Official Receiver took no action to realise the property or to collect the rents until about February 20, 1962, when, as a result of certain information, he sent for the appellant who then frankly admitted that he had been collecting the rents from the property and paying out of the moneys so received sweeper and caretaker's wages, municipal water charges and many minor repairs and replacements, all of which were reasonable and proper expenses incurred in the management of the property. These receipts and payments were collected and paid by the appellant between November 2, 1960, and February 22, 1962, and the balance of income over expenditure was deposited with a certain firm in Nairobi, On March 1, 1962, the appellant took a police officer to that firm and there handed over the sum of Shs. 3,625/- taken from the safe, together with an account of the income received and the outgoings which he had paid. He also handed over receipt books and receipts. It has not been proved that this account was either inadequate or inaccurate.

The account showed that the total receipts collected by the appellant after the receiving order amounted to Shs. 10,620/- and that the total outgoings paid by him after the receiving order amounted to Shs. 6,995/60cts., leaving a balance of account of income over expenditure of Shs. 3,624/40 cts.

The income collected up to the end of May, 1961 amounted to Shs. 3,640/- and the outgoings paid in that period, which was before the date of adjudication, amounted to Shs. 2,282/-.

The income for the month of June, 1961 was Shs. 520/- and the outgoings Shs. 825/-. It is not clear whether these sums were received and paid before or after the date of the adjudication.

The income from the month of July, 1961 and, therefore, after the adjudication was Shs. 6,460/- and the corresponding outgoings paid by him Shs. 3,888/60 cts.

The trial magistrate held that the appellant was guilty of theft by fraudulent conversion of the whole amount of Shs. 10,620/- received by him after the receiving order.

Learned Crown counsel conceded that he could not support the conviction in respect of the whole amount of Shs. 10,620/- which was received by the appellant after the date of the receiving order, but he submitted that the facts constituted a theft of the moneys amounting to Shs. 6,460/- admittedly received by the appellant after the date of his adjudication as a bankrupt when all his property became vested in the Official Receiver as trustee in bankruptcy.

We agree that there could not be a valid conviction of theft by conversion in respect of the moneys received before the adjudication. As regards the moneys received after the adjudication, the question is whether there was a conversion and, if so, whether it was fraudulent.

The moneys paid out for the outgoings were, in a sense, converted, but these conversions were reasonable and necessary to enable income to continue to be derived from the property. These payments by the appellant, in our opinion, would only be fraudulent if he had determined to keep the balance of the income for himself.

The fact that the appellant continued to manage the property by getting in income and paying necessary outgoings without remitting the balance of income to the trustee or informing the trustee of what he was doing, is consistent with the possibility that the appellant hoped that the matter would continue to be overlooked and, in that case, that he might eventually decide to use the balance of the income for his own purposes. Nevertheless, even if that were so we think that there would be no actual fraudulent conversion until the appellant had definitely decided to keep the money for his own purposes. The fact that he kept the money intact and returned it with a satisfactory account promptly on demand, raises a real doubt that he had not finally made up his mind to keep the money for himself. The onus of proof of this was upon the Crown. If he had been charged with certain bankruptcy offences the onus of proof that he did not intend to defraud would have been on him, but this is not so on a charge of theft under the Penal Code. In the circumstances, fraudulent conversion of any part of the money in question was not established.

For these reasons we allow the appeal, set aside the conviction and sentence and acquit the appellant.

Appeal allowed. Conviction and sentence set aside.

For the appellant:
Bryan O'Donovan, *Q.C.* and *A. S. G. Kassam*, Nairobi

For the respondent:
The Attorney-General, Kenya
F. Mallon (Crown Counsel, Kenya)

Demetra Jennings-Bramly v David William Allan Jennings-Bramly
[1962] 1 EA 512 (HCT)

Division: High Court of Tanganyika at Dar-Es-Salaam

Date of judgment:	3 August 1962
Case Number:	2/1957
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Divorce – Custody and access – Custody of children to mother – Husband to have reasonable access – Subsequent application by husband for access – Application that children be allowed to visit husband during school holidays – Whether order can be made – Meaning of "access" – Matrimonial Causes Rules, r. 54 (*T.*).

Editor's Summary

The decree nisi for dissolution of a marriage provided, inter alia, that the petitioner should have custody of the children and that the respondent "be given reasonable access" to the children. The respondent subsequently alleged that the petitioner had refused him reasonable access to the children on a specified day and had continued to do so, and moved for an order to allow him "such reasonable access as may be just", and, in the supporting affidavit, prayed for reasonable access

> "to the extent that I be allowed to have the children in my care for a period of ten days during August during their school holidays and at such other times as the court may deem meet".

The petitioner's affidavit in reply denied that her refusal of access to the children was in the circumstances unreasonable, and it was argued on her behalf that to permit the visits requested by the respondent would go well beyond the ambit of mere access and would amount to an order affecting custody, which in view of the terms of the decree regarding custody it would not be competent for the court to make.

Held –

(i) a parent's right of access to children cannot be extended to cover visits by the children to the parent even for brief periods, when they are in the lawful and actual custody of the other parent; a right of access means no more than that he shall be allowed to go to the place where they are and see them there and that in this he must not be unreasonably prevented by the other parent.

(ii) the court had no power on the application made to order that the respondent should be allowed to have his children to stay with him for a few days during school holidays.

Order for more specific periods of access granted.

Cases referred to in judgment:

(1) *Evershed v. Evershed* (1882), 46 L.T. 690.

(2) *Hunt v. Hunt* (1884), 28 Ch. D. 606.

Judgment

Sir Ralph Windham CJ: The applicant was the respondent in an undefended divorce suit in which his

wife the petitioner, who is the respondent in the present application, obtained, on August 18, 1958, a decree nisi for the dissolution of their marriage, which was made absolute on October 9, 1958. The parties had been married on May 27, 1950, and there were

twin children of the marriage, namely a son and daughter born on December 14, 1951. The decree for the dissolution of the marriage contained provisions for the custody of, and access to, the children, which read as follows:

> "It is further ordered that the petitioner shall retain the custody of the children, and that they shall not be removed from the jurisdiction of the court except for purposes of schooling in Kenya if a decision is made to educate them there. The petitioner must first give an undertaking to bring the children within the jurisdiction of this court if called upon to do so. If the parties wish to educate the children in England when they attain the age of about twelve years, an application to be made to this court nearer the time, when the position of the parties is better known, and a suitable order can be made in respect thereof, including their custody during school holidays. It is further ordered that the respondent be given reasonable access to the children . . ."

The present application is brought under r. 54 of the Matrimonial Causes Rules. It alleges that on April 14, 1962, the respondent refused, and has continued to refuse, to the applicant reasonable access to the children as ordered in the decree, and prays that she be now ordered to allow him "such reasonable access as may be just".

The application is supported by an affidavit of the applicant. The respondent, who lives and works in Moshi, has put in a counter-affidavit, in which she states that the access sought by the applicant on April 14, 1952, while she and the children were on a brief visit to Dar-es-Salaam, which access she admittedly refused to him, was in the circumstances not reasonable. She expresses herself as willing to afford him reasonable access to the children in the future. The children live with her in Moshi save during term time, when they board at a school in Arusha.

The applicant, through his counsel, has sought to put in a further affidavit, in reply to that of the respondent. I am satisfied, however, that upon the affidavits already filed, one by each party, and upon the submission of counsel for both sides before me, there is sufficient material to enable me to make an order upon this application without the necessity of admitting further affidavits.

The application is expressed to be for an order upon the respondent to allow the applicant "reasonable access" to the children. In the body of his affidavit, however, and in para. 10 of it in particular, he asks this court to enforce the order entitling him to reasonable access

> "to the extent that I be allowed to have the children in my care for a period of ten days during August during their school holidays and at such other times as the court may deem meet".

This prayer has been adhered to by his counsel before me, Mr. Dodd, who contends that "reasonable access" is a term wide enough to include a visit by the children, for a week to ten days during each school holidays, to stay with the applicant in his house in Dar-es-Salaam without the respondent. Mr. Beynon, for the respondent, contends that to order the respondent to permit such visits would go well beyond the ambit of mere access and would amount to an order affecting custody, and that in view of the terms of the decree regarding custody it would not be competent for this court to make such an order.

There appears to be little decided authority on the meaning and scope of the expression "access" in cases such as this, or laying down at what point a visit by a parent to his children, or by them to him, goes beyond mere access to them and amounts to his having temporary custody of them, actual if not legal. But such authority as there is would appear to indicate clearly that "access" by one parent to the children of a separated couple, where the other parent has been

awarded and in fact has custody of them, cannot be extended to cover visits by the children to stay in the home of the parent entitled to access, even for brief periods. In *Evershed v. Evershed* (1) (1882), 46 L. T. 690, a judicially separated couple had been unable to agree on the provisions for the wife's access to the children of the marriage (aged thirteen and fourteen) who were in the custody of the father. It was therefore agreed that in the deed of separation counsel should include "all usual terms as to access etc.". Counsel embodied in the deed a clause entitling the wife to have the children to stay with her, in her sole custody, for one half of any two of the three school holidays in each year. Upon her seeking specific performance of this clause in the Chancery Division it was held that the clause was ultra vires the powers of counsel under the reference to him, in that a term "as to access etc." did not cover a clause such as this, which related to custody and not merely to access. Kay, J., said:

> "Access is a thing which can only be dealt with after the question of custody is determined; it means access to children who are in the custody of some other person."

Again, in *Hunt v. Hunt* (2) (1884), 28 Ch. D. 606, the restricted meaning of access, as compared with custody, was stressed, in a case where the wife was entitled to "full and free access" to the children for at least one day in every fortnight. Baggally, L. J., said at p. 611:

> "It is to be observed that there is nothing said as to keeping the children in any particular place or as to bringing them to her; it is only stipulated that she shall have full liberty to come and see them."

Bowen, L.J., said of this same expression "full and free access", at p. 612:

> "This means, no doubt, that she is always to be allowed to go to the children, and I think it includes this, that Dr. Hunt" [the husband] "is not to do anything unreasonably which would prevent her seeing them."

Fry, L.J., said at p. 613:

> "The deed appears to me only to give the wife a right of access to them where they may happen to be; and to hold that it obliges the husband to keep the children in such a place that she can conveniently have access to them, would create formidable difficulties . . ."

From these decisions it is clear that a parent's right of access to children does not cover a right to have them come and stay with him under his roof, even for short periods, when they are in the lawful and actual custody of the other parent, but that it means no more than that he shall be allowed to go to the place (though not necessarily to the house) where they are and see them there, and that he must not be unreasonably prevented by the other parent from doing this. And this, moreover, is in accord with the ordinary and the dictionary meaning of "access". Access means being able to go to a person or a thing, and not having that person or thing come to and remain with oneself.

Moreover, the stipulations regarding custody and access in the decree in the present case, which I have earlier quoted, distinguish expressly between custody on the one hand and access on the other. Under those stipulations it is only if and when the children, who are now ten and a half years old, are being educated or are about to be educated in England after attaining the age of twelve years, that this court is empowered to make an order for their custody during school holidays. Until then, custody remains with the respondent and the applicant is entitled to reasonable access only.

For these reasons I hold that I would have no power to make an order, upon this application, allowing the applicant to have his children come and stay with

him for the few days during school holidays which he asks for, even assuming that I felt otherwise disposed to make such an order. But after considering all the circumstances of the case, and having in view the scope of the expression “reasonable access”, I make the following order upon the application, namely that the applicant shall be allowed to see and talk to the children at any place and at any reasonable and convenient time, and as frequently as he so desires, during the school holidays, provided that the respondent agrees thereto; but, failing such agreement, the applicant shall be permitted to visit and see and talk to the children in Moshi, in the presence of the respondent if she wishes to be present, at any reasonable meeting-place there other than the respondent’s residence, for a maximum of ten days (between sunrise and sunset) during each school holidays.

There will be liberty to either party to apply to vary the terms of this order in the event of any change of circumstance calling for such variation.

With regard to the costs of this application, after giving the question careful consideration, I think the most proper course would be to let each party bear his or her own costs.

Order for more specific periods of access granted.

For the petitioner:
A. C. Beynon, Dar-es-Salaam

For the respondent:
Dodd & Co., Dar-es-Salaam
H. G. Dodd

Daphne Parry v Murray Alexander Carson
[1962] 1 EA 515 (HCT)

Division:	High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	5 July 1962
Case Number:	140/1961
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Practice – Parties – Substitution – Application to dismiss sole defendant from suit and substitute another defendant – Whether application competent – Indian Civil Procedure Rules, O. I, r. 10(2).

[2] Practice – Third-party notice – Application for third-party notice as alternative prayer – No local rule authorising issue of third-party notice – Whether court has power to grant application – Judicature and Application of Laws Ordinance, 1961, *s.* 2 (2) (*T.*) – *Tanganyika Order-in-Council,* 1920, *art.* 17 (2) (*T.*) – *Rules of the Supreme Court, O. XVI, r.* 48 *to r.* 55.

Editor's Summary

The plaintiff having sued the defendant for £2,625, which she alleged the defendant held in trust for her, the defendant applied for an order under O. I, r. 10 (2) of the Civil Procedure Rules that he be

> "dismissed from this suit and the Official Receiver of Tanganyika be substituted for him as the defendant herein";

alternatively the defendant applied for the issue of a third-party notice to the Official Receiver and the Assistant Commissioner of Income Tax at Kampala, respectively, on the ground that the defendant was entitled to be indemnified by them jointly and severally in respect of the plaintiff's claim. The plaintiff and the Official Receiver opposed the defendant's application for dismissal from the suit but not the alternative relief sought.

Held –

(i) the court could not order that the defendant be "dismissed from the suit" without either holding that the plaint disclosed no cause of action against him, or that, on the face of the pleadings as a whole, the plaintiff had no chance of success as, to so hold would be to prejudice the pending case itself, one of the issues in which was that the plaint disclosed no cause of action; further, there had been no application for rejection of the plaint under O. VII, r. 11 as disclosing no cause of action.

(ii) the application for dismissal was misconceived as O. I, r. 10 (2) dealt with parties who had been wrongly joined, or who ought to be joined or added; to "join" or "add" a party was not synonymous with making a person a party to a suit; *Rama Rao v. The Raja of Pittapur* (1919), 42 Mad. 219 and *Heiniger v. Droz and Another* (1901), 25 Bom. 433, applied.

(iii) as the defendant would be entitled to indemnity either in equity or upon implied contract, he was entitled to an order for issue of a third party notice; *M. K. Mistry v. S. Mwintanga and Another*, Tanganyika High Court Civil Case No. 27 of 1960 (unreported), followed.

Order accordingly.

Cases referred to in judgment:

(1) *Rama Rao v. The Raja of Pittapur* (1919), 42 Mad. 219.

(2) *Heiniger v. Droz and Another* (1901), 25 Bom. 433.

(3) *M. K. Mistry v. S. Mwintanga and Another*, Tanganyika High Court Civil Case No. 27 of 1960 (unreported).

(4) *Birmingham & District Land Co. v. London and North Western Railway Co*. (1887), 34 Ch. D. 261.

(5) *Eastern Shipping Company v. Quah Beng Kee*, [1924] A.C. 177.

Judgment

Sir Ralph Windham CJ: The applicant is the sole defendant in an action pending against him by the respondent for payment to her (the respondent) of the sum of £2,625 (with interest) alleged to be held by him in trust for her. In his application, dated May 10, 1962, he seeks two alternative reliefs. First, he seeks for an order under O. I, r. 10 (2) of the Indian Civil Procedure Rules, that he be

> "dismissed from this suit and the Official Receiver of Tanganyika be substituted for him as the defendant herein".

This is strongly opposed, both by the plaintiff-respondent and by the Official Receiver. His alternative prayer is for the issue of a third-party notice upon the Official Receiver and the Assistant Commissioner of Income Tax at Kampala, respectively, on the ground that he is entitled to be indemnified by them jointly and severally in respect of the plaintiff's claim against him. The granting of this alternative relief is not opposed by the plaintiff-respondent or by the Official Receiver and the Commissioner of Income Tax. The application is supported by a long and detailed affidavit by the applicant.

There are a number of reasons why the relief sought under O. I, r. 10 (2), cannot be granted. I need mention only two of them. In the first place, I could not at this stage order that the defendant be

“dismissed from the suit” without holding that the plaint discloses no cause of action against him, or that on the face of the pleadings as a whole the plaintiff has no chance of success. But to so hold would be to prejudge the pending case itself, one of the issues in which, raised in para. 6 of the written statement of defence, is that the plaint discloses no cause of action. This I cannot do. Indeed, although no counter-affidavit

has been filed challenging the facts alleged in the applicant's supporting affidavit, I cannot decide this part of the application on the basis of the truth of any of those allegations which are or may be in issue in the pending suit. It is further to be noted that there has been no application for rejection of the plaint under O. 7, r. 11, as disclosing no cause of action.

Secondly, an application of this nature under O. I, r. 10 (2) is misconceived. Rule 10 (2) empowers the court to

> "order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, . . . be added."

The rule is thus concerned with parties who have been wrongly joined, or who ought to be joined or added. To "join" or "add" a party is not synonymous with making a person a party. To be joined or added presupposes a co-defendant (or co-plaintiff) to whom the defendant (or plaintiff) sought to be removed has been joined, or to whom the defendant (or plaintiff) sought to be joined or added can be joined or added. Such is not case in the present application where a straight substitution of one sole defendant for another sole defendant is being sought, the result of which would be the complete disposal of the suit as at present framed. The proposition seems quite clear; but if authority is needed it is to be found in *Rama Rao v. The Raja of Pittapur* (1) (1919), 42 Mad. 219, where, in an application to remove one of several defendants, it was observed at p. 225 that:

> "unless the removal of the plaintiff or defendants leaves the suit intact, O. I, r. 10, cl. (2), cannot apply."

The distinction between substitution of one party for another, which is what is being sought here, and joinder and misjoinder, which is what O. I, r. 10 (2) deals with, was pointed out in *Heiniger v. Droz and Another* (2) (1901), 25 Bom. 433, in the following observation regarding s. 32 of the old Indian Civil Procedure Code, 1882, now reproduced without relevant alternation in O. I, r. 10 (2):

> "What was necessary was not joinder, but substitution, and with substitution s. 32 does not deal."

For these reasons among others I cannot grant to the defendant-applicant the relief which he seeks under O. I, r. 10 (2).

The alternative relief, sought by the applicant, namely the issue of a third-party notice on the Official Receiver and on the Assistant Commissioner of Income Tax, is not opposed by any party concerned, and the only questions for decision are whether I have power to grant it and if so whether this is a proper case for the exercise of the power.

Under s. 2 (2) of the Judicature and Application of Laws Ordinance, 1961, which replaces without material amendment art. 17 (2) of the Tanganyika Order-in-Council, 1920, this court shall exercise jurisdiction in conformity with, inter alia, the procedure and practice observed by the courts of justice in England on July 22, 1920, to the extent that the local legislation does not extend or apply. Neither the Indian Civil Procedure Code nor any other local enactment provides for the issue of third-party notices such as are now sought. But in 1920 O. 16, r. 48 to r. 55 of the English Rules of the Supreme Court did make such provision; and those Rules may therefore be now resorted to and the third-party procedure applied. It was so held by LAW, J., in an unreported case, *M. K. Mistry v. S. Mwintanga and Another* (3), Tanganyika High Court Civil Case No. 27 of 1960, with which decision I respectfully concur.

In order to bring himself within the ambit of the English Order XVI, r. 48 to r. 55, the applicant must show, upon the face of the pleadings and upon his

supporting affidavit, that he would be entitled to indemnity from the Official Receiver and/or the Commissioner of Income Tax in respect of the amount which the plaintiff claims from him, in the event of that claim being successful. On a careful perusal of the pleadings and of the applicant's affidavit, and upon the authority of such cases as *Birmingham & District Land Co. v. London and North Western Railway Co*. (4) (1887), 34 Ch. D.261, at p. 271, and *Eastern Shipping Co. v. Quah Beng Kee* (5), [1924] A.C. 177, at pp. 182-3, I am satisfied that the applicant would be so entitled to indemnity, arising either in equity or upon implied contract. I accordingly think this is a proper case in which to grant the alternative reliefs prayed for, and I order the issue of a third-party notice in the terms prayed in para. (2) of this application. There will be no order for costs.

Order accordingly.

For the plaintiff:
Fraser Murray, Thornton & Co., Dar-es-Salaam
W. D. Fraser Murray

For the defendant:
Atkinson, Walker & Co., Dar-es-Salaam
C. W. Salter, Q. C. and *H. C. Walker*

Re an Application by Muhamudu Kasumba
[1962] 1 EA 518 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	16 July 1962
Case Number:	30/1962
Before:	Slade J
Sourced by:	LawAfrica

[1] Audience – Revision – African court – Consideration by High Court of proceedings in African court – Whether Director of Public Prosecutions has right of audience in revisionary proceedings – African Courts Ordinance, 1957 (*U.*) – *Constitution of Uganda*, *s.* 68 (*U.*) – *Uganda* (*Constitution*) *Order-in-Council*, 1962 (*U.*) – *Foreign Jurisdiction Act*, 1890.

Editor's Summary

Upon an application made under the African Courts Ordinance, 1957, for revision of a conviction, a preliminary point was taken by counsel as amicus curiae whether the Director of Public Prosecution had the right to appear in revisionary proceedings under the Ordinance. It was submitted that while the Director of Public Prosecutions could, under s. 68 of the Constitution of Uganda, institute and undertake,

take over and continue, and discontinue criminal proceedings in any court, because of s. 68 (5) ibid., revisionary proceedings were not part of the original proceedings, as was the case with an appeal from a judgment in any criminal proceedings, and in consequence the Director had no powers where a revision was before the court. On behalf of the Director it was contended that the intention of the section was to enshrine in the constitution the unfettered right of control of the Director in all criminal proceedings in Uganda in whatever court commenced or carried on, and though the word "revision" had been omitted by the draftsman, s. 68 (5) of the Constitution should be interpreted so as to give effect to what was the intention.

Held –

(i) the intention of sub-ss. (2) and (6) of s. 68 of the Constitution was to vest in the Director of Public Prosecutions the unfettered right of control of criminal proceedings in all courts (other than courts martial) in Uganda, and by s. 68 (5) that right was not intended to be confined to courts of original jurisdiction.

(ii) in order to give effect to the clear intention of s. 68 ibid. the court must construe sub-s. (5) thereof as if it contained the words "any revision of any such proceedings".

(iii) the Director of Public Prosecutions was entitled to exercise his powers in relation to the present proceedings.

Preliminary objection overruled.

Cases referred to in judgment:

(1) *Attorney-General v. Beauchamp*, [1920] 1 K.B. 650.

(2) *Re G. L. Binaisa*, [1959] E.A. 997 (U.).

Judgment

Slade J: This is a case set down for revision under the provisions of the African Courts Ordinance, 1957, in accordance with the order of this court of January 16, 1962.

Mr. Long appeared for the Director of Public Prosecutions, and I asked Mr. Kazzora, who was present at the hearing, to act in the capacity of amicus curiae.

Mr. Kazzora took the opportunity to raise, and I allowed him to raise, the question whether the Director of Public Prosecutions had the right to appear on this and, as I understand it, any other revision under the African Courts Ordinance, 1957.

Mr. Kazzora argued that while the Director undoubtedly could, by virtue of s. 68 of the Constitution of Uganda, institute and undertake, take over and continue, and discontinue criminal proceedings in any court, because of the provisions of s. 68 (5) of the Constitution, revisionary proceedings were not deemed to be part of the original proceedings, as is the case with an appeal from a judgment in any criminal proceedings, and in consequence the Director had no powers where a revision was before the court.

The powers of the Director of Public Prosecutions are contained in s. 68 of the Constitution of Uganda.

Mr. Long submitted that the intention of the section in question was to enshrine in the Constitution the unfettered right of control of the Director in all criminal proceedings in Uganda in whatever court commenced or carried on. He conceded that the word “revision” had been omitted by the draftsman, but submitted that s. 68 (5) of the Constitution should be so interpreted by the court as to give effect to what he submitted was the intention underlying this particular part of the Constitution.

Now the Constitution in question is contained in the Second Schedule to the Uganda (Constitution) Order-in-Council, 1962, which was made in exercise of powers conferred by the Foreign Jurisdiction Act, 1890. It is to be interpreted by reference to the same rules of construction as if it were a statute.

As I read the authorities, it seems well settled that if a construction of legislation according to the strict rules of grammar makes the particular enactment intelligible, and especially if it carries out its obvious intention as gathered from a perusal of the whole, that grammatical construction should not be departed from.

If, however, the intention underlying the legislation is not effected by its terms, then it is permissible to construe it by reading it as if words were added to the extent necessary to give effect to the intention. *Attorney-General v. Beauchamp* (1), [1920] 1 K.B. 650; *Re G. L. Binaisa* (2), [1959] E.A. 997 (U.).

It is clear that the intention of s. 68 (2) and s. 68 (6) of the Constitution is to vest in the Director of Public Prosecutions the unfettered right of control of criminal proceedings in all courts (other than courts martial) in Uganda.

That that right is not intended to be confined to courts of original jurisdiction is clear from a perusal of s. 68 (5) which provides that in the case of certain proceedings, those proceedings shall be deemed to be part of the original proceedings.

The proceedings specified in sub-s. (5), to which I have referred, are appeals to any court, cases stated, or questions of law reserved. It is therefore clearly the intention, in my view, that the Director shall have the power of control of proceedings not only in the court of original jurisdiction in which they were instituted, but also in superior courts into which those original proceedings might later come.

The reference to cases stated, and to questions of law reserved, is to English procedure, with which the draftsman was no doubt more familiar than with the Uganda practice and procedure. In Uganda we have now no such procedure. but we do have revisional powers vested in the High Court, which, so far as I can ascertain, is not the case in England.

If I am correct in interpreting the effect of s. 68 in the way I have mentioned, it would clearly result in absurdity if the Director's powers were limited to the case of appeals and not to other proceedings before this court or any other court of superior jurisdiction.

I am of the view that in order to give effect to what I regard as the clear intention of the section, I must construe s. 68 (5) of the Constitution as if it contained the words "any revision of any such proceedings", and I do so construe it. I accordingly rule that the Director is entitled to exercise his powers in relation to these proceedings, and I reject Mr. Kazzora's submissions.

Preliminary objection overruled.

The applicant did not appear and was not represented.
J. W. R. Kazzora as amicus curiae.

For the respondent:
The Director of Public Prosecutions, Uganda
J. M. Long, (Crown Counsel, Uganda)

Re an Application by Gideon Waweru Gathunguri
[1962] 1 EA 520 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	28 June 1962
Case Number:	2/1962
Before:	Rudd Ag CJ and Wicks J
Sourced by:	LawAfrica

[1] Certiorari – Limitation – Application to quash conviction and sentence – Leave to apply sought and

granted after six months from conviction – Period of limitation six months – Whether court should exercise discretion and grant application – Law Reform (*Miscellaneous Provisions*) *Ordinance*, 1956, *s.* 9 (*K.*) – *Civil Procedure* (*Revised*) *Rules*, 1948, *O. LIII*, *r.* 1 (*K.*).

Editor's Summary

In 1962 the applicant applied for and obtained leave to file an application for an order of certiorari to quash his conviction and sentence by the Kiambu African Court of Appeal on February 21, 1959. When the application for an order of certiorari came on for hearing the Crown raised, inter alia, the preliminary point that the application for leave was time barred under s. 9 of the Law Reform (Miscellaneous Provisions) Ordinance, 1956, as six months from the date of conviction and sentence had expired.

Held –

(i) the rules of court made under s. 9 ibid. could not defeat the clear provisions of sub-s. (3) of the same section which imposed an absolute period of

limitation, so that leave should not be granted unless the application for leave was made not later than six months after the date of the conviction and sentence.

(ii) the application for leave should not have been granted since it was made more than six months from the conviction and sentence.

(iii) since the remedy was discretionary and it was clear that in fact the order for leave to proceed should not have been made, the court would not exercise its discretion and make the order sought.

Application dismissed.

Cases referred to in judgment:

(1) *Cohen v. Jonesco*, [1926] 2 K.B.1.

(2) *R. v. The District Commissioner, Nyeri and Another*, E.A.C.A., Civil Appeal No. 46 of 1960 (unreported).

Judgment

Rudd Ag CJ, read the following judgment of the court: This is an application for an order of certiorari to quash the conviction and sentence passed against the applicant by the Kiambu African Court of Appeal on February 21, 1959.

Under O. LIII, r. 1 such an application cannot be made without the leave of the court first being obtained. Such leave was applied for by Chamber summons dated March 13, 1962, and was granted by Wicks, J., on March 14, 1962. The present application is made pursuant to that leave.

When this application came before the court for hearing on June 21, 1962, Mr. Mallon raised a number of preliminary points, one of which was that the application for leave to bring the motion for certiorari was time barred under s. 9 of the Law Reform (Miscellaneous Provisions) Ordinance, 1956, which reads as follows:

"9.(1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court:

(*a*) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;

(*b*) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;

(*c*) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.

"(2) Subject to the provisions of sub-s. (3) of this section, rules made under sub-s. (1) of this section may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months or such shorter period as may be prescribed after the act or omission to which the application for leave relates.

"(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of such judgment,

order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where such judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

"(4) Until rules under sub-s. (1) of this section have been made the rules of court made under s. 99 of the Supreme Court of Judicature (Consolidation) Act, 1925, pursuant to the provisions of s. 10 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, shall apply mutatis mutandis."

Order LIII of the Civil Procedure (Revised) Rules, 1948, was made in 1957 so that sub-s. (4) of s. 9 of the Ordinance does not apply in this matter. Sub-s. (2) of s. 9 is expressly subject to the provisions of sub-s. (3) of the same section. It follows from this that rules of court made under s. 9 cannot defeat the clear provisions of sub-s. (3) which imposes an absolute period of limitation in the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of being quashed so that leave shall not be granted unless the application for leave is made not later than six months after the date of such judgment, order, decree, conviction or other proceeding.

The application for leave should not have been granted since it was made more than six months after the conviction and sentence which are sought to be quashed on certiorari.

If the limitation period depended only upon rules of court incorporated in the Civil Procedure Rules then the time for the application could have been extended under O. XLIX, r. 5 of the Civil Procedure Rules. This rule, however, cannot have effect to defeat the express limitation absolutely imposed by s. 9, sub-s. (3) of the Law Reform (Miscellaneous Provisions) Ordinance, 1956.

No application was made to extend the time for applying for leave in this case until after the leave had actually been granted. Subsequently such an application was made and it was dismissed by Wicks, J., on the ground that it did not lie in view of the terms of s. 9, sub-s. (3). This application was not treated by Wicks, J., as capable of having retroactive effect, if granted, so as to validate the application for leave which had previously been made and granted but was treated as being possibly a preliminary step to a fresh application for leave to proceed.

Now the position is that leave has in fact been granted in this case. It was granted in error, by oversight, and because the relevant provisions as to limitation were not brought to the notice of Wicks, J., as they should have been. The matter was confusing inasmuch as r. 2 of O. LIII purports to lay down the period of limitation and if limitation had depended only on the existence of this rule time could have been extended.

Nevertheless leave has in fact been granted and it seems that this court has no jurisdiction to set aside the order granting such leave. See *Cohen v. Jonesco* (1), [1926] 2 K.B. 1, and the judgment of Gould, J.A., in *R. v. The District Commissioner, Nyeri and Another* (2), E.A.C.A., Civil Appeal No. 46 of 1960 (unreported). It follows that the applicant was entitled to move for certiorari pursuant to the leave which he obtained notwithstanding the fact that, in the opinion of this court, it is clear that on appeal such order for leave should be set aside.

Although this court cannot revoke the order of Wicks, J., granting leave to apply, the grant of an order of certiorari is in the discretion of the court. It is not a matter of course or of right though in some cases it may go ex debito justitiae.

Since the remedy is discretionary and it is clear that in fact the order for leave to proceed should not have been made, this court should not exercise its discretion and make the order for which the applicant applies. To proceed otherwise and grant the application would be to perpetuate an infringement of the express provisions of the Law Reform (Miscellaneous Provisions) Ordinance, 1956. The discretion of the court should not be used so as to have that result otherwise the discretion would be used to defeat the relevant provisions of the Ordinance. The fact that the remedy is discretionary enables the court, and justifies the court, in dismissing the application even though leave to proceed had been obtained.

In some respects the dismissal of the application is unfortunate inasmuch as the delay in this case appears to have been due to wrong advice and procrastination by the advocate originally consulted by the applicant rather than to any personal delay on the part of the applicant. We regret that this should be so with the result that the applicant cannot have this instance considered on its merits. In the judgment of Gould, J.A., in *R. v. The District Commissioner, Nyeri and Another* (2), it is suggested that there was power to extend the time for an application for leave to proceed. That judgment, however, does not refer to the provisions of s. 9, sub-s. (3) of the Law Reform (Miscellaneous Provisions) Ordinance, 1956, which, as far as the present application is concerned, is conclusive.

For these reasons the application must be dismissed.

Application dismissed.

For the applicant.
M. K. Bhandari

For the respondent.
F. Mallon (Crown Counsel, Kenya)

Chander Kanta Sethi v R
[1962] 1 EA 523 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	23 July 1962
Case Number:	563/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Street traffic – Dangerous driving – Accused approaching pedestrian crossing at speed on outside lane – Another vehicle on inside lane stopped at crossing – Pedestrian crossing from left – Pedestrian knocked down by vehicle on outside lane – View of crossing on left obscured by other stationary vehicle – Whether negligence constitutes dangerous driving – Traffic Ordinance, 1953, *s.* 44(*a*) (*K.*).

[2] Criminal law – Sentence – Dangerous driving – Accused sentenced to imprisonment without option

of fine – Imprisonment ordered so that accused could not buy her way out of consequences of her act – Whether proper consideration in assessing sentence.

Editor's Summary

The appellant was charged with dangerous driving contrary to s. 44(*a*) of the Traffic Ordinance, 1953, as a result of an accident which occurred on a pedestrian crossing in a central thoroughfare in Nairobi which was wide enough to allow four lanes of motor traffic, two going in either direction. The appellant was driving towards the pedestrian crossing on the outside lane. Ahead of her on the inside lane was a Volkswagen proceeding in the same direction which had pulled up at the crossing to allow the deceased woman and her husband, who were on a traffic island to its left, to cross the road. They began to do so and after they had passed in front of the Volkswagen the appellant drove up on its right and struck

the deceased woman causing injuries from which she later died. The appellant's vehicle came to a halt about 150 feet beyond the crossing and evidence was given that she was travelling between 25 to 30 m.p.h. and that the foot brake of her car was not in proper working order. The appellant elected not to give evidence but made an unsworn statement that she slowed down at the crossing and, finding that there were no pedestrians, she proceeded and suddenly saw a European couple hand in hand running across the road from her left towards her right, that she "braked sharply but could not avoid hitting them". The magistrate found the appellant guilty of dangerous driving, sentenced her to three months' imprisonment and disqualified her from holding or obtaining a driving licence for two years. He imposed a prison sentence because, as he stated, any fine imposed would be paid by her husband or relations and no convicted person should be able to buy his or her way out of the consequences of the act for which the conviction was recorded. On appeal against both conviction and sentence, it was argued on behalf of the appellant that, in the circumstances, her negligence merely amounted to lack of due care and attention.

Held –

(i) in the absence of any other explanation the fact that the appellant did not stop her vehicle until she was about fifty yards beyond the pedestrian crossing clearly indicated serious negligence amounting to dangerous driving.

(ii) the appellant should not have approached the crossing at such a speed with partially defective brakes, when a vehicle ahead of her had pulled up there and when, in consequence, her vision of part of the crossing on her left side was not clear.

(iii) the magistrate was not correct in holding that, if a fine was imposed in such a case, the offender was being allowed to buy her way out of the consequences of the act for which she had been convicted, nor was that the proper way of deciding the sentence which should be imposed.

(iv) the moral turpitude on the part of the appellant was not so great as to necessitate a sentence of imprisonment without the option of a fine.

Sentence set aside and a fine of Shs. 1,000/-, with three months' imprisonment in default, substituted. Disqualification reduced to one year.

Judgment

Rudd Ag CJ, read the following judgment of the court: The appellant was convicted of the offence of causing death by dangerous driving contrary to s. 44(*a*) of the Traffic Ordinance, 1953 and was sentenced to three months' imprisonment. In addition she was disqualified from holding or obtaining a driving licence for a period of two years. She appeals against conviction and sentence. The facts leading up to the accident in which the deceased so tragically met her death are not in dispute and may be said to be these:

The accident occurred on a pedestrian or zebra crossing on the central Delamere Avenue thoroughfare at about ten minutes past two in the afternoon when the main lunch hour rush had abated. This thoroughfare is wide enough to allow four lanes of motor traffic, two going in either direction. The appellant was proceeding towards the New Stanley Hotel on the outside lane of the traffic going in that direction. Ahead of her, on the inside lane, was a Volkswagen proceeding in the same direction, which pulled up at the zebra crossing to allow the deceased woman and her husband, who were on a traffic island to its left, to cross the road. They began to do so and after they had passed in front of this vehicle the appellant's motor car came up on the right of the stationary Volkswagen and struck the deceased

woman causing injuries from which she later succumbed. The appellant's vehicle came to a halt approximately 150 feet

beyond the crossing. Various descriptions were given as to the speed of her vehicle, but the magistrate made no specific finding upon this matter. We think on the balance of the evidence that it was probably proceeding between 25 and 30 m.p.h. After the accident the appellant's motor car was examined and it was found that the foot brake was not in proper working order, inasmuch as the pedal had to be pressed very far down before there was any marked braking effect and in order to ensure a good braking effect the pedal had to be "pumped", that is to say, quickly pushed down a second time when it became fully effective. The deceased's husband described the accident as follows:

> "We were standing at the kerbside. When the Volkswagen stopped and waved me by, I acknowledged his stopping and we started to cross. When I got to the offside of Volkswagen I looked to see if anything coming in other lane. I saw a large, lightish coloured car about twenty-five to thirty yards away, on my right. My wife was on my left arm. We judged the speed of the car to be sufficient to allow us to cross the road quite adequately and continued across the road. The car must have accelerated or something. The next thing we knew the car was upon us and before I could do anything my wife had been hit."

The driver of the Volkswagen described the accident as follows:

> "The gentleman paused a moment and acknowledged the fact I had stopped to allow them to cross. They then stepped off smartly on to the pedestrian crossing. They moved across the crossing smartly. Then I heard a car coming up on my right hand side. It seemed obvious the car had not noticed the pedestrians. By the sound it was obviously not slowing down. It seemed inevitable there was going to be an accident. I must have closed my eyes momentarily. I heard the impact but did not see it. As they got to my right wing it was obvious a car was coming up relatively fast."

There was another car proceeding in the opposite direction on one of the two lanes of traffic on the other side of the carriageway. The driver of this car said:

> "I was driving to the left of the centre of the road. As I approached the crossing I noticed a stationary car on the inside lane on the opposite side of the road and two pedestrians, a man and a woman, starting to cross over the crossing. I adjusted my speed so that by the time I got to the crossing they would have crossed the road . . . They came from my right passing to the left . . . The couple starting to cross the road in front of the stationary vehicle were hand in hand walking very swiftly, they got to the centre of the next lane when I noticed another vehicle coming up in that lane towards me . . . The male European must have noticed the car about the same time as myself and realised that unless he moved swiftly there would be an accident. He more or less jumped forward and appeared to give her hand a pull. She saw the vehicle and hesitated. The grey saloon (appellant's car) started to swerve round the stationary vehicle in an attempt to miss the pedestrians. It missed the man and caught the woman on the front driver's side mudguard . . . I would say the car was travelling at approximately 25 m.p.h. No more than 30 m.p.h. It gave no appearance of slowing up at any time."

At the close of the case for the prosecution the appellant elected not to give evidence and made a short unsworn statement to the effect that she stood by the statement which she had made to the police soon after the accident and had nothing to add to it. In that statement she said:

> "On March 30, 1962, at about 2.10 p.m. I was driving my husband's Opel Kapitan, Reg. No. KCM 672 along the main service lane of Delamere

> Avenue, in the direction of Government Road. The weather was fine and dry. The road surface was tarmac.
>
> "I was driving at about 20 m.p.h. when I reached near the zebra crossing which is situated about one hundred yards from Hardinge Street while I was driving in the outside lane I slowed down and I checked and found that there were no pedestrians on the zebra crossing. I went on and suddenly saw a European couple hand in hand running across the road from my left towards my right. When I saw them they were just in front of my car. I braked sharply but could not avoid hitting them. When my car stopped I realised that I had hit the woman . . .
>
> "I wish to stress that when the couple appeared in front of my car they were facing towards my right and they were running."

We think it is clear from the evidence that the appellant's vision of the deceased and her husband when they started to cross the carriageway must have been considerably obstructed by the Volkswagen and that the driver of the Volkswagen had a much better and longer opportunity to view the pedestrians, and consequently to stop, than had the appellant. It follows from this, in our opinion, that the magistrate's finding that if the driver of the Volkswagen had time to stop so should the appellant have had time to stop, requires some qualification and that, in point of fact, the first opportunity which the appellant had of clearly seeing that the deceased and her husband were attempting to cross the carriageway may well have been only momentarily before they emerged from in front of the stationary Volkswagen. Nevertheless, we agree with the view taken by the magistrate that the stopping of the Volkswagen, which must have been preceded by deceleration of that vehicle, should have put the appellant on her guard if she had noticed it and that she ought to have noticed it. Indeed, counsel for the appellant, made no attempt to suggest that there was no negligence on her part. He suggested, however, that her negligence merely amounted to lack of due care and attention and that it did not amount to dangerous driving. It is not clear to what extent the defective condition of the brakes on the appellant's motor car contributed to the accident, but it would seem from the evidence of the deceased's husband and of the driver of the Volkswagen that no effective attempt at braking was made until at earliest immediately before the actual collision. Be that as it may, there was no suggestion that the defect had appeared suddenly or that it was unknown to the appellant. In our opinion the fact that the appellant did not stop her vehicle until she had passed about fifty yards over and beyond the pedestrian crossing in the absence of any other explanation is a clear indication of serious negligence in the circumstances. We consider that it amounts to dangerous driving in the circumstances and we have no doubt but that the appellant should not have approached the crossing at such a speed with partially defective brakes, when a vehicle ahead of her pulled up at the crossing and when as a consequence her vision of part of the crossing on her left side was not clear. If she could have seen the two pedestrians, then her negligence was all the greater, but even if her vision of them was at first obscured then she ought not to have approached the obscured crossing at so great a speed that she could not stop within a much shorter distance than fifty yards.

The appeal against conviction is dismissed.

On the point of sentence the trial magistrate said:

> "Accused is a married woman and I have no doubt that any fine I impose would be paid as to some part or other by her husband or other relations. It should not be able to be said of any convicted person that he or she has been enabled to buy his or her way out of the consequences of the act for which he or she has been convicted. In the circumstances

> I Think The Only Appropriate Deterrent Is A Short Sentence Of Imprisonment And I Therefore Sentence Accused To Three Months' Imprisonment."

The Section creating the offence of which the appellant was convicted specifically empowers the court to levy a fine as an alternative to imprisonment. We do not consider it right to say that if a fine is imposed in such a case the offender is being allowed to buy her way out of the consequences of the act for which she has been convicted. Nor do we consider that that is a proper way of deciding the nature of the sentence which should be imposed. In the present case we consider it irrelevant that any fine that might have been imposed would be paid by the appellant's husband or relations and, indeed, there was no evidential basis for such a supposition. The determination of the nature of the penalty to be inflicted should depend mainly on the facts and the circumstances of the case. Applying that principle to the present case we think that no such great moral turpitude was involved on the part of the appellant as to necessitate that she be sentenced to imprisonment without the option of a fine. In this connection we think it is of some moment that the deceased and her husband probably appeared relatively suddenly from in front of the stationary Volkswagen and that from the fact that they were walking quickly, they must have realised that it was necessary to move with some degree of haste to avoid the appellant's car which they saw approaching. This, of course, is not a defence which is open in law to be taken by the appellant if she herself was guilty of negligence amounting to dangerous driving causing death. In all the circumstances we consider that a fine of Shs. 1,000/- with three months' imprisonment in default should be substituted for the sentence of three months' imprisonment imposed by the trial magistrate.

We are also of the opinion that disqualification for one year instead of two years would meet the requirements of justice in this case. The sentence and order of disqualification are altered accordingly.

Sentence set aside and a fine of Shs. 1,000/-, *with three months' imprisonment in default substituted. Disqualification reduced to one year.*

For the appellant:
Byron Georgiadis, Nairobi

For the respondent:
The Attorney-General, Kenya
F. Mallon (Crown Counsel, Kenya)

Mwaura s/o Kamau v Gatoto s/o Mwangi
[1962] 1 EA 528 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	16 March 1962
Case Number:	124/1961
Before:	Rudd Ag CJ
Sourced by:	LawAfrica

[1] Res judicata – Judgment of African court – Fatal accident – Claim by deceased's father in Supreme Court – Claim for self and dependants of deceased – Suit also filed in African court – Claim there founded on customary law – Cause of action similar in both suits – Remedies different – Judgment awarding compensation given by African court – Whether this judgment bars suit in Supreme Court – Fatal Accidents Ordinance (*Cap*.9), *s*.4, *s.* 6 (*K*.).

Editor's Summary

The plaintiff, a Kikuyu, brought an action under the Fatal Accidents Ordinance on behalf of himself and the other dependants of his deceased son, Maina. Maina had been killed by the defendant, who was subsequently convicted of manslaughter. The plaintiff had also taken claimed compensation according to African law and custom and obtained judgment in the Naivasha African Court against the defendant. In the present suit the defendant did not enter appearance and when the case was called for formal proof, it was argued on behalf of the plaintiff that the value of the judgment of the African Court should be taken into account when assessing damages under the Fatal Accidents Ordinance but that the judgment was not a bar to the present claim. Crown Counsel, as amicus curiae, submitted that the plaintiff had an election to proceed either in the African Court for relief in accordance with African law and custom or in the Supreme Court for relief under the Fatal Accidents Ordinance, but that he could not pursue both forms of relief.

Held –

(i) it was clear from the evidence of the expert witnesses that payment of compensation under customary law had the effect under that law of a complete settlement so that no other claim remained and this was so whether the proceedings were brought against the actual killer or against his father and whether the killing was tortious or not.

(ii) under Kikuyu customary law the acceptance and payment of compensation was subject to a condition that all further claims for compensation in respect of the death, against the killer and his family or clan, were wiped out; therefore, when such a claim was litigated to the point of judgment then, so long as that judgment stood, any further such claim was barred under African law and custom.

(iii) where the parties are subject to customary law either form of action is available, but if the customary law is invoked those proceedings would finalise the matter.

(iv) it is well settled that judgment in proceedings before an African court has effect as res judicata under the Civil Procedure Ordinance.

Action dismissed.

Cases referred to in judgment:

(1) *Muchogia wa Wariko v. Githu wa Kibugo* (1942), 9 E.A.C.A.36.

Judgment

Rudd Ag CJ: This is an action under the Fatal Accidents Ordinance brought by the plaintiff on behalf of himself and the other dependants of Maina s/o Mwaura who was killed by the defendant who was convicted of manslaughter in respect of that killing. The plaintiff is the father of the deceased and was appointed by the attorney-general in accordance with s. 6(*b*) of the Ordinance to bring the action.

The matter is complicated by the fact that the plaintiff has taken other proceedings in the Naivasha African court against the defendant's father claiming 106 sheep at 20/- each and 10 fat rams at 30/- as compensation for the killing of the plaintiff's son by the defendant. The plaintiff obtained judgment in the African court in accordance with his prayer and for costs of those proceedings. The total value of the judgment being Shs. 2,668/-.

The defendant did not enter an appearance in the action under the Fatal Accidents Ordinance and so the matter was put down for proof, but I have had the advantage of hearing Mr. Havers, Crown Counsel, as an amicus curiae. Mr. Morgan appeared for the plaintiff and it is right to say that I believe that the proceedings in the African court were instituted without any knowledge or approval of Mr. Morgan. The judgment of the African court has not yet been completely paid.

It was argued on behalf of the plaintiff that the value of the judgment of the African court should be taken into account when assessing damages under the Fatal Accidents Ordinance but that it was not a bar to judgment in that suit. On the other hand, Mr. Havers suggested that the judgment of the African court was a bar to the recovery of further compensation. He submitted that the plaintiff had an election to proceed either in the African court for relief in accordance with native law and custom or in this court for relief under the Ordinance, but that he could not pursue both forms of relief.

I have had the advantage of hearing a witness who is a Kikuyu and has studied Kikuyu African law and custom for seven years. His evidence was as follows:

> "I am district registrar, African courts, Kiambu and Thika districts. I am a Kikuyu. For last seven years I have studied Kikuyu customary law. I am familiar with it.
>
> "If one Kikuyu kills another the family of the deceased can claim compensation. It is immaterial whether the killing is wrongful or accidental. Compensation varies from district to district but is a fixed amount in each district. It represents the deceased himself.
>
> "The action is even taken against the killer or his father and it is for the father to get the clan to pay the amount. Once that amount is paid it is supposed to cover dependants. It is supposed to pay and maintain the dependants if any. For example, if he had a son he could use the amount to provide a fund for his bride price at the rate that would have been provided by his father. The wives are supposed to be maintained out of the compensation. The money is paid in goats and some rams are slaughtered so that the clans of both parties should be present to see that the compensation is paid. The rams provide a feast. This is still done. The clan gets nothing else.
>
> "The goats were kept and given to the head of the family to look after them and were supposed to be increased (by natural increase). In most cases nowadays the goats are paid as money. Once one has been paid compensation that concludes the matter. The rams are slaughtered to be eaten by both clans. Even in a very bad case you could not get more than what has been fixed for the district. A ceremony takes place after

compensation has been paid. It was not intended to take the place of prosecution but was to show that the clans had no complaint against each other."

Section 4 (1) and s. 4(2) of the Fatal Accidents Ordinance provide as follows:

"4.(1) Every action brought by virtue of the provisions of this Ordinance shall be for the benefit of the wife, husband, parent and child of the persons whose death shall have been so caused, and shall, subject to the provisions of s. 6 of this Ordinance, be brought by and in the name of the executor or administrator, of the person deceased; and in every such action, the court may award such damages as it may think proportioned to the injury resulting from such death to the persons respectively for whom and for whose benefit such action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the beforementioned persons in such shares as the court, by its judgment, shall find and direct:

"Provided that not more than one action shall lie for and in respect of the same subject-matter of complaint and that every such action shall be commenced within three years after the death of such deceased person.

"(2) In assessing damages, under the provisions of sub-s. (1) of this section, the court shall not take into account:

(*a*) any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Ordinance;

(*b*) any widows' or orphans' pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Governor in Council, by notice published in the Gazette, to be a scheme for the purpose of this paragraph."

As regards the effect of the proviso to s. 4, sub-s. (1), it is well settled that judgment in proceedings before an African court has effect as res judicata under the Civil Procedure Ordinance: *Muchogia wa Wariko v. Githu wa Kibugo* (1) (1942), 9 E.A.C.A. 36. It therefore follows that the proceedings in an African court can be considered to be an action and on this aspect of the case I think the question is whether or not the proceedings in the African court were in respect of the same subject matter of complaint as the action in this court. The subject matter of complaint was, in each case, the death of the deceased at the hands of the present defendant. The actions are different, however, in that the proceedings in the African court were against the defendant's father. The remedies are different being liquidated "blood money" in one case and unliquidated damages in the other. The "blood money" is intended to be a replacement of the deceased for all purposes, while relief under the Ordinance is compensation for dependants. It is possible to imagine cases in which an action under the Ordinance would fail, for example where there was no tort or wrong, while an action under the customary law would succeed. It appears to me that the subject matter of the complaint is not precisely the same in both cases, but that the subject matter of complaint in proceedings under the Fatal Accidents Ordinance is included within the scope of the subject matter of complaint under customary law. To that extent I think that the proviso to s. 4 (1) may apply, but I prefer to base my judgment on another ground.

There is nothing in the Fatal Accidents Ordinance to prevent proceedings being taken in accordance with African law and customs, but I think it is clear from the evidence of the expert witnesses that payment of compensation under the customary law has the effect under that law of a complete settlement so

that no other claim remains and this is so whether the proceedings are brought against the actual killer or against his father and whether the killing is tortious or not. In fact it can be said that under African (Kikuyu) customary law the acceptance and payment of compensation is subject to a condition that all further claims for compensation in respect of the death, against the killer and his family or clan, are wiped out. I think that when such a claim is litigated to the point of judgment then, so long as the judgment stands, any further such claim is barred under African law and custom. To allow dependants to pursue a concurrent claim under the Fatal Accidents Ordinance would be to allow them to approbate and, at the same time, reprobate the customary law. For these reasons I hold that under African law and custom the present claim is barred by the judgment of the African court, in the same way as I am sure an action for damages for personal injury under the common law would be barred by the recovery of compensation for personal injury not causing death under African law and custom. The compensation payable under the customary law is a fixed sum, irrespective of the actual loss suffered by the dependants. There can easily be cases in which such compensation is less than that which could be obtained in proceedings under the Fatal Accidents Ordinance and it is perhaps possible that there may be cases in which the customary compensation would be greater.

Where the parties are subject to customary law either form of action is available, but if the customary law is invoked those proceedings would finalise the matter. According to the customary law, that is the case whether all the parties are sui juris or not, and in common law I think that if the parties were all sui juris the acceptance of compensation under the customary law constitutes an agreement by necessary implication to waive any further right to compensation from the killer under any other law.

It is true that the principles of customary law cannot defeat the provisions of an Ordinance, but there is nothing in this Ordinance to prevent the parties agreeing to a settlement of their rights or waiving their rights under the Ordinance for good consideration. Under the common law such an agreement might be set aside in certain circumstances if, and in so far as, the dependants or some of them were infants, but I doubt if that could apply under customary law properly litigated to judgment by a person entitled so to litigate and to bind the infants concerned. In my opinion the invocation of the customary law to the point of judgment has the effect of an agreement to waive any right to further compensation and for this reason I dismiss the suit.

I propose, however, to make findings regarding dependants and to assess damages in case I am held on appeal to be in error in dismissing the suit.

I find that the plaintiff Mwaura s/o Kamau is the father of the deceased and that he was dependent on the deceased to the extent that when he required money he could call on the deceased and expect him to contribute to his needs. He is at least sixty years of age. I find that the deceased also left, as dependants, five children and two wives whom he married under native law and custom. Bride price was paid in respect of those wives. According to native law and custom they are considered to be wives and they have rights which are recognised by law. In my opinion they are entitled to the benefit of the Ordinance in a suitable case.

The deceased was about forty-five years of age at his death. This differs from the pleading but, as the evidence puts the defendant in a more favourable position, I do not hold the plaintiff to his pleading in this matter. The children are Mwaura, a son aged seven, Waithira, a daughter aged six, Gitome, a son aged five, Mwaura, a son aged four and Mwangi, a son aged three. Two of them are named Mwaura but they are by different mothers. As regards total damages, the deceased earned Shs. 30/- a month and in addition he was provided

with a house, posho and a shamba of about an acre. His wives worked in his shamba and also occasionally got work as casual labourers. The shamba provided vegetables for the family and a surplus which, on sale, brought in about Shs. 150/- a year. The wives still cultivate the shamba and I believe that the house is still available to them and the family, although in the ordinary way the deceased's emoluments and privileges would have been dependent on the continuance of his employment. I put his total income at about £40 a year, of it I think he would spend about £15 on himself including taxes, leaving £ for his dependants. Instead of trying to work out the damages on an actuarial basis which would be based on rather uncertain premises, I propose to assess the total damages in the way that I believe a jury would. I find the total damages to be £250 so far as the dependants are concerned. From this must be deducted £106 which is what the family would have when the plaintiff recovers the amount of the judgment of the African court, the balance of that judgment being in respect of costs and the value of rams for the provision of a feast. This would leave a balance of £144. The £106 remains with the plaintiff for the benefit of the family as a whole. He has the control of it under African law and I do not think that I can apportion it. The wives are comparatively young and can work as they always have worked; in addition the family or clan becomes responsible for their maintenance to the extent that they may require such maintenance. I think that the best way of dealing with the apportionment is to leave the £106 with the father as a general fund, which it is under the customary law and to allocate the £144 among the children as a special fund for their benefit, which can be used to give them better education and, if anything is left, to provide additional funds which may be necessary on marriage or in an emergency. I, therefore, out of the sum of £144, would have allocated £30 to each of the four sons and £24 to the daughter. However, for reasons which I indicated earlier in this judgment, the action is in fact dismissed. Plaintiff to pay the costs of the expert witness measured by consent at Shs. 60/-.

Action dismissed.

For the plaintiff:
Morgan & Co., Nairobi
M.J.E. Morgan

The defendant did not appear and was not represented.
J.K. Havers, (Crown Counsel, Kenya) as amicus curiae.

Alexander Ojera v The Returning Officer, South West Acholi, and another
[1962] 1 EA 532 (DCA)

Division:	HM District Court of Acholi at Gulu
Date of judgment:	3 July 1961
Case Number:	3/1961
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Elections – Legislative council – Ballot papers – Validity – Ballot papers not marked with official stamp – Voters' registration numbers written on ballot papers – Secrecy of ballot – Whether conduct of election in accordance with principles laid down in Legislative Council (*Elections*) *Ordinance,* 1957 (*U.*) *– Legislative Council* (*Elections*) *Ordinance,* 1957, *s.*8, *s.*38, *s.*46, *s.*60, *s.*62, *s.*65 *and s.*66(*U.*) *– Election Petitions Directions,* 1958, *r.*2(2)(*U.*).

Editor's Summary

At a legislative council election a substantial number of the ballot papers used were either not perforated or stamped with an official mark as required by the Legislative Council (Elections) Ordinance, 1957, and bore voters' registration numbers which should have been on the counterfoils. At the counting of votes the returning officer consulted the two candidates who agreed that the defective votes should not be rejected and it was common ground that the

defective votes given for the successful candidate exceeded those given for the petitioner. The unsuccessful candidate petitioned and asked the court, inter alia, to determine that the successful candidate was not duly elected or returned and that his election and return were void.

Held –

(i) the provisions of s. 46 (1) of the Legislative Council (Elections) Ordinance, 1957, are mandatory and give the returning officer no power to accept a ballot paper which is in fact lacking the official stamp or bearing writings whereby a voter can be identified; consequently the returning officer had no option but to reject the defective votes after showing them to the candidates.

(ii) the conduct of the election was not in accordance with a principle laid down in s. 46 (1) ibid.; the acceptance of the ballot papers lacking the official mark did not itself prove that the election was not conducted in accordance with the principles laid down in the Ordinance, but the acceptance of the ballot papers bearing voters' registration numbers proved that the election had been conducted otherwise than in accordance with the principle of secrecy laid down in the Ordinance.

(iii) the result of the election would have been affected if the ballot papers bearing voters' registration numbers had been rejected and accordingly under s. 60 (2) of the Ordinance the election must be declared void.

Declaration that the election was void.

Cases referred to in judgment:

(1) *Re South Newington Municipal Election Petition*, [1948] 2 All E.R.503.

Judgment

Sir Audley McKisack CJ: The petitioner, Mr. A. A. Ojera, was the unsuccessful candidate in the South West Acholi Electoral District at the general election for the Uganda Legislative Council held on March 24, 1961. The first respondent is the returning officer, and the second respondent is the successful candidate, Mr. A. A. Banya. In r. 2 (2) of the Election Petitions Directions, 1958, it is provided that, if the petitioner complains of the conduct of a returning officer, he shall be deemed to be a respondent.

Mr. Banya was elected with a majority of 52 votes. The votes cast for him totalled 7,150, and those for Mr. Ojera 7,098. It is common ground that a substantial number of the ballot papers included in these totals did not comply with the provisions of the Legislative Council (Elections) Ordinance, 1957. Of Mr. Banya's total –

806	ballot papers were not perforated or stamped with and official mark (as required by s. 38 (1)(*b*)(i)).
33	lacked an official mark and also had figures written on them in pencil.
566	had figures pencilled on them.

All these figures were the numbers assigned to electors in the electoral register and could thus enable the electors to whom the ballot papers had been issued to be identified. These numbers should, of course, have been written on the counterfoils of the ballot papers and not on the ballot papers themselves (s.38

(1)(*b*)(iii). Thus there were 1,405 of the votes given for Mr. Banya that contravened the provisions of the Ordinance. Of Mr. Ojera's total –

623 ballot papers lacked an official mark.

53 lacked an official mark and also had figures written on them in pencil.

447 had figures pencilled on them.

All these figures were the numbers assigned to electors in the electoral register. The total of Mr. Ojera's defective ballot papers were thus 1,123.

Section 46 of the Legislative Council (Elections) Ordinance, 1957, contains the following provisions with regard to the returning officer's duties in respect of ballot papers lacking an official mark or bearing writings whereby a voter could be identified –

> "46(1) The returning officer shall reject as invalid any ballot paper which is not stamped or perforated with the official mark or on which anything is written or marked by which the voter can be identified except the printed number.
>
> "(2) Before rejecting a ballot paper, the returning officer shall show it to each candidate or his counting agent if present, and hear his views thereon, taking all proper precautions to prevent any person from seeing the number printed on the back of the paper.
>
> "(3) The decision of the returning officer whether or not any ballot paper shall be rejected shall be final and shall not be questioned on an election petition."

At the counting of votes for the South West Acholi Electoral District, when it became apparent that a large number of ballot papers were unstamped or bore writings, the returning officer consulted the candidates on the question whether these papers should be rejected. It is not disputed that these defects were due to mistakes on the part of the presiding officers or polling assistants at certain polling stations; that the mistakes were honest ones due to a misunderstanding of instructions; and that the voters themselves were in no wise to blame for the defects.

According to the evidence of the returning officer, Mr. Twining, and Mr. Banya, both candidates agreed that the defective votes should not be rejected. According to Mr. Ojera, the returning officer overrode his (Mr. Ojera's) objection to these votes being accepted, but I prefer the evidence of Mr. Banya and Mr. Twining on this point.

I do not, however, take the same view as Mr. Twining concerning the extent of the discretion given to a returning officer by s. 46. The provisions of sub-section (1) are mandatory, and give the returning officer no power to accept a ballot paper which is in fact lacking the official stamp or bearing writings whereby a voter can be identified. It follows that the "decision" referred to in sub-s. (3) cannot be a decision to accept a ballot paper which is unstamped or bears writings of the kind specified. It can only be a decision on the question whether or not a ballot paper bears the official mark, or whether or not it bears writings by which the voter can be identified. It is on those questions that the returning officer's decision, under sub-s. (3), is final and cannot be questioned on an election petition. I think this is the only construction of the section by which sub-s. (1) and sub-s. (3) can be reconciled.

In the present case it was not open to question that the ballot papers with which we are concerned had no official mark and did bear writings by which the voters could be identified. Consequently the returning officer had no option but to reject them after showing them to the candidates. Even though the candidates wished them to be accepted, it was a contravention of s. 46(1) for the returning officer to accede to their wishes.

From the figures which I have given, it will be seen that the defective votes given for the successful candidate, Mr. Banya, exceeded those given for Mr. Ojera by 282. So that, if all these votes had been rejected, Mr. Ojera would have been elected by a majority of 230. Mr. Ojera's petition, however, does

not

expressly claim the seat for himself. After setting out the numbers of the defective votes the petition concludes as follows:

> "5. And your petitioner states that such a wholesale acceptance of otherwise void ballot papers under s. 46 (1) was unlawful, s. 46 (3) notwithstanding.

Wherefore your humble petitioner prays:

> (i) That it may be determined that the said Anjelo A. Banya was not duly elected or returned and that his election and return were void; and a new election in the said electoral district be held; ref. s. 65 of the Ordinance.
>
> AND/OR
>
> (ii) It may be determined that a recount should be held of the valid ballot papers in compliance with the said s. 46(1) of the Legislative Council (Elections) Ordinance, 1957."

Mr. Clerk, for the petitioner, says that the reference to a recount is to be construed as an implied claim for the seat. Section 65 sets out the reliefs which a petitioner may claim, and these do not include a recount. Mr. Clerk, however, says that by "recount" he meant a "scrutiny", and that one of the reliefs specified in s. 65 is:

> "(*d*) where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, a scrutiny."

For reasons which will appear, I do not find it necessary to decide whether the petition can be construed as claiming the seat for the petitioner, or, if the answer to that question is no, whether I would nevertheless have power to declare the unsuccessful candidate elected.

Section 60 (2) of the Ordinance sets out the grounds on which the court shall declare the election of a candidate to be declared void and includes the following ground:

> "(*b*) non-compliance with the provisions of the Ordinance relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election."

Section 62 of the Ordinance, the purpose of which is not wholly clear to me, appears at least to emphasise that the election of a candidate is not to be declared void for non-compliance with the provisions of the Ordinance if the court is satisfied that the election was conducted in accordance with the principles laid down in the Ordinance and that the non-compliance did not affect the result of the election.

On one of the questions involved in these provisions, the question whether non-compliance affected the result of the election, there is no room for argument in relation to the present case. If the defective ballot papers had all been rejected, as required by s. 46, it would be Mr. Ojera, not Mr. Banya, who would have been elected. But I cannot declare Mr. Banya's election void unless I am also satisfied that the election was not conducted in accordance with "the principles laid down" in the Ordinance. What are those principles? I do not find any provisions which are expressly stated to be "principles", so that the term "laid down" cannot have been used by the draftsman in that sense. But it is easy enought to infer certain principles from various provisions in the Ordinance, and I think that the term "laid down" is to be construed in that sense. For example, from s. 8, which states that an elector registered as such in an electoral district shall be entitled to one vote to be cast in that district, one can infer the principle that a voter is to cast one vote only. And from s. 38(1)(*c*), which requires a voter to record his vote "secretly", it

is not difficult to infer the principle of the secrecy of the ballot.

In the instant case the provisions with which there has been a failure to comply are those of s. 46 (1), requiring the rejection of ballot papers lacking the official mark or bearing writings by which the voter can be identified. The latter part of this provision must, I think, derive from the principle that I have already referred to in relation to s. 38, viz., the secrecy of the ballot. By looking at the register of voters, a person could identify 599 of the electors who voted for Mr. Banya and 500 of those who voted for Mr. Ojera. I have no hesitation in finding that the conduct of the election was not in accordance with a principle laid down in s. 46 (1).

I have also to decide whether any principle is laid down by the provision requiring the rejection of a ballot paper for want of an official mark. The requirement that a ballot paper shall be so marked is contained in s. 38 (1). The mark is to be made

> "immediately before the presiding officer or a polling assistant delivers a ballot paper to any person".

The purpose, I think, must be to show that the paper has been duly issued to a voter by the proper authority and that it is not, for example, one which has been forged or has been unlawfully obtained or issued. I do not think that this provision can be said to lay down any "principle". And, even if I am wrong and some principle can be discerned, I am satisfied on the evidence adduced at the trial, that the ballot papers in question were not forged or unlawfully obtained or (save for the want of the official mark) unlawfully issued. Consequently it has not been proved that, in the words of s. 60(1)(*b*), "the election was not conducted in accordance with the principles laid down" in this provision. In so far, therefore, as the petition relies on the failure to reject ballot papers whose only defect was the lack of the official mark, the petition fails. But it succeeds, as I have said, in respect of the papers which bore the voters' registration numbers, and, if those papers had been rejected instead of being counted as valid, Mr. Banya's majority of 52 would have been converted into a majority of 47 for Mr. Ojera. So the result of this trial is that the non-compliance with one requirement of s. 46 has been shewn to have affected the result of the election, and the election has been shewn to have been conducted otherwise than in accordance with the principle of secrecy laid down in the Ordinance.

It is true, of course, that this non-compliance was not the fault of any voter but due to a defect in the official machinery. Mr. Mukasa, for Mr. Banya, has referred me to the *Re South Newington Municipal Election Petition* (1), [1948] 2 All E.R.503, in which Birkett, J. (as he then was) said at p. 507:

> "We think that, in a case where the voter is in no sense to blame, where he has intended to vote and has expressed his intention of voting in a particular way, and, so far as his part of the transaction is concerned, has done everything that he should, and the only defect raised as a matter of criticism of the ballot paper is some defect on the part of the official machinery by which the election is conducted, special consideration should (and, no doubt, would) be given, in order that the voter should not be disfranchised."

But the *South Newington* case (1) has really no relevance to the South West Acholi one. The facts were very different, and no statutory provisions equivalent to s. 60 and s. 62 of our Ordinance fell to be discussed. If the conduct of the election violated the principles of that Ordinance, it cannot make any difference that the voters were blameless.

It remains to decide whether the election as a whole is to be declared void, or whether the election of Mr. Banya should be declared void, and Mr. Ojera be declared to have been duly elected. Assuming (without deciding) that the terms of the petition do not preclude me from taking the latter course, I nevertheless

consider that, for the following reasons, it is not open to me to do so. The defects in the conduct of the election applied to both candidates, and they were on a large scale. They have led to the disfranchising of a not inconsiderable proportion of the electors. If their votes had not been invalid, Mr. Banya would have been duly elected. For the court to declare Mr. Ojera to have been duly elected in such circumstances would clearly be wrong. Accordingly, under s. 66 of the Ordinance I shall certify to the Governor that neither Mr. Banya nor any other person was duly elected, and that the election was void. The result will be that a new election will have to be held.

Declaration that the election was void.

For the petitioner:
Mayanja Clerk & Co, Kampala
A.V. Clerk

For the first respondent:
The Attorney-General, Uganda
J. M. Long (Crown Counsel, Uganda)

For the second respondent:
Kiwanuka & Co, Kampala
A.W.K. Mukasa

Colonial Blankets Trading Co. v National and Grindlays Bank Ltd
[1962] 1 EA 537 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	11 May 1962
Case Number:	843/1961
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Execution – Attachment – Seizure of judgment debtor's goods by bank under letters of hypothecation – Seizure by bank with knowledge of issue of warrant of attachment – Effective time and date of execution of warrant of attachment – Whether seizure of goods gave bank title to the goods – Sale of Goods Ordinance (*Cap*. 290), *s*. 27 (1) (*K*.) – *Civil Procedure Ordinance* (*Cap*. 5), *s*. 30 (*K*.) – *Civil Procedure* (*Revised*) *Rules*, 1948, *O. XXI*, *r*. 38 (*K*.).

Editor's Summary

The plaintiff firm as decree holder against a debtor applied for execution and a warrant of attachment and sale was issued by the Supreme Court addressed to the first-class magistrate at Embu. Next day a representative of the plaintiff firm carried the warrant to Embu in order to obtain execution thereof. On the same day, having learnt of the issue of the warrant, the defendant, purporting to act under two letters of hypothecation, seized the goods of the debtor before the court clerk arrived at the debtor's shop to execute the warrant. The goods were subsequently sold on behalf of the defendant and from the proceeds of the sale the defendant was able to obtain reimbursement in respect of the debtor's indebtedness and held the balance to his credit. The plaintiff firm then filed this action claiming, inter alia, damages for conversion limited to the value of the decree.

Held –

(i) under s. 27 (1) of the Sale of Goods Ordinance from the time of the delivery of the warrant to the office of the first-class magistrate, the property in the goods of the debtor was bound by that warrant.

(ii) the defendant had notice of the warrant at the time when it purported to acquire its title by seizure and it could not therefore avail itself of the saving provision contained in the proviso to s. 27 (1) of the Sale of Goods Ordinance.

(iii) the purpose of s. 27 (1) is not to dispense with actual seizure but to provide for the contingency where, before actual seizure can be effected after receipt by the sheriff of a warrant, the title to the goods passes without good faith or at a

time when the person obtaining the title is aware of the existence of the writ in the sheriff's hands.

(iv) as the defendant had notice, before and at the time of seizure, of the warrant of attachment the seizure and later disposal of the debtor's goods was wrongful under and by virtue of the provisions of s. 27 (1).

Judgment for the plaintiffs for Shs. 3,975/-.

Judgment

Edmonds J: By a letter of hypothecation dated July 12, 1960, one Lakhamshi Jivraj, to whom I shall hereafter refer as the debtor, purported to hypothecate to the defendant bank his entire stock-in-trade in his shop at Embu in consideration of the bank allowing him overdraft facilities to a limit of Shs. 5,000/-. On November 11, 1960, the debtor executed a supplementary letter of hypothecation under which the limit of his overdraft facilities was increased to Shs. 10,000/-. On October 12, 1960, the plaintiff recovered a decree for Shs. 3,325/90 against the debtor in the Supreme Court at Nairobi in Civil Case No. 1499/1960. As a consequence of an application by the plaintiffs on November 10, 1960, for execution of this decree, warrants of attachments and sale were issued by the court, and on November 11, 1960, a representative of the plaintiff firm went to Embu in order to obtain execution of the warrants by the district court there. On the same day the bank purported to act under its letters of hypothecation by seizing the shop goods of the debtor, and on April 6, 1961, the Embu court broker on the instructions of the bank sold the goods for Shs. 13,555/-. From this sum the bank reimbursed itself in respect of the debtor's indebtedness to it, and holds the balance to his credit. Subsequently the debtor filed his petition in bankruptcy.

This action has consequently been filed by the plaintiff firm and they seek an order declaring that the letters of hypothecation are fraudulent and void against them under the Chattels Transfer Ordinance, and an order for the return of the goods or their value up to the limit of their decree or, alternatively, damages in the sum of Shs. 3,957/- for conversion. The issues have been broadly framed in these terms:

1. When, if at all, was the effective time and date of execution of the warrants.
2. Was execution by the court effective whether or not the bank had seized the goods.
3. Are the letters of hypothecation of July 12, and November 11, 1960, within the Chattels Transfer Ordinance? If so, are they void as against the plaintiffs.
4. (*a*) If not, did the letters of hypothecation of July 12, limit the bank to seizure of goods to value of Shs. 5,000/- only.

 (*b*) When was the letter of hypothecation of November 11, executed? Was it effective to increase the bank's security to Shs. 10,000/-.

The decision on the first two issues depends to some extent on the facts. The evidence as to the sequence of events on the morning of November 11, 1960, is conflicting. The plaintiffs maintain that the decree was executed, and the warrant of attachment, or proclamation, was affixed to the front door of the premises of the debtor's shop before the bank took any action to seize the goods. The bank, on the other hand, contends that it seized the goods by locking the shop and taking away the keys before the officer having the execution of the warrant took any step to effect actual seizure. The case for the plaintiffs is supported by the evidence of the plaintiff's representative who carried the

warrant to Embu for execution, and by the evidence of two shopkeepers whose premises were in close proximity to those of the debtor. The case for the bank is supported by the debtor and the court clerk who executed the warrant, and by a clerk of the defendant bank. The then manager of the bank at Embu was not available to give evidence as he is absent from the colony. The debtor's evidence amounts to this, that in the morning of November 11, he saw the plaintiff's representative in a motor car in Embu and, as a result of what he heard that this representative was saying, he reported to the bank that there was a warrant of attachment out against him, that the manager and one of his clerks thereafter came to his shop, locked it, took the keys and placed a large board, which bore in capitals the name of the bank, outside the front of his shop, that, after the bank officials had left, the court clerk with the plaintiff's representative and two askaris arrived and he was told that there was an attachment against his goods and the court clerk affixed "a paper" to his front door. The court clerk confirms this evidence, namely, that on his arrival at the debtor's shop he found it closed and saw the bank's board outside the front of the shop. It was as a consequence of this, he says, that he felt unable to execute the warrant and returned to the district officer for instructions. The latter then returned with him to the shop and ordered him to execute the warrant only against the debtor's personal effects in his residential quarters at the back of the shop. The district officer confirmed that the shop was closed and appeared to be sealed and he says that, after an interview with the bank, he decided not to execute the warrant against the shop goods. His evidence indicates that the impression he gained was that the bank had sealed the shop and was in control of it and that this had occurred before any actual seizure under the warrant had been attempted. This evidence is to some extent borne out by the plaintiff's representative who says that on his arrival at the shop with the court clerk and the two askaris he found it closed. It was as a consequence of this, he says, that he and the court clerk asked the district officer to come to the shop in order to ascertain what action should be taken, and that, on the arrival at the shop, the district officer spoke to the court clerk and then went to see the bank manager. The plaintiff's representative adds that after the district officer's return from the bank the court clerk then affixed "a paper" to the front door of the debtor's shop. He does say, however, that at this time there was no bank name-board outside the shop.

The only other witnesses who gave evidence relevant to this period are the bank clerk and two shopkeepers with premises near the debtor's. The latter were, I felt, unreliable. Their evidence as to the closing of the shop by the debtor himself was emphatically denied by the latter. As it was a consequence of the bank's action that his business came to an end, it is unlikely that he would have fabricated evidence in favour of the bank. Generally I thought the debtor gave his evidence well and I prefer it to the evidence of the other two shopkeepers. The bank clerk was not an impressive witness but he did give significant evidence confirming that of the debtor as to the latter's report to the bank of there being an attachment about to be executed against him, and he states that, as a consequence of this information, he went to the district office and learned that it was correct, and it was then that the bank took possession of the debtor's shop goods.

I accept the evidence of the court clerk whom I considered to be a reliable witness and speaking to the best of his recollection, and he confirms the debtor that the bank had closed and purported to take possession of his shop goods before he, the court clerk, arrived at the shop with the purpose of executing the warrant.

The only other issue, that is to say the fourth issue, which is dependant upon a finding of fact on the evidence is the question of the time when the letter of hypothecation of November 11, 1960, was executed by the debtor. His is the only evidence on the question. He can only say that his impression is that he signed it before his shop was locked by the bank. He made only the one call on

the bank before this happened, and the clear inference which I draw is that he signed the letter of hypothecation either then or some time later in the day-but, in any event, after the bank had notice of the existence of the warrant of attachment.

Having considered all the evidence, I am satisfied that the following facts affecting the first two issues are established:

1. The bank officials had locked the shop of the debtor, taken the keys and placed a large name-board outside the front of the premises before the arrival of the court clerk and his attempted execution of the warrant of attachment.
2. The court clerk arrived after the bank officials had taken this action and it was only then that he attached a "paper" to the front door of the shop.
3. However, before the bank officials had taken any action they had been informed by the debtor of the arrival of the representative of the plaintiff firm and of the existence of a warrant of attachment, and they did not take any action against the debtor's goods until after confirmation of the existence of the warrant had been obtained by the bank clerk as a result of a visit to the district office.

Following upon these findings the first question which arises is whether the seizure of the debtor's goods by the bank in the knowledge of the existence of a warrant of attachment in the hands of the officer charged with its execution could give the bank a good title to those goods. Section 27 (1) of the Sale of Goods Ordinance (Cap. 290), provides as follows:

> "27(1) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month and year when he received the same:
>
> "Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff."

By sub-s. (2) it is provided that the term "sheriff" includes any officer charged with the enforcement of a writ of execution. By s. 30 of the Civil Procedure Ordinance it is provided that a decree

> "may be executed either by the court which passed it or by the court to which it is sent for execution".

In this case, the warrant of attachment was addressed to the first-class magistrate, Embu, and it was, therefore, the duty of this officer, himself or through the officers of his court, to execute the decree in terms of the directions contained in the warrant. The fact that one of his officers, namely, the second-class magistrate, altered the warrant by addressing it to the court broker for execution by him, and the fact that it was not the latter (as he was found to be absent from Embu) but the second-class magistrate and the court clerk who ultimately purported to execute the warrant does not affect its initial validity or the application of the provisions of s. 27 (1) of the Sale of Goods Ordinance. So far as the bank was aware, the warrant was in the hands of the officer charged with its

execution, it having been delivered to the office of that officer for execution. That the warrant did not actually reach the hands of the first-class magistrate himself is immaterial. It was delivered to his office, and that is tantamount to delivery to him. Thus, the warrant was initially in the hands of the proper officer for the purpose of execution and at a time when the bank had taken no steps under its letter of hypothecation to seize the debtor's goods, and the evidence is clear that it was only as a consequence of obtaining information of the receipt of the warrant in the first-class magistrate's office that the bank acted. It must, therefore, follow under s. 27 (1) that, as from the time of the delivery of the warrant to the office of the first-class magistrate, the property in the goods of the debtor was bound by that warrant. It is true that the endorsement on the writ as to the time and date of its receipt was made, not by the first-class magistrate, but by the second-class magistrate. But such an endorsement is required by the section only "for the better manifestation of the time and date of receipt". The fact that it was not made by the first-class magistrate but by one of his officers, if it is an irregularity, is one which cannot affect the fact that the writ was received in the office of the officer charged with its execution at a time before the bank had taken any step to seize the goods. The evidence is clear that the bank had notice of the warrant at the time when it purported to acquire its title by seizure, and it cannot therefore avail itself of the saving provision contained in the proviso to sub-section (1).

No attempt has been made on behalf of the bank to argue that it had any title to the goods prior to seizure. All it had under the letter of hypothecation was a right to seize, but it is contended that upon seizure the bank became a secured creditor as pledgee or pawnee and thus entitled to the goods. It is further argued for the bank that, by virtue of O. XXI, r. 38 of the Civil Procedure (Revised) Rules, 1948, attachment to be effective must be by actual seizure, and that "national" attachment as envisaged by s. 27 (1) of the Sale of Goods Ordinance is in conflict with the express provision of r. 38. I do not follow this argument and I can see no conflict. The purpose of s. 27 (1) is not to dispense with actual seizure. It is to provide for the contingency where, before actual seizure can be effected after receipt by the sheriff of a warrant, the title to the goods passes without good faith or at a time when the person obtaining the title is aware of the existence of the writ in the sheriff's hands. The section in fact covers just those circumstances as are disclosed in this case, for the defendant decided to seize and seized the debtor's goods only after coming to know that a warrant of attachment was about to be executed against the goods.

In the result, therefore, I find the facts disclose that before and at the time of seizure, the defendant bank had notice of the warrant of attachment and consequently, the seizure and later disposal of the debtor's goods must be held to have been wrongful under and by virtue of the provisions of s. 27 (1) of the Sale of Goods Ordinance.

This decision has, therefore, the effect of disposing of the first two issues, and of the case, in favour of the plaintiffs. I have been invited nevertheless to consider the further issues and, principally, the issue as to whether the form of letter of hypothecation utilised by the defendant bank is an instrument requiring registration under the Chattels Transfer Ordinance. I have, however, considered all material issues of fact and made my findings thereon. On those findings I have decided an issue of law which disposes of the case, and I have no doubt that my decision on the law must prevail whether or not the letters of hypothecation are exempt from registration under the Ordinance. It follows that any opinion I express on the question of whether such registration is necessary will be obiter and of no binding effect. I do not, therefore, intend to express any opinion on this issue.

I enter judgment for the plaintiffs in the sum of Shs. 3,957/- as damages for conversion, together with interest thereon at court rates, and the costs of this action.

Judgment for the plaintiffs for Shs. 3,975/-.

For the plaintiffs:
Khanna & Khanna, Nairobi
D.N. Khanna

For the defendant:
Hamilton Harrison & Mathews, Nairobi
Sir William Lindsay

Andrea Obonyo and Others v R
[1962] 1 EA 542 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	29 June 1962
Case Number:	8/1962
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Sir Trevor Gould JA
Sourced by:	LawAfrica
Appeal from:	Appeal from High Court of Tanganyika – Reide, Ag. J.

[1] Criminal law – Murder – Circumstantial evidence – Deceased found dead after raid by gang – No direct identification of any accused – All accused found in possession of articles stolen during raid – Whether inference of theft can be drawn so as to support charge of murder – Whether deceased killed by gang – Common intent – Penal Code (*Cap*. 16), *s*. 3 (*T*.).

Editor's Summary

The appellants were convicted of the murder of a man found dead in the street soon after a raid by a gang of eight to ten men. It was alleged the appellants were in the gang. At the trial evidence was given that the gang was armed with pangas and clubs, terrorized the residents of the street and broke into and stole from two buildings there. The appellants were not directly identified and their convictions were based on evidence of their possession at the time of their arrest, some six days later, of some of the property stolen during the raid. The appellants denied taking part in the raid or of being in possession of the stolen property which they said had been planted on them by the police. On appeal, it was submitted inter alia, on their behalf, that the evidence did not establish conclusively that the deceased was killed by a member

of the raiding party, that even if he was killed by the raiders, it was not proved that he was killed in the prosecution of the common unlawful purpose of the gang, or that each appellant was a member of the gang. It was also submitted that in order to establish that the appellants were in the gang it was necessary to eliminate beyond reasonable doubt that possibly they were mere receivers and not thieves, which had not been done.

Held –

(i) in all the circumstances, the inference was irresistible that the deceased (*a*) was killed by a member of the gang during the course of the raid and that he met his death in some other way was not a reasonable possibility and could be excluded; (*b*) was murdered in the prosecution of the common unlawful purpose of the gang and, as murder was a probable consequence of that common purpose, each member of the gang was guilty of murder.

(ii) where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt; and if a finding that he stole the articles depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the articles has been excluded.

(iii) as to the first and third appellants, while the trial judge's inference may well have been true, the court, with some hesitation, considered that other possibilities had not been sufficiently excluded, particularly in view of the lapse of time; the absence of any explanation was not sufficient to negative a reasonable possibility that the appellants might have been only receivers.

(iv) further, there was no evidence except the stolen property connecting them with the raid, and the nature of the stolen property did not point so strongly to them being the thieves; having regard to the high degree of proof required on a charge of murder, it would be unsafe to allow their convictions to stand.

Appeal of first and third appellants allowed; appeal of second appellant dismissed.

Cases referred to in judgment:

(1) *Ezera Kyabanamaizi and Others v. R.*, [1962] E.A. 309 (C.A.).

(2) *Kantilal Jivraj and Another v. R.*, [1961] E.A. 6 (C.A.).

(3) *R. v. Hassani s/o Mohamed* (1948), 15 E.A.C.A. 121.

(4) *R. v. Bukari s/o Abdallah* (1949), 16 E.A.C.A. 84.

(5) *R. v. Exall*, 4 F. & F. 922; 176 E.R. 850.

(6) *R. v. Loughlin*, 35 Cr. App. R. 69.

(7) *Bater v. Bater*, [1950] 2 All E.R. 458. –

(8) *Hornal v. Neuberger Products Ltd.*, [1956] 3 All E.R. 970.

(9) *Henry H. Ilanga v. M. Manyoka*, [1961] E.A. 705 (C.A.).

Judgment

Sir Ronald Sinclair P, read the following judgment of the court: The three appellants were convicted by the High Court of Tanganyika sitting at Musoma of the murder of a man named Lameck s/o Ikingo. They now appeal to this court.

During the night of March 22/23, 1961, an armed gang of about eight or ten men carried out a raid on the small trading centre of Mugango in the East Lake Province, in the course of which they terrorized the inhabitants, broke into two buildings and stole therefrom. The account of the raid given by the eye-witnesses is summarized by the trial judge in his judgment as follows:

> "The raid began at about 11 a.m.
>
> "It appears that the gang approached Mugango from the main Magita/Musoma road, shouting as they came such phrases as 'Kill', 'Beat', 'Kill the Indians', 'Butcher', and the like. Patris, a night watchman, hearing a fellow watchman shouting, went towards the main street, was hit on the side of the head, and fell unconscious. He had seen stones being thrown, and torches shining. The next day he was removed to hospital, where he stayed for three weeks. Muhunda, hearing the noise of stones hitting houses, went out and was instantly assaulted by persons carrying pangas. He sustained one blow on the forehead and one on the back. He too saw lights being flashed and people running about armed with weapons. S. Nazerali was awakened by cries of 'Kill! Kill!' from several voices coming from opposite his shop, which is near that of the deceased. He went

out, saw torches flashing and many people, some armed with clubs. He ran back into his house, closed the door and extinguished his lamp. He heard voices outside proposing to shoot him because he had gone in, whereupon he retreated through the back door and got a punch in the face. After that he took safety in an African house. Andrea was awakened by the sounds of people ‘opening shops’; went into the main street where

> someone shone a torch on him, and where he was beaten in several places by a club, or clubs, and fell unconscious. Masinde was awakened by shouts of 'Catch!, Assault!' and 'Kill!' and went into the street where he saw eight or ten persons shining torches. These persons had come, he says, from the Magita/Musomo road. He saw them assault someone near the shop of one Ismael and then pass on to Kurji's shop. As the gang drew nearer, they threw stones at him and he returned to his house.
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> "In the course of the raid it appears that someone caused an explosion in the street, with what object I do not know. A number of witnesses have testified to hearing a sound like 'a shot' or 'an explosion' and a police officer, ASP. Singh, has testified to finding what he called a 'dug-up place' near Kurji's shop; sand on the roof nearby and a burnt-out detonator (produced).
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> "The raid finished at about 2.30 a.m. with some of the gang driving away in the Peugeot van belonging to Kurji (P.W. 10). They drove the van to Musoma, followed by another trader Madatally (P.W. 8), and it was found abandoned a few days later.
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> "In the early morning Lameck, who was employed by Kurji as a clerk, and also had a shop of his own, was found lying in the street, dead, about four doors from his shop. He was taken to the hospital, duly identified, and a post-mortem was performed the same day. The doctor has testified that he found lacerations of the scalp with a depressed fracture underneath, and a fracture of the left parietal bone. There was also a bruise on the right side of his body. Death was due to intra-cranial haemorrhage following a blow on the head. He appeared to have been in normal health before sustaining this blow, which must have been caused by a blunt instrument like a club or a stone. One of the Mugango inhabitants, Ndege (P.W. 20) has testified that he had seen the deceased in good health at 3 p.m. the previous afternoon."

During the course of the raid members of the gang broke into two buildings, one occupied by Madatally and the other by Kurji. Each building comprised a shop and living quarters. Madatally was wakened at about 1.15 a.m. by shouts of "Butcher!", "Kill!". He opened his door and saw five or six figures and torches shining. He shut the door and then heard noises as if the glass of his truck outside was being broken and an explosive noise which he thought was that of the tyres being burst. He left to go to a ginnery to get help. Madatally's wife also was wakened by the noise of shouts and an explosion. She shut herself in the latrine in the compound, leaving her baby in the bedroom. She heard the front door being broken open and people entering and then one voice suggesting that the child should be killed and another advising against it. When Madatally returned he found that a quantity of property had been stolen from the premises.

Kurji and his family went to sleep that night in one room in the living quarters behind the shop. Kurji was wakened by shouting and went on to the verandah. There he met Munya, a watchman. As a result of what Munyat told him he hid outside. While in hiding he heard his Peugeot motor car being driven away. After he had left the premises his wife heard cries of "Kill", "Beat Indians" and then an explosion. People came to the window and told her to open the door or "we will break it open and kill you". She opened the back door. There were men outside one of whom said "Where is your husband? I want to kill him". She said that her husband was not there and one of the men demanded keys for the cupboard and the safe in the living quarters. These she gave to him. This man entered the living quarters while other men went into the shop. The man, after trying in vain to open the safe, frightened her into opening it

herself. She was unable, however, to open the inner drawer and, on her son's intervening, the man kicked him and told him to open it. He did so and gave the Shs. 180/- inside to the man. There was other money in the safe which the man also took. She, Kurji's wife, opened a cupboard and the man took therefrom a purse with Shs. 300/- and a rolled gold chain. Other men were outside on the verandah shouting "Kill this woman and take all the money". The man went into the shop, returned to the living room, told her to open another cupboard, demanded a gun, returned to the shop and collected articles therefrom. Other men went out through the shop; one man showed her a parcel containing shirts and said

> "Don't close the shop. Now we are going to rob your brother. If we find your husband we will kill him".

The men then left. Kurji returned to the shop when all was quiet and found that, in addition to the money, a quantity of other property had been stolen.

The trial judge summed up the evidence as to the raid as follows:

> "It is the story of a desperate gang of thieves who achieved their object by terrorizing and assaulting those whom they met, and who were determined to gain their ends by any means, no matter how violent."

We are in entire agreement with that conclusion.

None of the witnesses could identify any of the appellants as having taken part in the raid, but six days after the raid the appellants were arrested at Kiabakari each being in possession of some of the stolen property. In addition, the second appellant had in his possession some gelignite and detonators. That was the only evidence connecting the appellants with the raid. The appellants gave evidence at the trial, but called no witnesses. Each denied taking part in the raid and denied that any of the stolen property was found in his possession.

The trial judge's conclusion was as follows:

> "I find that the accused not only stole the articles found in their possession and proved to have been stolen during the night of the raid, but that they were also members of the gang who carried out the raid and participants in it. I also find that the members of that gang had formed a common intention to prosecute their unlawful intention of theft in conjunction with one another, and in the prosecution of that purpose one of their number struck the deceased Lameck a heavy blow with a blunt instrument and so killed him, and that the committing of that act was a probable consequence of the prosecution of their purpose of theft. That being so, each of the accused is guilty of the murder of Lameck, and I so find and I convict them so accordingly."

The first point taken on behalf of the appellants was that the evidence, which is circumstantial only, did not establish with the certainty which the law requires that the deceased, Lameck, was killed by a member of the raiding party. It was submitted that the only evidence was that Lameck's dead body was found in the street shortly after the raid and that he died at about the time of the raid: that there was no evidence as to how he met his death: and that he might, for instance, have been a member of the gang or have been mistaken for one of the members of the gang and assaulted in that belief or he might have been accidentally struck by a stone thrown by an inhabitant of the trading centre.

On this aspect of the case the judge said:

> "It is, of course, possible that he was killed before the raid, or that he might have been killed during the raid by someone not a member of the

> gang, but I cannot think that this is a reasonable possibility when one remembers the evidence of the assaults and terrorization which the gang carried out. I am satisfied, as were the assessors, beyond reasonable doubt that Lameck was killed in the course of, and by a member or members of the gang."

Lameck's dead body was seen by Nazerali at about 2.30 a.m. when he came into the street just after the raid had ended. He said it was where he had seen people in the street with torches and clubs. A post-mortem was performed on the body of Lameck at 11.00 a.m. on March 23, 1961, and the medical evidence established that death had occurred about twelve hours previously, with a margin of two hours, error each way. He could, therefore, have been killed when the raid began at about 1.00 a.m. In addition to being in the employ of Kurji as a clerk, he also had a shop of his own and must have been well known to the inhabitants of the trading centre. There is no suggestion in the evidence that anyone threw stones at the raiders or resisted them in any way. On the contrary it is evident that the inhabitants were terrorized and either hid or ran away. On the other hand, the raiders were armed with pangas and clubs and assaulted the inhabitants who dared to show themselves in the street. In all the circumstances we think that the inference is irresistible that the deceased was killed by a member of the gang during the course of the raid and that the possibility that he met his death in some other way is not a reasonable possibility and can be excluded.

The next point argued on behalf of the appellants was that, even if the deceased was killed by one of the raiders, it was not proved with legal certainty that he was killed in the prosecution of the common purpose of the gang: that there was no evidence as to how or why he was killed: and that he might, for instance, have been recognised by a member of the gang and killed to avoid detection.

Section 23 of the Penal Code provides:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence."

As this court observed in *Ezera Kyabanamaizi and Others v. R.* (1), [1962] E.A. 309 (C.A.), in a charge of this nature the essential issues which had to be determined were (1) whether the murder of the deceased was committed in the prosecution of a common unlawful purpose of the gang and was a probable consequence of the prosecution of that purpose and (2) whether the individual appellants have been shown to have been members of that gang sharing the common purpose. There can be no doubt that the members of the gang shared a common purpose to break into buildings in the trading centre and to subdue and overcome with violence any resistance by the inhabitants in order to effect that purpose. There can also be no doubt that murder was a probable consequence of the prosecution of that common purpose. In view of the nature and circumstances of the raid, we think the inference is again irresistible that the deceased was murdered in the prosecution of such purpose: any other hypothesis can, we think, be safely excluded. In those circumstances each member of the gang was guilty of murder.

We turn now to the question whether it was established beyond reasonable doubt that each of the appellants was a member of the gang. When arrested, the first appellant had in his possession a broken fountain pen (exhibit C), a Basis wristlet watch without a strap (exhibit F), a Robin Hood shirt (exhibit E) and eight packets of Star cigarettes with the code number 11070 (exhibit D). The fountain pen and the watch were positively identified as having

been stolen from Madatally's premises. The Robin Hood shirt was similar to those stolen from Madatally's premises and the Star cigarettes bore the same code number as those stolen from Kurji's premises.

When the second appellant was arrested he had in his possession a briefcase (exhibit I), the key to the briefcase to which was tied a handkerchief (exhibit K), a red plastic purse (exhibit Q), eight packets of Clipper cigarettes with the code number 21040, three packets of Crown Bird cigarettes with the code number 21090, a sum of money which included four currency notes to the value of Shs. 60/- and five detonators with some gelignite (exhibit M). The briefcase was clearly identified as belonging to Kurji: it had his name and address stamped on it. The key with the handkerchief tied to it and the red plastic purse were also positively identified as having been stolen from Kurji's premises on the night of the raid. The key had been in his safe. Both Crown Bird and Clipper cigarettes were stolen from Kurji's shop on the night of the raid. It was proved that the Crown Bird cigarettes could not have come from any shop but Kurji's, and that the Clipper cigarettes bore the same code number as those stolen from Kurji's shop. The four currency notes had a sticky substance on them as had a drawer in Madatally's house from which the raiders had stolen money. Madatally's wife testified that some brown sticky medicine which she used to keep in the drawer had leaked into it three or four days before the raid. The drawer and the notes were sent to the Government chemist who reported that the sticky substance on the drawer and on the notes had the same visible appearance and that both contained reducing sugar.

On his arrest, the third appellant had in his possession an Indian rupee bearing the date 1889 (exhibit X), a pair of broken sunglasses (exhibit O) and a Mercury shirt (exhibit N). Both the rupee and the sunglasses were positively identified as having been stolen from Madatally's shop on the night of the raid. The sunglasses had Madatally's initial "M" scratched on them. The rupee was given to Madatally by his grandmother on her death in 1941. It had no value but he kept it for luck. He said that Victorian rupees were impossible to get there. The Mercury shirt was similar to those stolen from Madatally's shop on the night of the raid.

The appellants denied that any of those articles were found in their possession and alleged that the articles had been planted on them by the police. It was also submitted by counsel for the third appellant that there was some confusion in the prosecution evidence as to the particular articles which were found in the possession of each appellant. It is true that some of the witnesses were confused as to the articles found in the possession of each appellant. The trial judge gave full consideration to each of those possibilities. He was satisfied that there was no mistake as to the articles found in the possession of each appellant and that the articles were not planted on them. He accepted without hesitation the evidence of the police officers and rejected that of the appellants. He gave cogent reasons for coming to those conclusions and we can find no ground for differing from them. Furthermore, we think the evidence established beyond reasonable doubt, as the trial judge found, that the articles found in the possession of the appellants were correctly identified by the owners as having been stolen during the raid.

Was the possession by the appellants of some of the stolen property six days after it had been stolen sufficient to justify a finding that the appellants stole that property and were, accordingly, members of the raiding party? The trial judge's reasons for his finding that the appellants stole the property were as follows:

> "The next question is whether the period – six days – between the raid and the finding of the stolen in the accused's possession is so recent as to invoke the doctrine of recent possession in the absence of a credible

> explanation of that possession. Some of the articles found in the possession of the first accused (Andrea) were the broken fountain pen, the strapless wrist watch, and the Kali (or Star) cigarettes (a kind which he says he does not smoke). Some of those in the possession of the second accused (Odochi) were Kurji's briefcase with his name in it, the key to the case with Mrs. Kurji's handkerchief tied to it, two cigarette carton wrappers, one of which at any rate could have come from no other shop in the Lake Province but Kurji's; and the red plastic purse, with a sticky substance on it. Some of the articles found in the possession of the third accused (Maura) were the old rupee and the broken sunglasses. These are all articles of which the accused have said that they would not wish to acquire them, and which have little or no intrinsic value, and they are all such as would not pass readily, if at all, from hand to hand.
>
> "I have accordingly no hesitation in finding that the accuseds' possession of them was so recent as to invoke the doctrine of recent possession, so as to raise a presumption, in the absence of a credible explanation of that possession, that each accused either stole or received the stolen articles he was found with. Inasmuch as each accused has falsely denied his possession of those articles, none of them has furnished such an explanation. The presumption that then arises is overwhelmingly one of theft, and not of receiving, because it is not conceivable that the accused either bought or received the articles. In a word it is clear that such things as, for example, the broken sunglasses, the watch, the purse, the rupee and the empty cigarette cartons are the residue of goods which they stole and could not dispose of."

It was submitted that in order to establish that the appellants were members of the raiding party it was necessary to eliminate beyond reasonable doubt the possibility that the appellants were mere receivers and not thieves and that that possibility has not been eliminated in the present case.

In *Kantilal Jivraj and Another v. R.* (2), [1961] E.A. 6 (C.A.) at p. 7 this court said:

> "It is, of course, well established, and the learned resident magistrate properly directed himself, that a court may presume that a main in possession of stolen goods soon after the theft is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession. (Illustration (*a*) to s. 114 of the Indian Evidence Act.) This is an inference of fact which
>
> > 'may be drawn as a matter of common sense from other facts including, in particular, the fact that the accused has in his possession property which it is proved has been unlawfully obtained shortly before he was found to be in possession of it'
>
> (*Director of Public Prosecutions v. Neiser* (1), [1958] 3 W.L.R. 757 at p. 766). It is merely an application of the ordinary rule relating to circumstantial evidence that the inculpatory facts against an accused must be incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt. According to the particular circumstances, it is open to a court or jury to hold that unexplained possession of recently stolen articles is incompatible with innocence. But guilt in this context may be guilt either of stealing or of receiving the articles in question."

At p. 9 of the same report the court quoted with approval the following passage from *R. v. Hassani s/o Mohamed* (3) (1948), 15 E.A.C.A. 121 at p. 122:

> "On that finding (i.e. the possession of property recently stolen) in the absence of any explanation by the appellant to account for his possession

> a presumption does arise that the appellant was either the thief or a receiver. In the circumstances of this case it was no easy matter for the learned trial judge to say which, because there was really no pointer in either direction. We appreciate that this is a difficulty in which judges and magistrates often find themselves so it may be as well to repeat which has been said before that 'it is a presumption of fact, and not an implication of law, from evidence of recent possession of stolen property unaccounted for, whether the offence of stealing or of feloniously receiving, has been committed', *R. v. Langmead*, 9 Cox C.C. 464. Whenever the circumstances are such as to render it more likely that the party found in possession did not steal it the presumption is that he received it. Everything must depend on the circumstances of each case. Factors such as the nature of the property stolen, whether it be of a kind that readily passes from hand to hand, and the trade or occupation to which the accused person belongs can all be taken into account. A shopkeeper dealing in second-hand goods of the kind involved would naturally suggest receiving rather than stealing. In the present case the stolen property was a wrist watch of some value, easily identifiable, and therefore an article which a thief might experience some difficulty in disposing of by sale. There was nothing to suggest that he was the receiver or the kind of person who might be accustomed to receive stolen property."

The trial judge quoted and relied on the following passage from the judgment of this court in *R. v. Bukari s/o Abdallah* (4) (1949), 16 E.A.C.A. 84:

> "That cases often arise in which possession by an accused person of property proved to have been very recently stolen had been held not only to support a presumption of burglary or of breaking and entering but of murder as well, and if all circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal."

The same principle was applied in *R. v. Exall* (5), 4 F. & F. 922; 176 E.R. 850 and in *R. v. Loughlin* (6), 35 Cr. App. R. 69.

We stress the words used in *R. v. Bukari s/o Abdallah* (4)

> "if all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal".

All criminal charges must, of course, be proved beyond reasonable doubt. As was pointed out in *Kantilal Jivraj v. R.* (2), the presumption which arises from the possession of property recently stolen is merely an application of the ordinary rule relating to circumstantial evidence. Where the evidence is circumstantial, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

When a person is charged with theft and, in the alternative, with receiving, and the sole evidence connecting him with the offences is the recent possession of the stolen property, then, if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, he should be convicted either of theft or of receiving according to which is more probable or likely in the circumstances. He is not entitled to be acquitted altogether merely because there may be some doubt as to which of the two offences he has committed. That position is justified because the decision is not between guilt or innocence, but between whether he is guilty of theft or receiving, it having been proved that he is guilty of one or the other.

But where it is sought to draw an inference that a person has committed another offence from the fact he has stolen certain articles, the theft must be proved beyond reasonable doubt. If, in such a case, a finding that he stole

the articles depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the articles has been excluded. The inference that he stole the articles must be irresistible. That is merely applying the ordinary principles which must be followed when an inference of guilt depends on circumstantial evidence. This is a murder charge. As to the standard of proof required in criminal cases Denning, L.J. (as he then was), had this to say in *Bater v. Bater* (7), [1950] 2 All E.R. 458 at p. 459:

> "It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear."

That passage was approved in *Hornal v. Neuberger Products Ltd*. (8), [1956] 3 All E.R. 970, and in *Henry H. Ilanga v. M. Manyoka* (9), [1961] E.A. 705 (C.A.). In *Hornal v. Neuberger products Ltd*. (8), Hodson, L.J., cited with approval the following passage from Kenny's Outlines of Criminal Law (16th Edn.), at p. 416:

> "A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature. For in the latter it is sufficient that there be a preponderance of evidence in favour of the successful party, whereas in criminal cases the burden rests upon the prosecution to prove that the accused is guilty 'beyond reasonable doubt'. When therefore the case for the prosecution is closed after sufficient evidence has been adduced to necessitate an answer from the defence, the defence need do no more than show that there is a reasonable doubt as to the guilt of the accused. See *R. v. Stoddart* (12) (1909), 2 Cr. App. Rep. 217 at p. 242. Even in civil proceedings, e.g. in actions of debt, a mere scintilla of evidence would not warrant a jury in finding a verdict for the plaintiff; for there must (as we have seen) be so much evidence that a reasonable man might accept it as establishing the issue. But in criminal cases the presumption of innocence is still stronger, and accordingly a still higher minimum of evidence is required; and the more heinous the crime the higher will be this minimum of necessary proof. The progressive increase in the difficulty of proof, as the gravity of the accusation to be proved increases, is vividly illustrated in an extract from Lord Broguham's speech in defence of Queen Caroline: 'The evidence before us [he said] is inadequate even to prove a debt – impotent to deprive of a civil right – ridiculous for convicting of the pettiest offence – scandalous if brought forward to support a charge of any grave character – monstrous if to ruin the honour of an English Queen'."

With those principles in mind we now examine the finding of the learned judge that the appellants stole the articles which were found in their possession and which we have enumerated. He did not expressly direct himself that the possibility that the appellants were merely receivers had to be excluded before he could find it proved that they stole the property found in their possession, but he did say

> "The presumption that then arises is overwhelmingly one of theft, and not of receiving, because it is not conceivable that the accused either bought or received the articles".

A considerable quantity of the stolen property was found in the possession of the second appellant, namely, the briefcase, the key and handerkchief, the purse, the Clipper and Crown Bird cigarettes and the four currency notes.

This appellant said in evidence that he did not smoke cigarettes at all or buy them and he agreed that no one would want to buy the handkerchief and that he would have no use for the purse. The briefcase and the key in particular are not articles which would readily pass from hand to hand. He gave no explanation of his possession of these articles, but merely falsely denied possession. If he was merely a receiver it is difficult to believe that, when faced with a murder charge, he would not say so even though this would involve confession to an offence; but it must be borne in mind that a fully logical approach is not always to be expected from persons of the appellant's status. As to the four currency notes with the sticky substance on them which were undoubtedly stolen from Madatally's premises, it is unlikely in the extreme that the thief would pass them on to a receiver. The possibility that the appellant received the notes in an innocent transaction is excluded by his possession of the other stolen property. Taking all those factors into account we think that the inference is inescapable that this appellant stole the articles and that the possibility that he was merely a receiver can safely be excluded. In addition there is other evidence connecting him with the raid. During the raid an explosion occurred and after the raid a burnt-out detonator was found. Detonators and gelignite were found in this appellant's possession. His unexplained possession of explosives is strong confirmation that he took part in the raid. In our view the second appellant was rightly convicted and his appeal is dismissed.

The evidence against the first and third appellants is less strong. Of the stolen property, the first appellant had in his possession the fountain pen, the wristlet watch, a Robin Hood shirt and eight packets of Star cigarettes, while the third appellant had only the rupee, the sunglasses and the Mercury shirt. The first appellant said in evidence that no one would buy a broken fountain pen like exhibit C, that he did not smoke Star cigarettes and that he had never bought a watch and would not buy one like the watch exhibit E anyway. The third appellant agreed that he would have no use for the rupee or the broken sunglasses. The trial judge said it was clear that such things as the broken sunglasses, the watch and the rupee were the residue of goods which the appellants stole and could not dispose of. While we think that the learned trial judge's inference may well be the true one, we think, thought with some hesitation, that other possibilities have not been sufficiently excluded, particularly in view of the lapse of time. It is, no doubt, probable that the appellants stole the articles, but it is possible that they bought or received bundles of stolen property which included the articles. It is true that these appellants also gave no explanation of their possession of the stolen property and merely falsely denied possession. As we have said, however, a logical approach cannot always be expected from persons of the appellants' status, and we do not think that the absence of explanation is sufficient to negative a reasonable possibility that they might have been receivers. Unlike the case against the second appellant, there is no other evidence connecting them with the raid and the nature of the stolen property does not point so strongly to their being the thieves. As we have stressed, this is a murder charge and a high degree of proof is required. Although we have little criticism to make of the careful and able judgment of the learned trial judge, we think that in all the circumstances it would be unsafe to allow the convictions of these two appellants to stand. Their appeals are accordingly allowed, their convictions and sentences are quashed and it is ordered that they be set at liberty in respect of this charge.

Appeal of the first and third appellants allowed appeal of second appellant dismissed.

For the first and second appellants:
Gurbachan Singh, Mwanza
Bryan O'Donovan, Q.C., and *S. B. Bali-Sharma*

For the third appellant:
Bali-Sharma & Co., Nairobi

For the respondent:
The Attorney-General, Tanganyika
M. G. Konstam (Crown Counsel, Tanganyika)

R v John s/o Njiwa Samweli
[1962]1 EA 552 (HCT)

Division:	High Court of Tanganyika at Arusha
Date of judgment:	26 April 1962
Case Number:	44/1962
Before:	Biron J
Sourced by:	LawAfrica

[1] Criminal law – Robbery – Misdirection – Evidence that accused flung bottle picked up at scene of crime – Finding that whether bottle flung by accused or by companion is immaterial – Common design – Misdirection fatal to conviction.

[2] Criminal law – Practice – Accused charged with robbery – Plea of guilty to theft with denial of violence – Omission by magistrate to explain substance of charge and inform accused of his rights – Accused convicted – Whether irregularity fatal to conviction – Criminal Procedure Code (*Cap.* 20), *s.* 206 (1) (*T.*) – *Criminal Procedure Code* (*Cap.* 27), *s.* 209 (*K.*).

Editor's Summary

The accused was convicted in the magistrate's court at Arusha on four counts involving burglary, robbery and stealing. The accused pleaded guilty unequivocally on three counts but as regards the second count in the charge sheet he pleaded guilty to stealing but denied using violence. It was alleged that when the complainant opened his bedroom door the accused flung a bottle at him. In evidence the accused denied this and further said that he did the breaking alone. The trial magistrate held that it was immaterial whether the accused committed the offence alone or with others, that as the bottle was flung with considerable force in furtherance of the theft, he was guilty of robbery with violence, and in view of the gravity of the charges and the accused's very bad previous record, committed him for sentence by the High Court under s. 5(*a*) of the Criminal Procedure Code. At the trial, the magistrate, despite the equivocal nature of the plea to the second count, did not comply with s. 206 (1) of the Criminal Procedure Code but in view of the complainant's evidence proceeded to convict. At the hearing in revision the substantial points were whether the second count had been proved and whether non-compliance with s. 206 (1) ibid. was fatal to conviction.

Held –

(i) the trial magistrate had seriously misdirected himself when he held that it was immaterial whether the breaking was done by the accused alone or with others as, in the instant case, it was impossible to say, if there were more than one burglar, that such violence was part of a common design, or that the other, who did not throw the bottle, had consented to, or even contemplated such violence.

(ii) section 206 (1) of the Criminal Procedure Code is mandatory and unless complied with, the proceedings could not be termed a trial.

(iii) the accused could not be convicted on the admissions made in his plea once the court rejected such plea as a plea of guilty and dealt with it as a plea of not guilty.

(iv) as the complainant had left Tanganyika on retirement and there was little likelihood of him being available to give evidence, the court would not be justified in ordering a retrial;

Shiv Kumar Sofat v. R., [1957] E.A. 469 (C.A.), applied.

Conviction on the second count quashed. Accused sentenced to five years' imprisonment concurrent on each of the other three counts.

Cases referred to in judgment:

(1) *Meghji Nathoo v. R.* (1946), 13 E.A.C.A. 137.

(2) *R. v. Bakala* (1942), 20 K.L.R. 67.

(3) *Kyesongera s/o Weraga v. R.* (1936), 2 E.A.C.A. 63.

(4) *Pirmin bin Kunjanga v. R.* (1936), 2 E.A.C.A. 64.

(5) *Mgundulwa s/o Jalu and Others v. R.* (1946), 13 E.A.C.A. 169.

(6) *Wachira s/o Wambogo v. R.* (1954), 21 E.A.C.A. 396.

(7) *Shiv Kumar Sofat v. R.*, [1957] E.A. 469 (C.A.).

(8) *Chacha s/o Wamburu v. R.* (1953), 20 E.A.C.A. 339.

Judgment

Biron J: The accused was convicted on four counts; (two combinations) of burglary and robbery, and of burglary and stealing, and he has been committed to this court for sentence under s. 5(*a*) of the Criminal Procedure Code.

When originally charged on February 1, 1962, the accused pleaded not guilty and was remanded in custody until February 3, when the evidence of Mr. Justice Williams, the complainant in the first two charges, was recorded, apparently, because, and I quote from the proceedings:

> "This foregoing evidence has been recorded as Judge Williams is leaving Tanganyika on retirement."

After two further remands in custody, the accused appeared on February 22, when, and I quote from the record of the proceedings:

> "Accused present and now states:
>
> > 'I do not wish the expert witness on fingerprints to be called. I admit that the fingerprints found on a bottle in Judge Williams' house (counts 1 and 2) are mine. I also admit that the fingerprints found on three bottles in Mr. Caldwell's house are mine. As a consequence I now wish to alter my pleas on all four counts to pleas of guilty. I admit that on 24/12/61 I broke into the house of Judge Williams and stole the property stated in count 2. I was alone. I did not throw the bottle.
> >
> > 'In respect of counts 3 and 4, I admit I broke into Mr. Caldwell's house by night as charged in count 3, and I stole the property as charged in count 4.'
>
> "Finding.
>
> "Judgment.
>
> Accused has now unequivocally pleaded guilty on counts 1, 3 and 4.
>
> On count 2 he pleads guilty to stealing but denies using violence. However, there is the clear evidence of P.W. 1 (Judge Williams) that somebody flung a bottle at him when he opened his bedroom door.
>
> Accused has stated that he did the breaking alone, but whether he did it alone or with others is immaterial. Somebody flung a bottle with considerable force at P.W. 1 and this was done in furtherance of the theft.
>
> I find accused guilty on count 2 as charged, and guilty on his own pleas of guilty (sic) on counts 1, 3 and 4 as charged.
>
> "Sentence.
>
> Accused admits the previous convictions recorded in P.F. 18c (exhibit 'B') produced. I note that accused's last sentence was twenty-one years of which he served approximately 10 1/2 years until the Governor granted a remission of the remainder of the sentence.
>
> In view of the gravity of the present charges linked to accused's very bad previous record, I consider the

powers of this court are utterly inadequate to deal with him.

> I commit the accused for sentence by the High Court under s. 5(*a*) of the Criminal Procedure Code as amended by Ord. 24 of 1960."

The accused was thus convicted on counts 1, 3 and 4 on his own pleas, and on count 2, after a purported trial which, however, cannot by any stretch, be regarded as a trial.

Before dealing with the procedural aspect, I think it necessary to refer to the learned magistrate's statement in his judgment, that,

> "Accused has stated that he did the breaking alone, but whether he did it alone or with others is immaterial. Somebody flung a bottle with considerable force at P.W. 1 and this was done in furtherance of the theft. I find accused guilty on count 2 as charged".

Such a very serious misdirection cannot be allowed to pas unnoticed.

If two persons together steal, and one of them employes violence, it will not be robbery in the other unless they were acting in concert, or, at very lowest, unless violence was agreed, or even contemplated. When the violence is committed with a weapon, particularly if such weapon is carried openly by one of the thieves, there would be grounds for holding that violence was, at lowest, contemplated, and therefore agreed to by the other thief as well.

In this instant case, the violence consisted in the throwing of a bottle picked up in the burgled premises. It would therefore be impossible to say, if there were more than one burglar, that such violence was part of a common design, or that the other, who did not throw the bottle, had consented to, or even contemplated such violence.

I now turn to the procedural position.

Section 206 (1) of the Criminal Procedure Code, reads:

> "At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has the right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence if any."

Sub-section (2) is not relevant.

The provisions of this section are mandatory and, unless they are complied with, proceedings cannot be termed a trial.

Learned Crown counsel has referred me to the case of *Meghji Nathoo v. R.* (1), (1946), 13 E.A.C.A. 137, the headnote to which reads:

> "That an omission at the trial to comply with the provisions of s. 209 of the Criminal Procedure Code, is not fatal to conviction, when such omission has not in fact occasioned a failure of justice."

This is a Kenya case and s. 209 corresponds to our s. 206. However, this instant case is easily distinguishable from the Kenya case in that, in that case, although the section was not complied with in the sense that the accused was not specifically informed of his rights, the section was in fact complied with in substance, as the accused gave evidence. There was therefore a proper trial.

The only irregularity was that the charge was not again explained to the accused and he was not informed of his rights. But, as specifically noted in that case, the accused was represented by counsel

who, I think, one may presume,

would know the procedure. Therefore, the omission to address the accused in the terms of the section could not have occasioned any miscarriage of justice, and was really an irregularity in form, but not in substance.

It is not, I think, irrelevant to quote from the judgment in that case:

> "The object of s. 209 (1) is to ensure that the accused shall fully understand the nature of the charge which he has to answer, and that it is open to him to give evidence, etc. The appellant was represented by an experienced advocate who opened his final address by stating that it was a question of fact whether an invoice was given or not. That shows that the nature of the charge was fully appreciated. Since also the appellant gave evidence, it is clear that the omission of the magistrate to explain to him his right to give evidence, did not occasion any prejudice or embarrassment to the appellant in his defence."

It was thus merely an irregularity in form, but not in substance.

In this instant case, there was, in fact, no trial, and that is fatal to the conviction. The case more to the point which was cited in the East African Court of Appeal case above quoted, is that of *R. v. Bakala* (2) (1942), 20 K.L.R. 67, the headnote to which reads:

> "That the omission to comply with the provisions of s. 209 (1) of the Criminal Procedure Code is fatal to a conviction."

In this instant case, as the learned magistrate rejected the accused's plea on the second count as a plea of guilty, and then in a judgment proceed to convict him, he convicted him on such purported trial.

Further, as the court did not accept the accused's plea on the second count as a plea of guilty, his statements in such plea, that he stole the property of Mr. Justice Williams and that he was alone, could not be used against him. This has been laid down and reiterated time and time again. To cite but three authorities: in *Kyesongera s/o Weraga v. R.* (3) (1936), 2 E.A.C.A. 63, it was held and I quote from the headnote:

> ". . . when a plea of 'Not Guilty' is entered it must be taken as a general denial, and the words which are construed as the plea cannot also be construed in derogation of the plea."

and it was stated in the judgment:

> ". . . We are unable to accept the proposition that an inculpatory statement in answer to a charge can be used against an accused person if a plea of not guilty is entered. A plea of not guilty must be taken as a general denial, and the words which are construed as the plea cannot also be construed in derogation of the plea."

In *Pirmin bin Kunjanga v. R.* (4) (1936), 2 E.A.C.A. 64 it was held, and I quote from the headnote:

> "That an inculpatory statement in answer to a charge cannot be used against an accused person if a plea of not guilty is entered."

Again, in *Mgundulwa s/o Jalu and Others v. R.* (5) (1946), 13 E.A.C.A. 169, it was held (quoting from the relevant part of the headnote):

> "That once a plea of not guilty is entered any admission made by an accused in answer to the charge cannot be considered in derogation of that plea."

It is also not out of place to refer to High Court Circular No. 9 of 1957, a practice directive from the then Acting Chief Justice of this Territory, Mahon, J. (as he then was), wherein it is stated:

> "When an answer to a charge does not amount to a plea of guilty it should be entered on the record in two words only 'Not Guilty'.
>
> "If, however, the actual words of the accused are recorded or if a plea of guilty is withdrawn it must be remembered that an inculpatory statement made in the plea cannot thereafter be used as an admission of guilty.
>
> *Omari bin Juma v. R.*, T.L.R.S. 1/52, p. 10."

There is a direction to the same effect in a judgment of the Court of Appeal for Eastern Africa in *Wachira s/o Wamboga v. R.* (6) (1954), 21 E.A.C.A. 396, the headnote to which reads:

> "If the court decides to enter a plea of not guilty, the better course is to record the plea in those words and not to record the prisoner's actual words. It is only when a plea of guilty is entered that there is an obligation to record, as nearly as possible, the words used by the accused person when admitting the truth of the charge."

If the accused's statements are excluded, as they must be, the only evidence against the accused was that of Mr. Justice Williams, who did not identify the accused, as he said he could not recognize the man he saw. And there was, as I have already said, no trial. The conviction on the second count cannot therefore be sustained.

Nor can a conviction for stealing be substituted as, in the light of the authorities above cited, the accused cannot be convicted on the admissions made in his plea once the court rejected such plea as a plea of guilty and dealt with it as a plea of not guilty.

In the exercise of the court's revisional jurisdiction, this conviction on the second count, is accordingly quashed.

This court could order a retrial in respect of the charge as laid in the second count, but it is well established that, to quote the relevant part of the headnote to *Shiv Kumar Sofat v. R.* (7), [1957] E.A. 469 (C.A.)

> "**Held** –
>
> (i) a re-trial should not be ordered unless the appellate court is of opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result".

As recorded in the proceedings above quoted, the complainant, Mr. Justice Williams, has left the Territory on retirement. There is therefore little likelihood of his being available to give evidence, should a retrial be ordered.

In the circumstances, this court would not be justified in ordering a retrial.

Before leaving the question of procedure, I ought to point out that, when in the course of a trial, an accused changes his plea, it is the established practice to recharge him. *Chacha s/o Wamburu v. R.* (8) (1953), 20 E.A.C.A. 339.

I now turn to sentence.

It is more than usually difficult to assess the appropriate sentence in the accused's case. He has already had one sentence which totalled twenty-one years, of which he served a little more than half. But this does not appear to have strengthened his resistance to temptation, to which he attributes his offences. There is nothing to indicate that, whatever sentence the court imposes, it is likely to have any reformative or deterrent effect. But the public must be protected from the accused's depredations, which, oddly enough, in these cases, appear to have been limited to food and drink.

There is, however, one redeeming feature in the accused's record, in that he does not appear to have resorted to violence.

I sentence the accused to imprisonment for five years on each of the three counts, the sentences to run concurrently.

Conviction on the second count quashed. Accused sentenced to five years' imprisonment concurrent on each of the other three counts.

The accused in person.

For the Crown:
The Attorney-General, Tanganyika
T. W. Lane, Crown Counsel (Tanganyika)

Habib Javer Manji and another v Vir Singh
[1962] 1 EA 557 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 July 1962
Case Number:	34/1962
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Edmonds, J.

[1] Practice – Striking out pleading – "Set-off and defence" filed lacking particulars – No particulars sought – Particulars subsequently supplied without application – Application at trial to strike out "set-off and defence" – Whether such application proper – Civil Procedure (*Revised*) *Rules*, 1948, *O. VI, r.* 3, *r.* 17, *r.* 18, *r.* 27, *r.* 29, *r.* 30, *O. VIII, r.* 2, *O. L, r.* 1 (*K.*) *– Rules of the Supreme Court, O. XIX, r.* 7 *and r.* 27, *O. XXV, r.*2 *and r.* 4.

[2] Pleading – Set-off – Unliquidated damages – Failure to perform contract alleged – Whether equitable set-off can be entertained in same action as plaintiff's claim.

Editor's Summary

The respondent sued the appellants for the balance alleged to be due under a building contract. The appellants filed a pleading called "Set-off and defence" to which no objection was taken at the time. There were several adjournments of the hearing at one of which the trial judge intimated to counsel for the appellants that the "set-off and defence" was defective. Subsequently the advocate for the appellants sent to the advocate for the respondent a document giving further and better particulars of the defects in the work done by the respondent. Some nineteen months after the filing of the "set-off and defence", the hearing began and counsel for the appellants then submitted that the defence was not a defence in law,

that the set-off implied an admission of the plaintiff's claim and that the purported particulars could not be looked at. He opposed any application for amendment, applied for the defence to be struck out and asked for judgment. Counsel for the appellant argued that it was competent to file particulars, that the set-off was a good defence, that the respondent had not been taken by surprise and that issues could be framed to cover the matters in dispute, and he asked, if necessary, for leave to amend his defence. The trial judge refused to treat the purported particulars as part of the pleadings, held that the appellants' pleadings were clearly embarrassing and bad, refused to allow an amendment thereof on the grounds of delay and entered judgment for the respondent.

On appeal

Held –

(i) the matters pleaded in the defence, if established, would have constituted an answer or partial answer to the claim, and while the respondent would have been entitled to seek further particulars of the allegations, this was not a ground for striking out the pleading as embarrassing.

(ii) it was not proper for a party, who was entitled to further information from the other side, to sit by and do nothing till the trial and then seek to have the pleading struck out.

(iii) it was incumbent on the respondent, if he considered the defence ought to be struck out as disclosing no reasonable cause of action, to make application promptly by way of motion, or, if he was embarrassed by lack of particulars, to ask for further and better particulars.

(iv) technically, the particulars supplied by the appellants could not be said to form part of the pleadings unless the respondent elected to treat them as such, which he did not, but the respondent was not entitled, simply to refrain from asking for further and better particulars himself, and, when particulars were supplied without request, to shut his eyes to them and then ask court for the appellants' pleadings to be struck out.

(v) in the circumstances, the trial judge acted on a wrong principle in striking out the defence for lack of particulars and in holding that the set-off was embarrassing.

Appeal allowed. Case remitted to the Supreme Court.

Cases referred to in judgment:

(1) *Kemsley v. Foot and Others*, [1951] 2 K.B. 34; [1951] 1 All E.R. 331; [1952] 1 All E.R. 501.

(2) *Shah Hemraj Bharmal v. Santosh Kumari*, [1961] E.A. 679 (C.A.).

(3) *Government of Newfoundland v. Newfoundland Railway Co.* (1888), 13 App. Cas. 199.

(4) *Smith v. Parkes*, 16 Beav. 119.

(5) *Young v. Kitchin* (1878), 3 Ex. D. 127.

(6) *Hanak v. Green*, [1958] 2 Q.B. 9; [1958] 2 All E.R. 141.

(7) *Clarapede & Co. v. Commercial Union Association* (1883), 32 W.R. 262.

The following judgments were read:

Judgment

Sir Alastair Forbes VP: This is an appeal from a judgment (headed "Ruling", by which term I will refer to it in this judgment) and decree of the Supreme Court of Kenya dated March 5, 1962.

The respondent, who was the plaintiff in the suit, is a building contractor carrying on business in Nyeri under the business name of Kenya Highland Builders. He claimed from the appellants jointly and severally Shs. 22,000/-, alleged to be the balance due to the respondent in respect of work done to completion by the respondent under a building contract, together with damages, interest and costs. In reply to the plaint the appellants filed, on July 22, 1960, a "set-off and defence" I will refer to the "set-off and defence" in more detail later; it is sufficient to note here that it is far from being an artistic document.

The pleadings closed with the set-off and defence, and the case was set down for trial on March 1 and 2, 1961. Various adjournments took place, however, and it was not called on till October 30; and then, owing to the heavy rains, it was impossible for the appellants to reach Nairobi. A further adjournment was granted on the application of counsel for the appellants and, though there is no note on the record, it would seem that the learned judge intimated to counsel

for the appellants that he considered the set-off and defence filed was defective. This appears from a passage in his ruling to which I will refer later. The case finally came on for trial on February 27, 1962. Thus rather more than a year and seven months elapsed between the filing of the set-off and defence and the trial of the suit. During this time no application was made by the respondent for further and better particulars of the defence, nor was any application made for the set-off and defence to be struck out. However, on November 6, 1961, presumably as a result of the learned judge's comments on October 30, counsel for the appellants sent to counsel for the respondent, with a copy to the registrar of the Supreme Court, a document which commences as follows:

> "Take Notice that an inspection of the building now having been carried out by an engineer at the hearing of the above case the defendants will contend that in breach of the plaintiff's contract in which the use of proper materials and execution of the work in a proper and workmanlike manner were implied the plaintiff used inferior materials and executed the works negligently and in an unworkmanlike manner and will rely on the following particulars in support of their contention –"

Then follow particulars of alleged defects in the work carried out by the respondent.

At the hearing Mr. Nowrojee, who appeared for the respondent, is recorded as saying in opening:

> "Defence amounts to no defence at all.
>
> Pleadings bad.
>
> Para. 1(*a*) – no such condition in written contract attached plaint.
>
> Paras. 2, 3, 4, and 5 – General statements and allegations without any particular omissions.
>
> Para. 6 – A set-off implies an admission of plaintiff's claim.
>
> Para. 8 – Doesn't say for what period.
>
> "Ultimatum.
>
> Here a set-off, not a counterclaim. Set-off must be a sum accrued – no such sum pleaded.
>
> Defendant has since filed 'particulars'. Cannot be looked at. But see last paragraph – is this pleading or amendment? No leave. What is the document.
>
> Ask that defence be struck out.
>
> O. 8, r. 2.
>
> I would oppose any application for amendment on grounds of laches – defendant made aware by court in October last that defence not considered to be adequate.
>
> I ask for judgment as prayed. Defendant, if he has a set-off, can file a fresh suit."

In reply to this argument Mr. R. N. Khanna, who then appeared for the appellants, argued that it was competent for him to file particulars, that the set-off was a good defence, that the respondent had not been taken by surprise, and that issues could be framed to cover the matters in dispute between the parties; and he asked, if the court was against him, for leave to amend his defence.

The learned judge then delivered his ruling. In this he first considered the sufficiency of the set-off and defence, saying:

> "The plaintiff's claim is on a building contract. The defence is that the work contracted for was not done or completed in the terms of the written contract. No particulars are given, but in para. 3 of the defence it is alleged that the defendants have been prevented by the plaintiff from having the building inspected by an independent architect in order that
>
> > 'the nature and extent of the non-doing, non-completion or defective execution of the said works'

may be ascertained. It is clear, under O. 6, r. 2, that the nature of the defence is one which makes it incumbent upon the defendants to give particulars in their pleading in order that the plaintiff may not be embarrassed and may be put on his guard as to the case which he has to meet. As the defendants' pleading stands the plaintiff has no idea what case or complaint he has to meet, and is unable to prepare his evidence. There is a document on the case record dated November 6, 1961, and thus filed some three and a half months after the defence, in which the defendants purport to set out the particulars on which they rely. But I do not intend to look at that document as part of the pleadings. No application has been made to admit it, either under O. 6, r. 3, or under O. 6, r.18. Indeed it should not be on the file.

> "There is a further embarrassing feature in the statement of defence. Under para. 6 thereof, the defendants allege a set-off. Now a set-off implies the admission of the plaintiff's claim but sets up a cross-claim. The pleading of a set-off by the defendants thus contradicts their other pleading by which they deny on the ground that the plaintiff has failed to carry out the terms of the building contract, that anything is owing by them to the plaintiff under the contract.
>
> "The defendants' pleading is clearly embarrassing and bad."

The learned judge then considered the appellants' application to be allowed to amend. He said:

> "The defendants now ask that they be allowed to amend their pleading. This is opposed by the plaintiff on the ground of delay, and it is pointed out that the defendants will not be shut out in their claim against the plaintiff if an order is made under O. 8, r. 2. Had an application been made for the amendment of the defence at an earlier date, I have no doubt that I would have been disposed to grant it. But, the defendants had full warning on October 30, 1961, of the view which the court took of their pleading. There is no note on the record of what I said when the case was then called on for hearing, but it is conceded by counsel that I did point out that the defence was embarrassing in the absence of any particulars and, consequently, appeared not to disclose a good defence. I made no ruling then in the matter, but a clear indication of my views was given to the defendants. No step, however, has been taken to amend the defence – other than the filing of the document containing particulars to which I have already referred and which, in my view, cannot be looked at as part of the pleadings.
>
> "In all the circumstances, therefore, I do not think it would be proper to allow an amendment at this stage."

The learned judge continued:

> "However, the defendants would appear to allege they have a claim against the plaintiff and I do not think they should be shut out from their remedy. I accordingly order that that part of their defence which is embarrassing for want of particulars be struck out; and in respect of their

> counterclaim I am of the opinion that it cannot now conveniently be disposed of and I refuse leave to the defendants to avail themselves of it in this suit."

And the learned judge concluded:

> "Judgment is, accordingly, entered for the plaintiff as prayed in the plaint. The defendants will, of course, be at liberty to file a suit on their claim against the plaintiff."

With great respect to the learned judge, I find myself in disagreement with practically the whole of his ruling. In the first place it is far from clear what part of the defence he did order to be struck out. In the first paragraph of his ruling set out above he apparently holds that the defence is embarrassing for want of adequate particulars; in the second paragraph he holds that the set-off is embarrassing because it contradicts the defence that the respondent failed to carry out the terms of the building contract; while his order is

> "that that part of their defence which is embarrassing for want of particulars be struck out",

and that leave to the appellants to avail themselves of their "counterclaim" be refused. Presumably this order disposed of the set-off, but, if any part of the defence remained, it is difficult to see how judgment could be entered for the respondent forthwith, as was done by the learned judge.

The more important matter, however, is whether the learned judge was right in ordering any part of the appellants' pleading to be struck out. I do not propose to set out the whole of the set-off and defence. It is, as I have said, not an artistic document and is, indeed, sadly lacking in particulars. It was, however, pleaded:

(*a*) in para. 3, that the works were not done or completed;

(*b*) in para. 4, that the works were not completed by the contract date for completion;

(*c*) in para. 5, that alterations and omissions were made;

and it was alleged that access to the premises to ascertain the nature and extent of the non-doing, non-completion, or defective execution had been refused by the respondent. The set-off relied on was damages and expenses alleged to arise from the facts pleaded in the defence.

So far as the defence is concerned, the matters pleaded, if established, would in my view constitute an answer or partial answer to the claim; but I agree that the respondent would be entitled to seek further particulars of the allegations. This, however, in my view, is not a ground for striking out the pleading as embarrassing. The authority for striking out a pleading as embarrassing is r. 17 of O.VI of the Civil Procedure (Revised) Rules, 1948 (hereinafter referred to as "the Kenya Rules"). That rule is in pari materia with r. 27 of O. XIX of the English Rules of the Supreme Court (hereinafter referred to as "the English Rules"). In the commentary on the latter rule in The Annual Practice, 1962, at p. 485, it is stated:

> "Where a pleading is too general in its terms, and thus deprives the opponent of information to which he is entitled, and without which he cannot properly prepare for trial, he should apply for particulars under O. 19, r. 7."

Rule 7 of Order XIX of the English Rules is in the same terms as r. 3 of O. VI of the Kenya Rules. At p. 487 of The Annual Practice, 1962, it is noted:

> "Where a pleading is defective only in not containing particulars to which the other side is entitled, application should be made for 'a further and better statement of the nature of the claim or defence' under r. 7, and not for an order to strike out the pleading under this Rule. Striking out is employed only in plain and obvious cases."

The authority for this statement is *Kemsley v. Foot and Others* (1), [1951] 2 K.B. 34 where, at p. 39 Somervell, L.J., said, in reference to O. XIX, r. 27 and O. XXV, r.4, of the English Rules:

> "The effect of the cases is accurately summarized in the Annual Practice, and I think applies to both rules. They should be applied only in plain and obvious cases, and if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 25, r. 2."

The Kenya rule which corresponds with O.XXV, r. 2, of the English Rules is r. 27 of O. VI. It is to be noted that the respondent here raised no such point of law in his pleadings, nor did he at any stage apply for further and better particulars. Mr. Nowrojee in fact informed us that, as I understood him, he was not embarrassed by lack of particulars, and had not complained of the lack of particulars, but had contended that the defence disclosed no reasonable cause of action and should for that reason be struck out. The relevant rule here is r. 29 of O. VI of the Kenya Rules, which corresponds to O.XXV, r. 4, of the English Rules. That rule requires an application to the court which, by virtue of O. L, r. 1 and O. VI, r. 30, should be by way of motion. No such application was made.

In *Shah Hemraj Bharmal v. Santosh Kumari* (2), [1961] E.A. 679 (C.A.), in the course of my judgment, with which the other members of the court agreed, I said (at p. 687):

> "I will therefore not express an opinion on the adequacy of para. 7 of the defence, but would merely note (*a*) that the paragraph does contain some particulars of the undue influence alleged; and (*b*) that if the appellants regarded the particulars given as inadequate and thus embarrassing to them, they should have requested further and better particulars, and if these were not supplied to their satisfaction, have applied under O. VI, r. 3 of the Civil Procedure (Revised) Rules, 1948, instead of waiting till the trial and then applying to have the defence struck out."

I would adopt that passage in reference to the instant case. It is not proper for a party, who is entitled to further information from the other side, to sit by and do nothing till the trial and then seek to have the pleading struck out. Even if he is entitled to have a pleading struck out, the application should always be made promptly (Annual Practice, 1962, p. 485). Here, it is true the learned judge apparently commented adversely on the set-off and defence on October 30, 1961, and this may have led counsel for the respondent to think no application on his part was needed, but even at that stage well over a year had elapsed since the set-off and defence had been filed. In my opinion it was incumbent on the respondent, if he considered the defence ought to be struck out as disclosing no reasonable cause of action, to make application promptly by way of motion. Or, if he was embarrassed by lack of particulars, to request the appellants to supply further and better particulars, and if not satisfied with the response to this request, to make application under O. VI, r. 3 of the Kenya Rules. In the instant case, apparently, as I have said, as a result of the learned judge's comments, the appellants attempted to supply particulars though these had not been requested by the respondent. Technically, I do not think these particulars could be said to form part of the pleadings unless the respondent had elected

to treat them as such; which he did not. But I do not think the respondent is entitled, not merely to refrain from asking for further and better particulars himself, but, when particulars are supplied without request, to shut his eyes to them and then come into court asking for the appellants' pleadings to be struck out. The respondent had failed to take the steps which he ought to have taken if he found himself embarrassed, and I think, with respect, that in the circumstances the learned judge acted on a wrong principle in striking out the defence (or such part of it as he did strike out) for lack of particulars at that stage in the proceedings.

The next point is the matter of the set-off. The learned judge held this was embarrassing because

> "a set-off implies the admission of the plaintiff's claim but sets up a cross-claim. The pleading of a set-off by the defendants thus contradicts their other pleading".

With respect, however, that is not the position in the circumstances of this case. In *Government of Newfoundland v. Newfoundland Railway Co.* (3) (1888), 13 App. Cas. 199 at p. 213, Lord Hobhouse, delivering the judgment of the Privy Council, referred to the decision in *Smith v. Parkes* (4), 16 Beav. 119, and said:

> "That was a case of equitable set-off, and was decided in 1852, when unliquidated damages could not by law be the subject of set-off. That law was not found conducive to justice, and has been altered. Unliquidated damages may now be set-off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment."

Here, of course, there is no question of assignment. A situation very similar to the instant one was considered in *Young v. Kitchin* (5) (1878), 3 Ex. D. 127. The decision in that case was considered and applied in *Hanak v. Green* (6),[1958] 2 Q.B. 9, and I set out the passage in the judgment of Morris, L.J., in the latter case (at p. 19) in which he referred to *Young v. Kitchin* (5):

> "In *Young v. Kitchin* a firm of builders, Downs & Co., erected certain buildings for the defendant, who then entered into possession of them. At that time a sum of money was due from the defendant to Downs & Co. in respect of the contract. Downs & Co. then assigned such sum to the plaintiff, who sued the defendant for it. But the defendant pleaded that Downs & Co. had been late in erecting the buildings, whereby he had suffered loss, and he also said that Downs & Co. had done defective work, and that the contract had provided that defects were either to be remedied or allowed for. The plaintiff demurred to the plea that Downs & Co. had not completed the buildings by the contract dates: he so demurred on the ground that the plaintiff as assignee of Downs & Co. could not be held liable for breaches of contract by Downs & Co., and that such breaches constituted no answer to the plaintiff's claim. Cleasby, B., said:
>
> > 'In substance I think the defendant is entitled to the benefit of this defence in reduction of the plaintiff's claim. The Judicature Act, 1873, s. 25(6)(i) says that the assignment of a debt or other legal choice in action shall be "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed", that is, subject to all equities which would be enforced in a court of equity. I think this is a case where in equity, the whole matter might be dealt with and the plaintiff's claim settled, after deducting all that ought to be deducted in respect of the failure to complete and deliver the buildings.'

> Cleasby, B., pointed out that the defendant could not recover anything from the plaintiff but was entitled 'by way of set-off or deduction from the plaintiff's claim, to the damages which he had sustained by the non-performance of the contract on the part of the plaintiff's assignor'. Cleasby, B., further put the position as follows: 'He only meets the plaintiff's claim by a counterclaim of damages arising out of the same contract'."

A fortiori, where the action is between the client and the contractor, the client is entitled to set-off against the contractor's claim damages which he has sustained by non-performance of the contract. In *Hanak v. Green* (6), it was held that since the passing of the Judicature Act reliance might be placed in any court on any equitable set-off that formerly could only have been asserted in a court of equity; and that there might be (i) a set-off of mutual debts, (ii) in certain cases a setting-up of matters of complaint which, if established, reduced or even extinguished the claim, and (iii) reliance on equitable set-off and reliance as a matter of defence upon matters of equity which formerly might have called for injunction or protection. The respective claims in *Hanak v. Green* (6), were a claim by the plaintiff under a building contract for £266 for breach of contract for failing to complete or complete properly certain items of work; and a counterclaim or claim for a set-off (1) on a quantum meruit in respect of extra work done outside the contract, (2) on the ground that loss was caused by the plaintiff's refusal to admit the defendant's workman, and (3) for trespass to the defendant's tools. It was held that a court of equity would have held that neither of those claims ought to be insisted upon without the other being taken into account, and that the defendant had an equitable set-off which defeated the plaintiff's claim. In my opinion the position in the instant case is similar. It appears to me that the respondent's claim ought not, in equity, to be insisted upon without the appellants' claims being taken into account; that the appellants' claims, if established, will constitute an equitable set-off to the respondent's claim; and that both claims should be entertained in the same action. I think, therefore, that the learned judge was also wrong in principle in holding that the set-off was embarrassing.

What I have said really concludes the matter; but I would add, with regard to the learned judge's refusal to allow amendment of the defence, that, assuming amendment to be necessary, I can see no good reason for his refusing leave, subject, of course, to such terms as to costs as might be considered appropriate. As was said by Brett, M.R., in *Clarapede & Co. v. Commercial Union Association* (7) (1883), 32 W.R. 262 cited in Odgers on Pleading and Practice (17th Edn.), at p.170:

> "However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but if the amendment will put them into such a position that they must be injured, it ought not to be made."

Here, as it seems to me, the respondent could have been compensated by costs.

For the reasons I have given I think the decision of the Supreme Court was wrong, and the decree ought to be set aside. I would allow the appeal with costs, set aside the decree of March 5, 1962, and remit the matter to the Supreme Court. I would further order that if the respondent requires particulars of the set-off and defence he be at liberty to treat the particulars already supplied as part of the pleadings, and to apply, if he be so advised, under O. VI, r. 3, of the Kenya Rules for any additional particulars he may consider necessary. Similarly I would order that the appellants be at liberty, if they be so advised, to apply under O. VI, r. 18, for leave to amend their pleadings. And I would order that

the costs of the proceedings in the Supreme Court, including the costs of the abortive hearing, be in the discretion of the judge upon the trial of the suit.

Sir Ronald Sinclair P: I agree and have nothing to add. There will be orders in the terms proposed by the learned Vice-President.

Crawshaw JA: I also agree.

Appeal allowed. Case remitted to the Supreme Court.

For the appellants:
Khanna & Co., Nairobi
D. N. Khanna

For the respondent
E. P. Nowrojee, Nairobi

Popat Bros Ltd v The Commissioner of Customs and Excise
[1962] 1 EA 565 (CAE)

Division:	Court of Appeal for Eastern Africa at Nairobi
Date of judgment:	9 July 1962
Case Number:	108/1960
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Sir Trevor Gould JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Bennett, J.

[1] Customs – Import duty – Date when duty to be calculated – Arrival of rice in Kenya for transit to Uganda – Goods then subject to suspended duty in Uganda – Order made before goods enter Uganda imposing duty – Whether duty payable on goods entering Uganda – Material date for calculation of duty in territory of ultimate destination – East African Customs Management Act, 1952, *s.* 2, *s.* 16, *s.* 29, *s.* 82, *s.* 97 *and s.* 104 (1) – *East Africa*(*High Commission*) *Order-in-Council*, 1947, *Third Schedule*, *s.* 28, *Item* 3 – *Interpretation Act* (*Cap.* 1), *s.* 2 – *East African Customs Regulations*, 1954, *reg.* 42 – *Customs Tariff Ordinance*, 1958, *s.* 1 *and s.* 3 (*U.*) – *Interpretation and General Clauses Ordinance* (*Cap.* 1), *s.* 2(*U.*) – *Eastern African Court of Appeal Rules*, 1954, *r.* 65.

Editor's Summary

On April 19, 1959, when the appellant company imported rice into Kenya for subsequent transit to

Uganda, rice was liable in Uganda to a suspended customs duty but since no order had been made by the Governor in Council under s. 4 of the Customs Tariff Ordinance imposing the duty, no duty was in fact chargeable on that date on rice imported into Uganda. In Kenya, however, rice was liable to a duty of Shs. 10/- per 100 Ibs. The Customs at Mombasa permitted the rice to enter Kenya duty free subject to a bond conditioned for railing the rice from Kilindini harbour direct to Uganda within thirty days. The rice was railed in several consignments and entered Uganda between May 1 and May 20, 1959. On April 29, 1959, an order was made with effect from April 30, imposing an import duty of Shs. 10/- per 100 Ibs. on rice imported into Uganda. The respondent then demanded duty which the appellant company refused to pay claiming that duty was not payable. The respondent sued for the duty and the High Court held that duty was payable by virtue of the proviso to s. 104 (1) of the East African Customs Management Act, 1952, on the basis that as there was no definition of the word “import” in the Act, the proviso could be applied to the goods as being imported overland into Uganda. On appeal it was conceded

that this interpretation of s. 104 (1) ibid. was untenable, but counsel for the respondent sought to support the judgment of the High Court on the ground that in law liability to pay customs duty arose from the Customs Tariff Ordinance, 1958, of Uganda, that the Ordinance referred specifically to importation into Uganda and not to importation into East Africa, and that if duty is exigible under a territorial ordinance which has not elsewhere been paid, it becomes payable on the day of importation in the territory.

Held –

(i) under the Tariff Ordinance itself, duty on the rice in respect of importation into Uganda fell to be calculated as at April 19, 1959, when the rice arrived "within the territories" and when the necessary entry was made in accordance with reg. 42 of the East African Customs Regulations; at that date no duty was payable in respect of rice imported into Uganda.

(ii) in the circumstances the provisions of s. 97(2)(*b*) of the East African Customs Management Act, 1952, relating to transfer between territories in which different rates of duty were in force, were not applicable.

Appeal allowed. Respondent's claim dismissed.

The following judgments were read:

Judgment

Sir Alastair Forbes VP: This is an appeal from a judgment and decree of the High Court of Uganda whereby the appellant company (the original defendant) was ordered to pay to the respondent a sum of Shs. 22,024/- in respect of customs duty on 999 bags of rice weighing 220,240 Ibs. brought into Uganda, together with interest and costs of the suit.

I take the following statement of the facts, which are not in dispute, from the judgment of the learned trial judge:

> "On April 19, 1959, the defendants, through their agents at Mombasa, imported into Kenya – at the Port of Kilindini – 999 bags of rice for subsequent transit to Uganda. On April 19, rice was liable in Uganda to payment of a suspended customs duty of Shs. 18/- per 100 Ibs., by virtue of s. 3 and item 8 in the Schedule to the Customs Tariff Ordinance, 1958. Since no order had been made by the Governor in Council under s. 4 of the Ordinance imposing the duty, no duty was in fact chargeable on rice imported in Uganda on that date. In Kenya, On the other hand, rice was liable to a duty of Shs. 10/- per 100 Ibs. The customs authorities at Mombasa permitted the rice to enter Kenya duty free subject to the defendants entering into a bond conditioned for the railing of the rice directly form Kilindini harbour to Kampala or Jinja within thirty days. The rice was subsequently railed to Uganda in several consignments, and entered Uganda on various dates between May 1 and May 20, 1959. In the meantime, on April 29, 1959, an order was made under s. 4 of the Customs Tariff Ordinance, 1958, of Uganda, imposing an import duty of Shs. 10/- per 100 Ibs. on rice imported into Uganda. This order had effect as from April 30, 1959. Since the order came into force before the rice was imported into Uganda, the plaintiff demanded customs duty from the defendants at the rate of Shs. 10/- per 100 Ibs.; but that demand has not been satisfied, since the defendants claim that the rice is not exigible to duty."

The management and administration of customs in East Africa at the material time was regulated by the East African Customs Management Act, 1952 (No. 12

of 1952) (hereinafter referred to as "the Act") enacted by the East African High Commission in exercise of the powers conferred by s. 28 and the Third Schedule of the East Africa (High Commission) Order-in-Council, 1947 (hereinafter referred to as "the Order-in-Council"). Paragraph (*a*) of sub-s. (1) of s. 28 of the Order-in-Council provides:

"28(1). Subject to the provisions of this order it shall be lawful for the High Commission –

(*a*) with the advice and consent of the Assembly, to make laws for the peace, order and good government of the Territories, in respect of the matters specified in the Third Schedule to this order;"

Sub-section (3) of s. 28 makes provision with respect to repugnancy between territorial laws and laws made under para. 28(1)(*a*), but in the view I take it is not necessary to refer to it.

Item 3 of the Third Schedule to the Order-in-Council, so far as material, reads:

"3. Customs and Excise – administration and general provisions (but not including tariff rates) . . ."

The principal provisions of the Act which are relevant to this appeal are:

(*a*) the definition of "import" in s. 2:

" 'import' with its grammatical variations and cognate expressions means to bring or cause to be brought into the Territories";

It may be mentioned that "the Territories" is defined in s. 2 of the Interpretation Act (Cap. 1) as

"the Colony and Protectorate of Kenya, the Trust Territory of Tanganyika, and the Protectorate of Uganda";

(*b*) paragraph (*a*) and para. (*b*) of sub-s. (2) of s. 2:

"(2) For the purposes of this Act:

(*a*) goods shall be deemed to be entered when the entry, made and signed by the owner in the prescribed manner, is accepted and signed by the proper officer at the port of importation, warehousing, or exportation, as the case may be, and when any duty due or deposit required under this Act in respect of the goods has been paid, or security has been given for the compliance with the provisions of this Act;

(*b*) the time of importation of any goods shall be deemed to be the time at which such goods come within the boundaries of the Territories;"

(*c*) The following provisions of s. 97:

"97(1) Subject to the provisions of the Customs laws, duty shall be paid on the goods and at the rates and in the circumstances specified in the appropriate Territorial Ordinance.

"(2) Where under the provisions of the appropriate Territorial Ordinance goods are liable:

.

(b) on entering a Territory, to a rate of duty different from that to which such goods were liable on their importation into the Territories, then, where such goods so enter that Territory on transfer from another Territory, the amount of such difference shall be collected or refunded, as the case may be, in such manner as may be prescribed

and the provisions of this Act shall apply as if such goods on so entering that Territory were imported;"

and

(*d*) sub-section (1) of s. 104:

"104 (1) Subject to the provisions of s. 82, and of sub-s. (3) of this section, import duty shall be paid at the rate in force at the time when the goods liable to such duty are entered for home consumption;

"Provided that, in the case of goods imported overland, the time of entry of such goods for home consumption shall be deemed to be the time when the import duty thereon is paid."

Section 82 and sub-s. (3) of s. 104 are not relevant to the appeal. There are certain other provisions of the Act to which I will refer, but it is unnecessary to set them out in full.

The imposition of customs duties on goods imported into Uganda, including the duty which is claimed to be payable in this case, is effected by and under the Uganda Customs Tariff Ordinance, 1958 (No. 26 of 1958) (hereinafter referred to as "the Tariff Ordinance"). Section 1 of the Tariff Ordinance provides, inter alia, that the Ordinance "shall be read and construed together with" the Act. Sub-section (1) of s. 3 of the Tariff Ordinance (omitting the proviso) reads:

"3.(1) There shall be charged in respect of the goods specified in the second column of the Schedule hereto which are imported into the Protectorate import duties and suspended duties at the rates specified in the third and fourth columns of such Schedule; and such import duties and suspended duties shall be levied, collected and paid in accordance with the provisions of the Act."

The learned trial judge based his decision that duty was payable on the proviso to sub-s. (1) of s. 104 of the Act, on the assumption that there was no definition of "import" in the Act, and that the proviso could be applied to the goods as being imported overland into Uganda. With respect, the definition of "import" which is set out above, and which the learned judge overlooked, makes this interpretation of the proviso to s. 104 (1) of the Act untenable, and Mr. Hooton, who appeared for the respondent, did not attempt to support it. Instead, he sought leave at the hearing to support the decision of the High Court on grounds other than those relied on by the learned trial judge. Although no notice of his intention to do so had been served in accordance with r. 65 of the Eastern African Court of Appeal Rules, 1954, Mr. Bechgaard, who appeared for the appellant company, did not oppose the application, and leave was therefore granted. The argument on the appeal accordingly related to the ground on which Mr. Hooton sought to support the decision of the High Court, and not to the grounds set out in the memorandum of appeal, Mr. Bechgaard not pressing ground 2 of the memorandum, which related to another part of the learned judge's judgment. Mr. Hooton also abandoned a preliminary objection, of which notice had been given, relating to the time of service of the record on the respondent.

The ground on which Mr. Hooton sought to support the decision of the High Court was: that in law liability to pay customs duty, as distinct from a procedural direction to pay, arises from the territorial Customs Tariff Ordinances; that these Ordinances, including the Uganda Tariff Ordinance, refer specifically to importation into the relevant Territory and not to importation into East Africa; and that if duty is exigible under a territorial Ordinance and it has not elsewhere been paid, it becomes payable on the day of importation into the Territory.

I accept that there can be no liability to pay customs duty unless such duty is imposed by a territorial legislature. That is clearly the scheme contemplated by the Order-in-Council. And I accept that liability to pay a duty so imposed can only arise in respect of the importation of goods into the particular Territory which has imposed the duty. The crucial matter, however, is the time at which such duty falls to be calculated. Mr. Hooton contended that the provisions of the Act were directory only, and that if duty had not previously been paid it became payable on entry into the particular Territory. Without going into the question whether the provisions of the Act considered alone should be regarded as merely directory, which I doubt, I think, with respect, that Mr. Hooton's contention ignores the express provisions of the Tariff Ordinance itself. I agree that s. 3 (1) of the Tariff Ordinance imposes the duty which is payable on goods imported into Uganda. But that sub-section expressly provides that

> "such import duties and suspended duties shall be levied, collected and paid in accordance with the provisions of the Act";

and (ignoring for the present the provisions of s. 97 (2) of the Act) s. 104 (1) of the Act provides in terms that

> "duty shall be paid at the rate in force when the goods liable to such duty are entered for home consumption".

By virtue of the provisions of s. 3 (1) of the Tariff Ordinance therefore, the material time for calculation of duty payable under that Ordinance is the time of entry for home consumption.

I digress here to mention that Mr. Bechgaard founded an argument on the use of the word "import" in the Tariff Ordinance. He argued that "import" as defined in the Act meant importation into the Territories; that the Act only referred to "transfer" as between Territories; that "import" in the Tariff Ordinance could not mean something different from "import" in the Act; and that therefore "import" in the Tariff Oridnance must mean "import into East Africa". With respect, I do not think there is any substance in this argument. Apart from the plain terms of s. 3 (1) of the Tariff Ordinance, the Uganda Interpretation and General Clauses Ordinance (Cap. 1) in s. 2 defines an import as an import into Uganda, and this definition, not the definition in the Act, governs the Tariff Ordinance. In any case in the Act itself the word "import" is used in the sense of importation in a Territory as opposed to importation into the Territories – see s. 16 (2).

It is clear from the provisions of sub-s. (2) of s. 2 of the Act set out above, read with s. 29 of the Act, that entry for "home consumption" is made when goods arrive within the Territories, twenty-one days being allowed for the making of such entry by reg. 42 of the East African Customs Regulations, 1954. Such entry in respect of the rice, the subject of this case, was made on April 19, 1959. In the absence of any other provision in the Act I would have no doubt that, by virtue of the terms of the Tariff Ordinance itself, duty on the rice in respect of importation into Uganda fell to be calculated as at that date, April 19, 1959; and at that date no duty was payable in respect of rice imported into Uganda. It follows further from what I have said that in my view, by virtue of the provisions of s. 3 (1) of the Tariff Ordinance, if duty on importation into Uganda is to be calculated as at some date other than the date of entry for home consumption, it must be by reason of some provision in the Act itself.

The only provision of that nature in the Act is s. 97(2)(*b*), which I have set out above. That provision clearly is designed to recognise the territorial nature of customs duties and provides for the adjustment of the amount of duty paid in respect of goods upon the movement of such goods from one Territory to another.

If that provisions does not extend to cover the instant case, then in my view the provisions of s. 104 apply, and duty must be calculated as at the time of "entry".

Mr. Hooton stated at the commencement of the hearing that he did not contend that the judgment of the High Court should be affirmed on the basis that s. 97(2)(*b*) applied, so initially little argument was addressed to the court on the effect of that section. Subsequently, however, in response to a request from the court, counsel addressed the court further as to the effect of the section. Mr. Hooton then amplified his earlier concession and stated that he could not seek to rely on s. 97(2)(*b*) since the rice was liable on arrival at Mombasa to the Kenya duty of Shs. 10/- per 100 lbs.; that this duty could, and perhaps should, have been exacted; but that the fact that the duty was not in fact exacted upon deposit of a bond for the transfer of the rice to Uganda, did not alter the fact that the rice was liable to that rate of duty on importation into the Territories; and that he could not therefore contend that the goods were liable to a different rate of duty within the meaning of s. 97(2)(*b*) upon importation into Uganda, the Uganda rate then being the same as the Kenya rate.

I think this view of the effect of s. 97(2)(*b*) must be the correct one. It is to be noted that the bond taken for the transport of the rice to Uganda was for the amount of duty which would be payable if the rice remained in Kenya. Therefore, notwithstanding the heading "Import Free Entry" on the customs form passed in respect of the rice, I think there was a notional assessment of Kenya duty; and in any case, as Mr. Hooton said, the rice was in law liable to the Kenya duty at Shs. 10/- per 100 lbs. on arrival in East Africa. This was the rate of duty applicable in Uganda upon arrival of the goods there, and so there was no difference in the respective rates of duty which would bring section 97(2)(*b*) into operation. It follows that the material time for calculation of the Uganda duty remains the time of entry for home consumption; and at that time no duty was payable in respect of importation into Uganda.

For the reasons I have given I would allow the appeal with costs, set aside the decree of the High Court and substitute a decree that the plaintiff's claim be dismissed with costs.

Sir Ronald Sinclair P: I agree and have nothing to add. There will be an order as proposed by the learned Vice-President.

Sir Trevor Gould JA: I also agree.

Appeal allowed. Respondent's claim dismissed.

For the appellant:
Russell & Co., Kampala
K. Bechgaard, Q.C. and *R. E. G. Russell*

For the respondent:
The Legal Secretary, E.A. Common Services Organization
J. C. Hooton, Q.C. and *M. G. Muli* (Legal Secretary and Assistant Legal Secretary, E.A. Common Services Organisation)

Ali Abdul Kader Salehbhai Assabwalla v Khadija Bint Gafoor and Others
[1962] 1 EA 571 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	12 July 1962
Case Number:	85/1961
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Sir Trevor Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden – Light, J.

[1] Trade Mark – Use of own name by trader – Trade mark registered – Use of own name by trader's son – Name not registered – Similarity of trade marks – Bona fide use – Whether use of own name by son constitutes infringement – Meaning of "bona fide" – Trade Marks (*United Kingdom*) *Registration Ordinance* (*Cap.* 151), *s.* 6 (*A.*) – *Trade Marks Act*, 1938, *s.* 4 *and s.* 8 – *Trade Marks Act*, 1905, *s.* 44 – *Jamaican Trade Marks Law, s.* 44

Editor's Summary

The father of the appellant was the registered proprietor of a trade mark consisting of the word "Assabwalla" in Arabic, which was also his surname, below which he used his initials "A.K.S.A." in English. The word "Assabwalla" was used in respect of a brand of tea in which the father traded. The appellant, who had set up his own tea business also used on one side of his packing cases the words in Arabic "Imported by Ali A.K. Assabwalla" and below that used the same words in English. On the other side of the packing cases appeared the initials in English "A.A.K.A." and below these initials the word "Aden" in English. The father of the appellant sued the appellant for and obtained an injunction restraining the appellant from infringing his trade mark. At the hearing it was common ground that "Ali A.K. Assabwalla" was the true name of the appellant and that the letters "A.A.K.A." were his initials and that the tea of the plaintiff had come to be known by the public as "Assabwalla" tea. The trial judge, reluctantly following Farwell, J., in *C. & T. Harris* (*Calne*) *Ltd. v. Harris*, [1934] 51 R.P.C. 98, held that even though the appellant might have used his name innocently and in good faith, he would nevertheless infringe the plaintiff's trade mark, if in fact the use of his own name led to purchasers being misled. After the appellant had given notice of appeal his father assigned the trade mark to the tenth and eleventh respondents and later died and his heirs and the assignees were duly made respondents to the appeal. At the hearing of the appeal, it was contended for the appellant that the alleged offending mark was merely his own name with initials, that it was used bona fide within s. 8(*a*) of the Trade Marks Act, 1938, which applied in Aden, and that it was used not as a trade mark but as a descriptive mark.

Held –

(i) the bona fide user by a man of his own name was protected by s. 8(*a*) ibid. "whether he traded under that name or whether he used it as a trade mark in respect of his goods".

(ii) a person will not lose the protection of s. 8 ibid. merely because confusion may result from the use by that person of his own name; the term "bona fide" imported intent and if the name is honestly used in the belief that confusion will not arise and without the intention of wrongfully diverting business, the use was "bona fide" within the meaning of the section.

(iii) the trial judge's findings that the appellant acted honestly in the use of his own name disposed of the question of intent and therefore, he was entitled to the protection afforded by s. 8(*a*).

Appeal allowed.

Cases referred to in judgment:

(1) *C. & T. Harris* (*Calne*) *Ltd. v. Harris*, [1934] 51 R.P.C. 98.

(2) *Watt* (*or Thomas*) *v. Thomas*, [1947] R.P.C. 491; [1947] 1 All E.R. 582.

(3) *De Cordova and Others v. Vick Chemical Co*., [1951] 68 R.P.C. 103.

(4) *Baume & Co. Ltd. v. Moore* (*A.H.*) *Ltd*., [1958] R.P.C. 226; [1957] R.P.C. 459; [1958] 2 All E.R. 113.

(5) *Adrema Ltd. v. Adrema-Werke G.m.b.H., B.E.M. Business Efficiency Machines and Others*, [1958] R.P.C. 323.

(6) *George Ballantine & Sons Ltd. v. Ballantyne Stewart & Co. Ltd*., [1959] R.P.C. 47.

The following judgments were read:

Judgment

Sir Alastair Forbes VP: This is an appeal from a judgment and decree of the Supreme Court of Aden. The suit from which the appeal arises was brought against the appellant by the appellant's father, Abdul Kader Salehbhai Assabwalla (hereinafter referred to as "the plaintiff") in connection with a trade mark in respect of tea of which the plaintiff was the registered proprietor. The plaintiff prayed that the court would:

"(*a*) grant a perpetual injuction restraining the defendant by himself, his servants or agent from:

(i) infringing the plaintiff's said trade mark,

(ii) passing off or causing to pass off or to be passed off defendant's tea as plaintiff's tea,

(iii) importing, advertising, selling, offering for sale or dealing in tea under any mark, words or letters in any manner likely to lead to the belief that the defendant's tea is the plaintiff's tea or in any way connected with the plaintiff;

"(*b*) decree that the defendant shall deliver up, eradicate or destroy upon oath all marks, words, letters, advertisements or other materials in possession or power or under control of the defendant the use of which would be a breach of either of the foregoing injunctions;

"(*c*) direct that an inquiry be made as to damages or at plaintiff's option an account of profits;

"(*d*) decree that the defendant will pay the costs of the plaintiff."

In the event it was decreed:

"1. That the defendant is hereby prohibited and restrained by a perpetual injunction by himself, his servants or agent from infringing the plaintiff's said trade mark, passing off or causing to pass off or to be passed off defendant's teas as plaintiff's tea, importing, advertising, selling, offering for sale or dealing in tea under any mark, words or letters in any manner likely to lead to the belief that the defendant's tea is the plaintiff's tea or in any way connected with the plaintiff.

"2. That the defendant shall deliver up, eradicate or destroy upon oath all marks, words, letters, advertisements or other materials in possession or power or under the control of the defendant the use of which would be a breach of either of the foregoing injunctions.

"3. That the defendant do pay to the plaintiff the sum of Shs. 40/- (shillings forty) only being nominal

damages.

> "4. That the defendant do pay to the plaintiff the sum of Shs. 215/50 cts. (shillings two hundred and fifteen and cents fifty) only being the costs of this suit."

The appellant is appealing against this decision. Subsequent to the filing of the notice of appeal the plaintiff assigned all his rights, title and interest in the suit trade mark to Ismail Noormohamed Haji Essa and Omer Abdul Gafoor (hereinafter referred to as "the assignees"), being respondents No. 10 and No. 11 to this appeal. Thereafter the plaintiff died, leaving as his heirs the persons named as respondents 1 to 9 inclusive to this appeal. On application duly made the heirs of the plaintiff and the assignees were brought on to the record as respondents. Extension of time was also granted for the filing of the memeorandum of appeal. It is conceded that respondent 1 to 9, that is to say, the heirs of the plaintiff, have no interst in the appeal, and they have not appeared. The appeal is being contested by the assignees, who are the effective respondents to the appeal.

The facts out of which the suit arose were shortly stated by the learned trial judge in his judgment as follows:

> "2. The facts as I find them are that the plaintiff has been trading in tea in Aden for the past fifteen years, and in 1958 he registered his trade mark, which consists of his surname 'Assabwalla' in Arabic and below this his initials 'A.K.S.A.' in English. The certificate of registration has been produced and the plaintiff has proved he is the registered proprietor of this trade mark. The defendant has failed to establish that this registration is invalid; indeed Mr. Iyer, pleader for the defendant, in his submission at the close of the case conceded that registration was not challenged.
>
> "3. The defendant was assisting his father, the plaintiff, in the tea business until about two years ago, when he left his father's service and set up a tea business of his own, and has been using on one side of his packing cases the words in Arabic 'Imported by Ali A. K. Assabwalla', and below that the same words in English. On another side of the packing cases appear the initials in English 'A.A.K.A.' and below these initials the word 'Aden' in English. It is undisputed that Ali A.K. Assabwalla is the true name of the defendant, and that the letters A.A.K.A. are his initials. It is also undisputed that the tea of the plaintiff has come to be known by the public as 'Assabwalla' tea. The defendant himself admits this."

After stating the facts, the learned judge first considered whether there had been a passing-off by the appellant of his own goods in breach of the common law, and concluded that there had not been such a passing-off. In fact, counsel for the plaintiff had already expressly abandoned any claim based on passing-off. Accordingly, no question arose on appeal as to passing-off, except as to the form of the relief granted and embodied in the decree which, as was conceded by Mr. Kazi for the assignees, required amendment in so far as it was appropriate to a successful claim based on passing-off. The learned judge, however, in relation to the passing-off issue, made a finding as to the honesty of the appellant's use of his name which is material to the infringement of trade mark issue and is in issue on this appeal. The finding appears in the following passage from the judgment:

> "10. A feature of the present case is that there has been no evidence of actual deception, nor any evidence from members of the public that they themselves would be deceived; on the contrary the defendant appears to have acted perfectly honestly in the use of his own name. There has, therefore, been no passing-off by the defendant in breach of the common law."

The learned judge then considered whether there had been an infringement of the plaintiff's registered trade mark, having regard to s. 4 and s. 8 of the English Trade Marks Act, 1938 (hereinafter referred to as "the Act"), which are applicable by virtue of s. 6 of the Trade Marks (United Kingdom) Registration Ordinance (Cap. 151). In this connection the learned judge referred to, and reluctantly held himself bound by, the dictum of Farwell, J., in *C. & T. Harris* (*Calne*) *Ltd. v. Harris* (1), [1934] 51 R.P.C. 98. He said:

> "15. I have read s. 4 and s. 8(*a*) of the Act, in conjunction with the view of FARWELL, J., a dozen times and I must confess that I fail to see the purpose of s. 8(*a*) with regard to the use of one's own name in the light of the words of Farwell, J. On the other hand I have not sufficient confidence in the grounds of my own scepticism to press them to the point of dissent, and accordingly I must hold that even though the defendant may have used his name innocently and in good faith, he will nevertheless have infringed the plaintiff's trade mark if in fact the use of his name is such that it must lead to purchasers being misled or confused."

On the basis of the dictum of Farwell, J., in the *Harris case* (1), the learned judge concluded, after making a comparison of the respective marks:

> "21. Having compared the trade mark of the plaintiff with the marks of the defendant, I must concede that some ignorant and indiscriminating persons might be deceived, whilst persons exercising ordinary caution would not be likely to be deceived, but I cannot for this reason hold that there has been no infringement.
>
> "To allow the marks of the defendant would result in there being two Assabwalla marks for the tea trade in Aden; and this, in my opinion, must be a source of confusion injurious to the goodwill of the plaintiff, whose business depends largely upon the reputation of 'Assabwalla' tea by which his tea is known.
>
> "Though there are differences, the marks of the defendant complained of are not unlike those of the plaintiff; i.e. there is a similarity, and with due regard to the dicta of Farwell, J., in the *Harris* case (supra), I am of the opinion that where a name has become well known, a defendant in using that name would not be acting bona fide within the meaning of s. 8(*a*) of the Act of 1938.
>
> "22. Having regard to all the circumstances the defendant, in my judgment, has infringed the plaintiff's trade mark by the use of the words 'Imported by Ali A.K. Assabwalla' and by the use of the letters 'A.A.K.A.'."

The appellant appeals against this conclusion.

The assignees filed notice of cross-appeal, seeking to have the decision of the Supreme Court affirmed on a ground other than that relied on by the learned judge, namely, that:

> "The lower court erred in holding that the defendant (appellant) appears to have acted perfectly honestly in the use of his own name."

So far as the cross-appeal is concerned, Mr. Kazi argued that the intention of the appellant is an inference of fact to be drawn from facts which were not in dispute; and that the proper inference from those facts was that he had not acted honestly in the use he made of his own name. There was, however, direct evidence from the appellant himself as to what his intention was, which the learned judge appears to have accepted. Applying the principles which must govern an appeal court in considering findings of fact which depend on credibility (see *Watt* (*or Thomas*) *v. Thomas* (2), [1947] R.P.C. 491), I can see no

ground here for concluding that the learned judge was wrong in his finding, and I would not interfere with it.

I turn now to the grounds of appeal. These challenge substantially the learned judge's interpretation of s. 8 of the Act, and his finding of fact that there was a risk of some classes of persons being deceived by the appellant's marks.

Sub-section (1) of s. 4 and para. (*a*), s. 8 of the Act, which are the provisions of those sections relevant to this appeal, read as follows:

> "4.(1) Subject to the provisions of this section, and of sections seven and eight of this Act, the registration (whether before or after the commencement of this Act) of a person in Part A of the register as proprietor of a trade mark (other than a certification trade mark) in respect of any goods shall, if valid, give or be deemed to have given to that person the exclusve right to the use of the trade mark in relation to those goods and, without prejudice to the generality of the foregoing words, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, use a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either:
>
> (*a*) as being used as a trade mark; or
>
> (*b*) in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.
>
>
>
> "8. No registration of a trade mark shall interfere with:
>
> (*a*) any bona fide use by a person of his own name or of the name of his place of business, or of the name, or of the name of the place of business, of any of his predecessors in business;".

The appellant contends that the alleged offending mark was merely his own name with initials; that it was used bona fide within the meaning of s. 8(*a*); and that it was used not as a trade mark but as a descriptive mark.

Two points arise in s. 8(*a*), namely (*a*) whether it applies at all to a person using his name by way of trade mark; and (*b*) if it does, whether the dictum of Farwell, J., in the *Harris* case (1), applies.

As regards the question whether s. 8(*a*) applies to a person using his name by way of trade mark, Mr. Kazi argued that the protection conferred only applies to a person using his name as a trade or business name. This argument is based on a dictum of Lord Radcliffe in the judgment of the Privy Council in *De Cordova and Others v. Vick Chemical Co*. (3), [1951] 68 R.P.C. 103 where, at p. 107, in relation to s. 44 of the Jamaican Trade Marks Law, which is in terms similar to s. 44 of the Trade Marks Act, 1905, which is itself similar to s. 8(*a*) of the Act, he said:

> "That section declares that no registration under the law
>
> 'shall interfere with any bona fide use by a person of his own name or place of business or that of any of his predecessors in business, or the use by any person of any bona fide description of the character or quality of his goods.'

> There is nothing in the section to suggest that it is directed specifically, if it is directed at all, towards protecting use by a person of a name or place of business or description by way of a trade mark."

It is clear, however, that this dictum was obiter and was not intended to be a final pronouncement on the effect of the section since Lord Radcliffe continued:

> "However this may be, it seems plain on the facts of this case that 'Vapour Rub' cannot be regarded in Jamaica as a 'bona-fide description' of the character or quality of the appellants' goods."

The application of s. 8(*a*) of the Act was considered by the English Court of Appeal in *Baume & Co. Ltd. v. Moore* (*A.H.*) *Ltd.* (4), [1958] R.P.C. 226. There, at p. 234, Romer, L.J., delivering the judgment of the court, said:

> "Accordingly, and having regard to the views which we have expressed earlier in this judgment as to the likelihood of confusion, the defendants are in the position of infringers of the plaintiffs' trade mark unless they are entitled to the protection of s. 8 of the 1938 Act.
>
> "Mr. Aldous for the plaintiffs contended before us that they are not. His argument, in summary, was that the section only protects a trader in the use of his own name if he uses it as the name of his business or on his stationery, invoices, etc., and that it does not protect him if he uses the name (assuming the likelihood of confusion) as a trade mark in respect of his goods; that the section was introduced into the Act ex abundanti cautela to show that the defence of bona fide user by a man of his own name as a business name, which may be open to him in a passing-off action, is also available to him in an action for infrigement of a registered trade mark. Mr. Aldous's contention on this point would appear to have the support of a dictum of the Privy Council in *de Cordova v. Vick Chemical Co*. The Judicial Committee in committee in that case was considering a section of the Jamaican Trade Marks Law which was the sale, so far as relevant, as s. 4" (sic) "of the Trade Marks Act, 1905 (which was the forerunner of s. 8 of the 1938 Act) and Lord Radcliffe (at p. 107 of the report), said:
>
> > 'There is nothing in the section to suggest that it is directed specifically, if it is directed at all, towards protecting use by a person of a name or place of business or description by way of a trade mark.'
>
> "The expression of this view was, however, in no way necessary to their Lordships' decision, and for ourselves we find some difficulty in accepting it. Section 8(*a*) is expressed in perfectly general terms, and we can see no sufficient warrant for confining its operation to the bona fide use by a trader of his own name as a trade name as distinct from using it as a trade mark. We do not accept Mr. Aldous's suggestion that s. 8 (the provisions of which were enacted in a somewhat narrower form by s. 44 of the Trade Marks Act, 1905), was introduced merely ex abundanti cautela. It seems to us that its object was to ensure that the use by a man of his own name should be protected provided that the user was bona fide, whether he traded under that name or whether he used it as a trade mark in respect of his goods; and, if the narrower interpretation for which Mr. Aldous contends is attributed to the section, it is difficult to apprehend the purpose of Parliament in enacting it at all. We would only add that the construction of the section which seems to us to be the right one is in conformity with the view which Farwell, J., apparently took of the effect of s. 44 of the Act of 1905 in *C. & T. Harris* (*Calne*) *Ltd. v. F.S.E. Harris*, [1934] 51 R.P.C. 98."

It is true that the view expressed by Romer, L.J., was itself obiter, an injunction having been granted to the plaintiffs in that case against passing-off, but that view appears to have been accepted in subsequent cases in England – *Adrema Ltd. v. Adrema-Werke G.m.b.H., B.E.M. Business Efficiency Machines and Others* (5), [1958] R.P.C. 323, 333; *George Ballantine & Sons Ltd. v. Ballantyne Stewart & Co. Ltd*. (6), [1959] R.P.C. 47, 49. For myself, I would respectfully adopt the reasoning of Romer, L.J., particularly in view of the fact that s. 4 (1) of the Act (which relates to infringement of a registered trade mark by use of a "mark", defined to include, inter alia, a "brand" or "label") is expressly made subject to the provisions of s. 8. It is difficult to see what application s. 8 could have to the use of a "mark" within the meaning of s. 4 (1), if s. 8 is confined to the use of a name merely as the name of a business or on stationery, etc. It does not appear that the Trade Marks Act, 1905, contained any corresponding provision relative to s. 44 of that Act. I would accordingly hold that the bona fide user by a man of his own name is protected by s. 8(*a*) of the Act

> "whether he traded under that name or whether he used it as a trade mark in respect of his goods".

The next matter which arises on the appeal is whether the learned judge was right as to the construction he place on the term "bona fide" in s. 8 of the Act. He had already held that the appellant had acted perfectly honestly in the use of his own name, a finding with which, as I have indicated, I do not think this court should interfere; and it is, I think, evident from the judgment that, but for the dictum of Farwell, J., in the *Harris* case (1), he would have held that the appellant was entitled to the protection of s. 8(*a*). Unfortunately it would seem that the latest edition of Kerly on Trade Marks, which was available to the trial court was the 7th edition, and that consequently the learned judge's attention was not drawn to subsequent cases, noted in the 8th edition, in which the dictum of Farwell, J., has been criticised. The first of these is the *Baume* case (4), to which I have already referred. That case came before Danckwerts, J. (as he then was), at first instance, and the proceedings before him are reported at [1957], R.P.C. 459. In his judgment at p. 463 of the report, Danckwerts, J., set out the passage from the judgment of Farwell, J., which was cited by the learned trial judge in the instant case, and contined:

> "Now that is the passage which I find rather difficult to apply. I think I understand what 'bona fide' normally means: it means the honest use by the person of his own name, without any intention to deceive anybody or without any intention to make use of the goodwill which has been acquired by another trader. But when I find the learned judge saying that there may be confusion which will take the case out of the bona fide use for the purposes of the section, I do find great difficulty in seeing what the standard is which is to be applied in a case of that kind. How much risk of confusion is necessary before the benefit of what appears to be quite a generally expressed section is lost? However, perhaps it is not necessary for me to consider that precise point in the present case, because taking Farwell, J.'s language as being equivocal under the law, I do not think that I can say in the circumstances of the present case that the use by *Baume & Mercier S.A.* of their name in the manner in which it has been used in the present case was not bona fide for the purposes of s. 8."

On appeal, Romer, L.J., said ([1958] R.P.C. at p. 235):

> "The next point which was discussed before us was as to the meaning of 'bona fide use' in s. 8. Danckwerts, J., said that he understood that 'bona fide' normally 'means the honest use by the person of his own name, without any intention to deceive anybody or without any intention to make use of the goodwill which has been acquired by another trader'; and in that

> sense he acquitted the defendants of any want of bona fides in the present case. We agree with the learned judge's definition of the term 'bona fide' and we see no reason to attribute a different or special meaning to the phrase in its context in s. 8. The mere fact in itself that a trader is using his own name which too closely resembles a registered trade name of which he is aware does not prevent the user from being 'bona fide', provided that the trader honestly thought that no confusion would arise and if he had no intention of wrongfully diverting business to himself by using the name. The truth is that a man is either honest or dishonest in his motives; there is no such thing, so far as we are aware, as constructive dishonesty. In our judgment, if a trader is honestly using his own name, then no action will lie for infringement of trade mark and any rival trader who thinks himself aggrieved must sue, if at all, for passing off. We would accordingly hold, were it necessary to do so, that the defendants were entitled to rely on s. 8 of the Act as a defence to a claim for infringement having regard to the finding of the learned judge that they acted in good faith."

Finally, in the *Adrema* case (5), Danckwerts, J., after referring to the same passage in the judgment of Farwell, J., in the *Harris* case (1), and to the passage I have cited above from the judgment of the Court of Appeal in the *Baume* case (4), said (at p. 334):

> "It appears from those passages that something less than fraudulent intention will suffice to prevent the use of a trader's name being bona fide for the purposes of s. 8. I do not consider that the use of the German Company's name in connection with the machines was bona fide. I think that the defendants knew that such use was likely to cause confusion, and they were determined to make use of the goodwill in connection with the machines which was associated with the word 'Adrema'. It may be that the German Company resented the loss of the trade marks and the claim that the goodwill in the United Kingdom associated with the name 'Adrema' was the property of an English Company which they had formed and of which they had lost control as a result of the war. But, in my view, these motives do not justify what the defendants have done or make that bona fide."

In the light of these comments I do not think that it is to be accepted that a person will lose the protection of s. 8 merely because confusion may result from the use by that person of his own name. The term "bona fide" imports intent, and if the name is used honestly in the belief that confusion will not arise and without the intention of wrongfully diverting business, it seems to me that the use is "bona fide" within the meaning of the section. For the purposes of the instant case I would accept the view of Danckwerts, J., in the *Adrema* case (5), that something less than fraudulent intention will suffice to prevent the use of a trader's name being bona fide. But in fact I do not think the distinction between fraud and "something less" than fraud has any application here. Danckwerts, J., was dealing with a case in the peculiar circumstances of which he was able to say that though the defendants "were determined to make use of the goodwill . . . associated with the word 'Adrema'", yet that intention was not fraudulent. In nine cases out of ten such an intention would be fraudulent, and certainly in the instant case it would have been fraudulent if the appellant had intended, by means of the use of his name on the cases, to benefit from the goodwill attached to the plaintiff's trade mark. The learned judge's finding that he acted honestly in the use of his name negatives any such intention. On the learned judge's finding of fact I consider that the appellant is entitled to the protection afforded by s. 8(*a*) of the Act; and I do not doubt that if the learned judge had been aware of the dicta in the *Baume* case (4), and the *Adrema* case (5), he would have reached the same conclusion.

It follows from what I have said that I think the appeal ought to succeed. I will only add that I have some doubt as to the correctness of the learned judge's finding that the use by the appellant of his own name in relation to the tea "must be a source of confusion". The learned judge based this conclusion on his view that "some ignorant and indiscriminating persons might be deceived". In many cases this may be a correct approach. But here it is to be remembered that the plaintiff and appellant were importers of tea; that the marks complained of were marks on the 80 lb. chests in which the tea was shipped; that there is no suggestion in the evidence that either of them was a retailer of tea, nor is there any complaint as to marks on packages, if any, suitable for retail in which the tea may have been sold; and that it follows that in all probability the purchases of the tea from the plaintiff and the appellant respectively would themselves be traders who might be expected to fall within the class of persons whom the learned judge thought would not be likely to be deceived: this is particularly the case in a small and confined community such as Aden. However, in view of my conclusion as to the construction to be placed on s. 8 of the Act this aspect is not of importance, except that I think it tends to support the learned judge's finding that the appellant's use of his name was "bona fide".

I would allow the appeal, set aside the decree of the Supreme Court, and substitute a decree that the suit be dismissed with costs. The appellant's costs of the appeal should be paid by the assignees.

Sir Ronald Sinclair P: I agree and have nothing to add. There will be an order in the terms proposed by the learned Vice-President.

Sir Trevor Gould JA:I also agree.

Appeal allowed.

For the appellants:
Horrocks, Williams & Beecheno, Aden
G. Horrocks

For the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth respondents:
S. Daruwalla, Aden

For the tenth and eleventh respondents:
M. H. Mansoor, Aden
A.E. Kazi

The respondents 1 to 9 were not present and were not represented.

Mary Margaret Partington v John Derek Partington
[1962] 1 EA 579 (HCT)

Division:	High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	8 May 1962
Case Number:	18/1961

Before: Sir Ralph Windham CJ

Sourced by: LawAfrica

[1] Divorce – Jurisdiction – Self governing dominion – Colonial divorce jurisdiction – Whether colonial jurisdiction conferred by statute continues after attainment of independence – Indian and Colonial (*Divorce Jurisdiction*) *Act*, 1926, *s.* 1 *and s.* 2 *– Colonial and Other Territories* (*Divorce Jurisdiction*) *Act*, 1950, *s.* 2 *– Colonial and Other Territories* (*Divorce Jurisdiction*) *Order-in-Council*, 1953 *– Tanganyika* (*Non-Domiciled Parties*) *Divorce Rules*, 1953 (*T.*) *– Tanganyika Independence Act*, 1961, *s.* 3 (4) *and Second Schedule, para.* 15.

Editor's Summary

A petition for dissolution of marriage under the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, was filed in 1961. On December 9, 1961, before the petition had been heard, Tanganyika gained its independence, following which the court considered, as a preliminary issue, whether upon the attainment of independence the jurisdiction of the court to

entertain the petition had survived. By s. 2 (1) of the Indian and Colonial (Divorce Jurisdiction) Act, 1926, divorce jurisdiction under s. 1 of the Act could be applied to any part of Her Majesty's dominions other than a self-governing dominion, and by s. 2 (1) of the Colonial and Other Territories (Divorce Jurisdiction) Act, 1950, the application of s. 2 (1) of the Act of 1926, was expressly extended to any protectorate or trust territory. In 1953 divorce jurisdiction under the Act of 1926, was extended to Tanganyika. The point for decision was whether the Tanganyika Independence Act, 1961, revoked the jurisdiction of the court under the Tanganyika (Non-Domiciled) Parties Divorce Rules, 1953.

Held –

(i) Section 2 (1) of the Indian and Colonial (Divorce Jurisdiction) Act, 1926, is simply an enabling provision under which Her Majesty-in-Council may confer jurisdiction under s. 1 of that Act upon the High Court of Tanganyika; this jurisdiction was conferred in 1953.

(ii) it is a well-recognised principle of constitutional law that all legislation applicable to a territory remains applicable unless the instrument setting up the new constitution otherwise provides in clear terms.

(iii) since there is nothing in the Tanganyika Independence Act, 1961, repealing the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, the effect of s. 3 (4) and para. 15 of the Second Schedule to the Tanganyika Independence Act, 1961, was simply to preclude Her Majesty-in-Council from touching what had been done in 1953, and accordingly the court had jurisdiction to entertain the petition.

Order accordingly.

Judgment

Sir Ralph Windham CJ: This petition for dissolution of marriage is brought under the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, and the first question for decision, before the petition can be heard on its merits, is whether those Acts, which undoubtedly applied to Tanganyika before it attained its independence on December 9, 1961, have continued to apply to Tanganyika since that date. In short I must determine whether this court today has jurisdiction to entertain the petition.

The legislative milestones relevant to the determination of this point are the following. In 1926 the Indian and Colonial Divorce Jurisdiction Act, 1926, was enacted. I will hereinafter refer to it as the Act of 1926. Section 1 of the Act contains the substantive provisions the application of which to any Territory of the kind mentioned in s. 2 (1) would vest in the appropriate court of such Territory the divorce jurisdiction which the present petitioner now seeks to invoke. Section 2 (1) empowers Her Majesty, by Order-in-Council, to apply the provisions of s. 1 to "any part of Her Majesty's dominions" other than a "self-governing dominion". The latter term is defined by s. 2 (2) to mean those dominions, therein specified by name, which were in fact self-governing in 1926. Since that year the list has been from time to time amended and added to.

By s. 2 (1) of the Colonial and Other Territories (Divorce Jurisdiction) Act, 1950, the power of Her Majesty-in-Council, under s. 2 (1) of the Act of 1926, to apply s. 1 of the latter Act to "any part of Her Majesty's dominions" is expressly extended to enable her to apply the section to "any protectorate or United Kingdom trust Territory". Tanganyika was in 1950, and remained until 1961, a United Kingdom trust Territory, and Her Majesty was thus enabled to apply by Order-in-Council the provisions of s. 1 of

the Act of 1926, to Tanganyika.

In 1953 this was done, in respect of Tanganyika and certain other Territories, by the Colonial and Other Territories (Divorce Jurisdiction) Order-in-Council, 1953. Rules, consequential upon the application of s. 1 of the Act of 1926 to Tanganyika and framed to implement the application, were thereupon duly made, under the title of the Tanganyika (Non-Domiciled parties) Divorce Rules, 1953.

Now it will be recalled that the terms of s. 2 (1) of the Act of 1926, preclude the application of s. 1 to any of the self-governing dominions mentioned in s. 2 (2). In 1953, when s. 1 was applied to Tanganyika in the manner that I have described, Tanganyika was not mentioned in s. 2 (2), nor was it in fact a self-governing dominion. But on December 9, 1961, Tanganyika became a self-governing dominion, under the Tanganyika Independence Act, 1961. Under s. 3 (4) of that Act, read with para. 15 of the Second Schedule to the Act, an amendment was effected to s. 2 (2) of the Act of 1926, whereby Tanganyika was added to the list of self-governing dominions therein mentioned. Thus, if s. 1 of the Act of 1926 had not already, in 1953, been applied to Tanganyika, Her Majesty-in-Council would, from and after December 9, 1961, have no longer had the power so to apply it, since under s. 2 (1) she is precluded from applying it to any of the self-governing dominions listed in s. 2 (2), which from that date include Tanganyika. The brief point for decision, however, is whether the adding of Tanganyika to the list on December 9, 1961, has had the effect of revoking, as from that date, the application of s. 1 of the Act of 1926, to Tanganyika; in short of undoing what was lawfully done in 1953.

In my view the amendment to s. 2 (2) effected by the Tanganyika Independence Act, 1961, clearly had no such effect. As has been rightly pointed out by the learned Solicitor-General as Queen's Proctor, who has argued this question of jurisdiction before me as amicus curiae, there is nothing in s. 2 (1) of the Act of 1926, which itself confers jurisdiction under s. 1 of that Act upon the Tanganyika High Court. Section 2 (1) is purely an enabling provision, enabling Her Majesty-in-Council to confer such jurisdiction, which she lawfully did in 1953. Section 1 of the Act of 1926, thereupon became a part of the law of Tanganyika. And, as has also been pointed out by the learned Solicitor-General, it is a well-recognised principle of constitutional law that all legislation applicable to a Territory remains applicable unless the instrument setting up the new constitution provides otherwise in clear terms. But in the Tanganyika Independence Act, 1961, there is no provision repealing the Colonial and other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, or s. 1 of the Act of 1926, in particular, in so far as its application to Tanganyika is concerned, or providing that the High Court of Tanganyika shall no longer exercise that divorce jurisdiction which until December 8, 1961, it had lawfully exercised under s. 1. Indeed, so far from expressly or impliedly repealing the application of s. 1 to Tanganyika, the effect of s. 3 (4) and para. 15 of the Second Schedule of the Tanganyika Independence Act, 1961, as I see it, is to freeze the status quo as it stood on December 8, 1961, and to preclude Her Majesty-in-Council from touching what she lawfully did in 1953, whether by revoking the provisions of s. 1 in so far as concerns their application to Tanganyika or even by modifying their application or amending their terms in that regard.

On these grounds I hold that this court has jurisdiction today to entertain the present petition.

Order accordingly.

For the petitioner:
Fraser Murray, Thornton & Co., Dar-es-Salaam
R. S. Thornton

For the Queen's Proctor:

The Attorney-General, Tanganyika
D. L. Davis (Queen's Proctor, Tanganyika)

The respondent did not appear and was not represented.

Mary Margaret Partington v John Derek Partington

[1962] 1 EA 582 (HCT)

Division:	High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	9 June 1962
Case Number:	18/1961
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Divorce – Jurisdiction – Residence – Residence in territory for a fortnight – Meaning of "resided" – Indian & Colonial (*Divorce Jurisdiction*) *Act*, 1926, *s.* 1 – *Colonial and other Territories* (*Divorce Jurisdiction*) *Order-in-Council*, 1953 – *Tanganyika Independence Act*, 1961 (*T.*).

Editor's Summary

The petitioner had filed a petition under the Indian and Colonial Divorce Jurisdiction Act, 1926, as amended, for divorce on the grounds of the respondent's adultery committed in Tanganyika. The parties were married in Tanganyika in 1956, lived there until 1960, with a break in England in 1959, and after the alleged adultery the petitioner went to Kenya and remained there until November, 1961, when she returned to Tanganyika for a holiday and legal advice. She remained there for a fortnight. At the trial the preliminary point considered was whether the petitioner's "residence" of fourteen days in Tanganyika prior to the presentation of her petition, qualified her under proviso (*c*) to s. 1 (1) of the Act.

Held –

(i) the residence of the petitioner for a fortnight was too casual to be termed "residence" within the meaning of s. 1 (1) ibid.

(ii) it was not the intention of the legislative authority to enable a spouse residing in a territory in East Africa to go casually to an adjoining territory for a short period, in order that such a spouse might take advantage of the appropriate legislation operative therein.

(iii) the court had no jurisdiction to hear the petition.

Petition dismissed.

Cases referred to in judgment:

(1) *Flowers v. Flowers* (1910), 32 All. 203.

(2) *R. v. Richard Hughes* (1857), 26 L.J. M.C. 133.

(3) *R. v. Myott* (1863), 32 L.J. M.C. 138.

(4) *Vevers v. Mains* (1888), 4 T.L.R. 724.

(5) *Niboyet v. Niboyet* (1878), 4 P.D. 1.

(6) *Armytage v. Armytage*, [1898] P. 178.

(7) *Matalon v. Matalon*, [1952] P. 233; [1952] 1 All E.R. 1025.

(8) *Stransky v. Stransky*, [1954] 2 All E.R. 536.

(9) *Ramsay-Fairfax v. Ramsay-Fairfax*, [1955] 3 All E.R. 695.

(10) *Attorney-General v. Coote*, 146 E.R. 433.

Judgment

Mosdell J: Before the hearing of this case on its merits could commence, two matters concerning jurisdiction arose. The first was the question whether, in view of the passing of the Tanganyika Independence Act, 1961, this court had jurisdiction to act under the Indian and Colonial Divorce Jurisdiction Acts as applied to the Territory, and the second preliminary matter concerned the "residence" of the petitioner.

The first of these two preliminary matters has been dealt with by the learned Chief Justice who on May 8 last ruled that this court had such jurisdiction. On May 31 last Mr. Thornton for the petitioner appeared before me and argued on behalf of the petitioner in connection with the second preliminary point. At the hearing before the learned Chief Justice on March 22, an order was made giving leave to the petitioner to file an affidavit setting forth the facts relevant to the question of the petitioner's residence at the time of the filing of this petition. Such affidavit was made and filed in this court on April 4, 1962.

The question of "residence" arises thus. Under s. 1 (1) of the Indian and Colonial Divorce Jurisdiction Act, 1926, as amended, and following on the Colonial and Other Territories (Divorce Jurisdiction) Order-in-Council, 1953, this court in certain circumstances was given jurisdiction to make a decree for the dissolution of a marriage where the parties to the marriage are British subjects domiciled in the United Kingdom in any case where this court would have had such jurisdiction if the parties to the marriage were domiciled in Tanganyika, subject to certain conditions precedent having been fulfilled, in particular in accordance with proviso (*c*) to the said sub-section which reads as applied to Tanganyika as follows:

> "No such court shall grant any relief under this Act except in cases where the petitioner resided in (Tanganyika) at the time of presenting the petition and the place where the parties to the marriage last resided together was in (Tanganyika) or make any decree of dissolution of marriage on the ground of adultery, cruelty or any crime except where the marriage was solemnised in (Tanganyika) or the adultery, cruelty or crime complained of was committed in (Tanganyika)."

The petition in this case has been filed by the petitioner on the grounds of the respondent's adultery committed in Tanganyika. From the petition it appears that the marriage was solemnised in Tanganyika and that the parties last resided together in Tanganyika. All that this court is concerned with at the moment is whether at the time of the presentation of the petition, namely December 1, 1961, the petitioner could be said to have been "residing" in Tanganyika. In para. 2 of the petition the petitioner states that:

> "After the said marriage (which took place on December 22, 1956 in Tanganyika) your petitioner lived and cohabited with the respondent at Dar-es-Salaam, aforesaid, at divers other places, and from January 1, 1960 to March 10, 1960, at Moshi, Tanganyika, at which address the parties last resided together."

In her affidavit of March 27, 1962, the petitioner amplified the latter particulars, deposing as follows:

> "3. From December, 1956, until June 1959, we lived at Dar-es-Salaam.
>
> "4. From June, 1959, to December, 1959, we were on leave in England.
>
> "5. From January 1, 1960, to March 10, 1960, we lived at Moshi, Tanganyika.
>
> "6. On March 10, 1960, aforesaid I left the respondent and have not since the said date cohabited with him. I went immediately to Nairobi in Kenya and lived there until December, 1960.
>
> "7. From December, 1960, I lived at Nyeri, Kenya, where I am living at present.
>
> "8. On the 17th day of November, 1961, I visited Dar-es-Salaam for the purpose of having a holiday and also for the purpose of seeking advice on the question whether I could bring proceedings under the Colonial and Other Territories (Divorce Jurisdiction) Acts. On or about the 25th day of November,

1961, I instructed Messrs. Fraser Murray, Thornton & Company to file the petition in this cause.

"9. I remained in Dar-es-Salaam until the 1st day of December, 1961, when I returned to Nyeri."

It will be seen from these particulars that the duration of the petitioner's residence in Tanganyika was fourteen days.

The Shorter Oxford English Dictionary, defines the word "residence" in the following manner:

"1(*a*) To have (to hold, keep, make) one's residence, to have one's usual dwelling-place or abode; to reside. To take up one's residence, to establish oneself; to settle. (*b*) The circumstance or fact of having one's permanent or usual abode in or at a certain place; the fact of residing or being resident, 1480. 2. The fact of living or staying regularly at or in some place for the discharge of special duties, or to comply with some regulation; also, the period during which such stay is required of a person."

If a distillation of these various definitions of the word "residence" in the Shorter Oxford English Dictionary be made, it will be seen that the essence is some degree of permanence. If, therefore, one were to be satisfied with the definition so given, it would be an end of the matter and one could state with some satisfaction that the fourteen days' stay of the petitioner in Dar-es-Salaam between November 17, 1961, and December 1, 1961, would not amount to "residence" for the purpose of the Indian and Colonial Divorce Jurisdiction Act, 1926, as amended. But, alas, the matter is not so simple. The word "residence" has been judicially defined in different ways. In Stroud's Judicial Dictionary (3rd Edn.), Vol. 3, p. 2569 et seq., there are no less than fifty-nine instances showing how the word "residence" has been construed in different contexts, and a perusal of them shows that in accordance with item (3) under the heading "Reside; Residence; Resident" at p. 2569, op. cit.:

"'Residence' has a variety of meanings according to the statute (or document) in which it is used (per Erle, C.J., *Naef v. Mutter*, 31 L.J. C.P. 359). It is an 'ambiguous word' and may receive a different meaning according to the position in which it is found (per Cotton, L.J., *Re Bowie, Ex parte Breull*, 16 Ch. D. 484)."

Mr. Thornton for the petitioner ran through a whole gamut of contexts in which the meaning of the word "residence" had been dealt with starting with bankruptcy, proceeding through bastardy and ending up with decrees of judicial separation and nullity in matrimonial matters. Perhaps a good deal of assistance is to be derived from the case of *Flowers v. Flowers* (1) (1910), 32 All. 203. In this case a petition for dissolution of marriage was filed in the court of the district judge of Meerut, who heard the case and granted the petitioner a decree for dissolution of marriage. The decree then came up to the High Court for confirmation. In such confirmation the question of jurisdiction arose under s. 3 of the Indian Divorce Act, 1869, and it was held that a mere temporary sojourn in a place, there being no intention of remaining there, will not amount to residence in that place within the meaning of s. 3 of the Indian Divorce Act, 1869, so as to give jurisdiction under the Act to the court within the local limits of whose jurisdiction such place is situated. The case came before a full bench consisting of Stanley, C.J., Richards and Tudball, JJ., and in the judgment of the court at p. 204 and p. 205 it is stated:

"It is clear from this that the last residence of the petitioner with his wife was at Hyderabad in Scinde. The temporary sojourn for a day or two in Meerut did not constitute residence. The petitioner merely paid a flying

> visit to Meerut for a temporary purpose and not with any intention of remaining. Mere casual residence in a place for a temporary purpose with no intention of remaining is not 'dwelling' and where a party has a fixed residence out of the jurisdiction, an occasional visit within the jurisdiction will not suffice to confer jurisdiction by reason of residence."

The fact in this case are not wholly unlike those in the instant case in that the petitioner had been previously resident in Meerut as, in the instant case, she had previously been resident in Tanganyika and it would seem, though it is not wholly clear, that the matrimonial offence, namely adultery, had been committed in Meerut, as, in the instant case, it is alleged that the adultery was committed in Tanganyika.

Some help can I think be derived from the cases cited by Mr. Thornton in connection with bastardy applications. In *R. v. Richard Hughes* (2) (1857), 26 L.J. M.C. 133, it was held that where a woman went and lodged at a place for the purpose of applying to the magistrates there for an order of affiliation, intending to leave the place as soon as she had got the order, she having at the time no other residence, not having gone there for any fraudulent or improper purpose, she was resident at the place within the meaning of the Act 7 & 8, Vict. Cap. 101, which by s. 2 required that an application for such an order must be made to the justices acting for the Petty Sessional Division within which the woman resided. It is distinguishable from the facts in the instant case in that the petitioner here at the time of the presentation of the petition had a "residence" in Kenya.

R. v. Hughes (2), was distinguished in the later case of *R. v. Myott* (3) (1863), 32 L.J. M.C. 138, where a woman, having unsuccessfully applied on two occasions for an order of affiliation to the justices of the Petty Sessional Division in which she had been residing with her parents, and after a hearing on the merits took lodgings in a neighbouring borough "because", as she deposed, "people said if she came there she would have a better chance". After she had been in such neighbouring borough nearly a month she applied to the borough justices and obtained an order of affiliation. On an appeal by the putative father it was held that the object of the woman's removal was to obtain a new tribunal, and therefore she did not "reside" within the borough so as to give the borough justices jurisdiction. It might be stated by analogy that in the instant case the petitioner came to Dar-es-Salaam for a fortnight in order to give the High Court of Tanganyika jurisdiction to hear her petition, and that, therefore, she did not "reside" in Tanganyika so as to give such High Court jurisdiction.

The third bastardy case cited by Mr. Thornton was *Vevers v. Mains* (4) (1888), 4 T.L.R. 724. In the latter case the question at issue was whether the magistrate of any division but that in which the woman is residing can make an affiliation order. The woman, who was a farm servant living in the Penrith Division of Cumberland, had an illegitimate child, and came overnight into the Cumberland Ward Division and next morning obtained a summons against the defendant as the putative father of her child under the Bastardy Act, 7 & 8 Vict. and 35 & 36 Vict. Cap. 65, s. 3, the latter providing that the woman must make the application to the justices acting for the division in which she may reside. In that case the summons was in the division in which the putative father was living and which was the nearest and most convenient. The defendant appeared and also had the assistance of a solicitor, who took no objection to the jurisdiction. The magistrates of the Cumberland Ward Division heard the case and made an order upon the defendant for the payment of a weekly sum of money. Subsequently the defendant's solicitors wrote to the woman's solicitor that the order was null and void for want of jurisdiction, and it was not obeyed. She, however, applied to the magistrates of the Cumberland Ward Division for a summons against the defendant for disregard of the order, and the objection was then taken that the

original order was without jurisdiction. The objection was overruled because (1) the woman was within their jurisdiction when the order was made and (2) the objection had not been taken when the order was applied for. A warrant was therefore issued and the man was arrested. A judge in chambers had refused an application for habeas corpus. A further application was made on behalf of the defendant to a divisional court of the Queen's Bench. It was held that the woman was not residing in the division of the magistrates who made the affiliation order under the Act, and that therefore they had no jurisdiction; so that in the latter case it was held for the purpose of the Bastardy Acts then operative that "residence" of one night did not amount to "residence" as required by the Acts.

Let us now proceed to consider the law regarding jurisdiction of the courts in England in suits for judicial separation and nullity. It is clear that jurisdiction in such matters depends not on domicile but on residence. I do not derive much assistance from the case of *Niboyet v. Niboyet* (5) (1878), 4 P.D. 1, the decision in which was subsequently overruled, but the observation of James, L.J., that "residence" was to be distinguished from casual presence on a visit or in itinere was not disapproved of.

Of greater assistance is the case of *Armytage v. Armytage* (6), [1898] P. 178. This concerned a suit for judicial separation. The petitioner had been before her marriage a domiciled Englishwoman. Her husband's domicile was in Australia where after the marriage she resided with him. Owing to cruelty committed by him while they were travelling in Italy, she sought the protection of her parents in England and established a home for herself and her children in England. The husband followed her to England and required her to return to him with the children, which she was afraid to do owing to her apprehension of a repetition of the cruelty. At the commencement of the suit both parties were living within the jurisdiction. It was held that the court, exercising the former powers of the ecclesiastical courts, under s. 22 of the Matrimonial Causes Act, 1857, had jurisdiction to entertain the suit. It appears that the respondent came to England not to take up permanent residence there but for the purpose of enforcing, and for so long as it may have been necessary to determine, such rights as he may have been necessary to determine, such rights as he may have had against the petitioner with regard to the children. The respondent appears to have arrived in England at the end of June, 1897, and the petition to have been filed during November, 1897. In the judgment of Gorell Barnes, J., at p. 195 there is the following:

> "Then, does the present case fall within the principles and rules upon which the courts have acted.? I think it does. The wife, an Englishwoman, whose domicil of origin was English, and who has resided at times in England with her husband, is forced, by the cruelty committed in Italy by her husband, a domiciled Australian, to seek the protection of her parents in England. Though legally domiciled in Australia, as a matter of fact she has been forced to separate herself from her husband and establish herself in a home of her own in this country. She and her husband are both within the jurisdiction. She has been required to return with her children to her husband, and is afraid to do so owing to her apprehension of a repetition of the acts of cruelty which have been committed against her while they were living together abroad. It is against the repetition of apprehended acts of cruelty that the court grants its protection, and, unless the court interferes, there is nothing to prevent the husband from forcing himself upon his wife and placing her in a position in which she may be subjected to further acts of cruelty. The status of married persons within the country is recognised. Performance of the duties arising from the marriage tie should be required, and protection afforded against an abuse of the position resulting from that tie where necessary. Police protection is an inadequate remedy."

In *Matalon v. Matalon* (7), [1952] P. 233 the headnote reads as follows:

> "The husband domiciled and resident in Jamaica married his wife in 1946 in England, then domiciled and resident in England. They settled in Jamaica where a child was born to them on December 16, 1947. The wife left her husband in Jamaica in July, 1949, and came to England bringing her child with her. On August 20, 1949, the husband came to England for two purposes: (1) for the purpose of the business of a textile firm, with connexions in Manchester and London of which he was the manager or representative, and (2) to secure the custody of his child.
>
> "On October 12, 1950, the husband took out a summons under the Guardianship of Infants Acts, 1886 to 1925, for the custody of the child, but these proceedings were stayed on the wife in England on October 31, 1950, presenting a petition for judicial separation on the ground of cruelty. The wife alleged, inter alia, that while her husband was in England between August 20, and October 12, she was put in fear by her husband's attitude and threats. The husband remained in England until December 20, 1950, engaged on his business and, at first in the proceedings for the custody of his child, living in hotels and boarding-houses. The husband contended that he was not resident in England and that the court had no jurisdiction to hear the petition. By consent this was tried as a preliminary issue.
>
> "Held, that the extent and quality of the residence by the husband and wife in England was sufficient to found jurisdiction.
>
> "Observations of Gorell Barnes, J., in *Armytage v. Armytage*, [1898] P. 178, applied."

The matrimonial home was in Jamaica. The husband lived in England from August 20, 1949, until October 31, 1950, when the petition for judicial separation was presented by the wife. Hodson, L.J., adopted the words of James, L.J., in *In re Bowie* (1880), 16 Ch. D. 484, namely:

> "There are cases in which it has been judicially decided, and I think rightly, that the words 'residence' and 'business' have no actual definite technical meaning, but that you must construe them in every case in accordance with the object and intent of the Act in which they occur."

At p. 239 in the judgment of Hodson, L.J., there is:

> "Then Gorell Barnes, J., referred to the facts of the particular case, which are closely parallel to the facts of this case: 'He has come here – that is, the husband – ' and subjected himself to the jurisdiction of the courts of this country. Could anything be more unreasonable than for this court to hold that it has no power to suspend the wife's obligation to live with her husband while in this country, and leave her to proceed in the courts in Australia to protect herself against her husband in England? It may, I think, be safely laid down that the ecclesiastical courts would formerly, and this court will now, interfere to protect a wife against the cruelty of her husband, both being within the jurisdiction, when the necessities of the case require such intervention. I therefore hold that this court has jurisdiction to entertain this suit, and I pronounce a decree of judicial separation in favour of the petitioner.
>
> "In my judgment, in this case the commissioner was right in taking the view that, although the point was not directly decided in *Armytage v. Armytage*, yet the careful judgment of Gorell Barnes, J., laid down sufficient guidance for him to ascertain the extent and the quality of the residence which was necessary to found jurisdiction in this case, and following that guidance he thought, and I think rightly thought, that the facts of the case

> before him warranted an assumption of jurisdiction, and, therefore, I think that he rightly decided the issue in favour of the wife."

It is worthy of note, I think, that in *Armytage v. Armytage* (6), and *Matalon v. Matalon* (7), the court assumed jurisdiction in order to "protect" the wife.

I have also considered *Stransky v. Stransky* (8), [1954] 2 All E.R. 536, and *Ramsay-Fairfax v. Ramsay-Fairfax* (9), [1955] 3 All E.R. 695. From none of the above-mentioned authorities can one derive a conclusive answer to the issue in the instant case, nor is the meaning of the word "residence" for income tax purposes as laid down in the *Attorney-General v. Coote* (10), 146 E.R. 433, of any assistance.

I do not think the links which the petitioner has with Tanganyika in this case, namely, that she was formerly resident therein, the marriage was solemnised therein and the matrimonial offence was allegedly committed in Tanganyika, carry the matter further, for, in spite of all these links with Tanganyika, the Act still requires the petitioner to be resident in Tanganyika at the time of presenting the petition.

I was invited by Mr. Thornton to consider the matter from the angle of alternatives. What are the alternative courses of action open to the petitioner in this case? She could file a petition in England, if she could afford to go there, which she apparently cannot. She could also, presumably, file a petition under the relevant law in Kenya, where she has been living for the past two years, when she will have been ordinarily resident there for three years – presumably on March 10, 1963. It is true that the whole purpose of making the Indian and Colonial Divorce Jurisdiction Act, 1926, applicable to Tanganyika was to enable persons with an English or Scottish domicile to sue for a dissolution of their marriage in the High Court of that Territory, but they can only do so provided they have fulfilled the conditions laid down.

On a consideration of the authorities as a whole I am of the opinion that the residence of the petitioner in Tanganyika for a fortnight at the end of 1961 was too casual for it to be termed "residence" within the meaning of s. 1 (1) of the Indian and Colonial Divorce Jurisdiction Act, 1926. I cannot but think that it was not the intention of the legislative authority to enable a spouse residing in a territory in East Africa to go casually to an adjoining territory for a short period in order that such spouse might take advantage of the appropriate legislation operative therein.

Mr. Thornton invited me to emulate the learned judge, whose name eluded him, who stated, when considering where the line should be drawn as to what is, and what is not, "residence",

> "I cannot say where I would draw the line. All I can say is, wherever the line may be drawn, this is clearly on the right side of it".

On the contrary, I am constrained in the circumstances to state

> "I cannot say where I would draw the line. All I can say is that, wherever the line may be drawn, in this case the duration of the petitioner's residence in Tanganyika is clearly on the wrong side of it".

My decision is, therefore, that this court has no jurisdiction in this matter, and the hearing of the case on its merits cannot follows.

Petition dismissed.

For the petitioner:

Fraser Murray, Thornton & Co., Dar-es-Salaam

R. S. Thornton

The respondent did not appear and was not represented.

Bombay Trading Stores (U) Limited and another v R

[1962] 1 EA 589 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	6 April 1962
Case Number:	166 and 167/1961
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Sir Trevor Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Jones, J.

[1] Criminal law – Evidence – Facts specially within the knowledge of the accused – Whether fact that a person is licensed as a medical practitioner is specially within knowledge of pharmacist – Evidence Ordinance (*Cap*. 9), *s*. 104 (1) (*U*.).

[2] Medicine – Pharmacy – Sale of poison to person not licensed to practise as medical practitioner – Sale to person formerly licensed – Statute constituting absolute prohibition against sale except to persons specified – Burden of proof whether purchaser licensed – Pharmacy and Poisons Ordinance, 1957, *s*. 2, *s*. 24, *s*. 29 (*U*.) – *Medical Practitioners Ordinance* (*Cap*. 93) (*U*.) – *Evidence Ordinance* (*Cap*. 9), *s*. 104 (1) (*U*.) – *Firearms Ordinance*, 1953, *s*. 4 (1) (*K*.) – *Indian Evidence Act*, 1872, *s*. 105.

[3] Statute – Construction – Criminal offence – Absolute prohibition – Provision excepting or exempting specified persons – Effect upon burden of proof – Pharmacy and Poisons Ordinance, 1957, *s*. 2, *s*. 24, *s*. 29 (*U*.).

Editor's Summary

The first appellant was a licensed wholesale dealer in drugs and the second appellant was a registered pharmacist and manager of the business. The appellants were convicted on five counts with selling to one, M., Part I poisons contrary to s. 29 (4) of the Pharmacy and Poisons Ordinance, 1957. At the trial it was proved that the appellant had supplied Part I poisons to M., who had been but was not at the relevant dates licensed and registered as a medical practitioner in Uganda. At the close of the case for the prosecution counsel for the appellants submitted that it had not been proved that M. was not a "duly qualified" medical practitioner since he might have been permitted to practise in Kenya or Tanganyika and thus by s. 2 of the Ordinance the sales to him might have been lawful. The magistrate held that s. 104 (1) of the Evidence Ordinance applied and that the prosecution was not under any obligation to prove that "M." was not entitled to practise. On appeal to the High Court against their conviction the judge held that s. 29 of the Ordinance constituted an absolute prohibition against the sale of Part I poisons except to the persons mentioned in sub-s. 1 of the section and, therefore, the burden of proof rested upon the appellants. On further appeal,

Held –

(i) whether M. was a person to whom Part I poisons could lawfully be sold was not a fact specially within the knowledge of the appellants.

(ii) whether an enactment creates an exception affecting the burden of proof must be resolved by construing as a whole the legislation in which it is contained, in which task the fact that the exception is expressed before, within, or after the provision creating the offence may possibly be a relevant, but is not a determining factor.

(iii) sub-section 4 of s. 29 of the Pharmacy and Poisons Ordinance makes it an offence for any person to sell Part I poison except in accordance with the section and creates an absolute prohibition against sale followed by words of exception. *R. v. Oliver*, [1943] 2 All E.R. 800 and *Mohamed Hassan Ismail v. R.* (1955), 22 E.A.C.A. 461 followed.

Appeal dismissed.

Cases referred to in judgment:

(1) *Roberts v. Humphreys* (1873), L.R. 8 Q.B. 483.

(2) *Taylor v. Humphries* (1865), 34 L.J.M.C. 54.

(3) *R. v. James*, [1902] 1 K.B. 540.

(4) *R. v. Audley*, [1907] 1 K.B. 383.

(5) *Mohamed Hassan Ismail v. R.* (1955), 22 E.A.C.A. 461.

(6) *R. v. Oliver*, [1943] 2 All E.R. 800.

(7) *Abdillahi Jama Awaleh v. R.*, [1958] E.A. 20 (C.A.).

Judgment

Sir Ronald Sinclair P: The appellants were convicted in the district court of Mengo District at Kampala on five counts of selling Part I poisons to an unauthorised person contrary to s. 29 (4) of the Pharmacy and Poisons Ordinance, 1957 (hereinafter referred to as "the Ordinance"). Their appeals to the High Court of Uganda having been dismissed, they now appeal against their convictions to this court.

The first appellant, Bombay Trading Stores (U) Ltd., is a limited company which is licensed under the Ordinance as a wholesale dealer in drugs. The second appellant is the manager of the appellant company. He is a registered pharmacist and as such is an authorised seller of poisons by virtue of the provisions of s. 24 of the Ordinance. In the five counts the appellants were charged with selling to one Y.M.K. Musoke on various dates between February 2, 1961, and March 16, 1961, Part I poisons otherwise than in accordance with the provisions of s. 29 of the Ordinance. The particulars of each offence are similar and it will suffice to quote the particulars of the first count which are:

> "Bombay Trading Stores (U) Ltd. and Kenneth Joseph Frost on or about the 2nd day of February, 1961, at plot 32, Kampala Road, Kampala, Mengo District, did sell to Yekoyada Mulindwa Katerega Musoke, a Part I poison, namely, 500 tablets of Sulphathiazole and 24 vials of Penicillin, otherwise than in accordance with the provisions of s. 29 of the Pharmacy and Poisons Ordinance."

It is necessary to set out in full s. 29. It reads:

> "29(1) Subject to the provisions of this Ordinance, a person licensed under s. 27 to deal as a wholesale dealer in poisons may sell Part I poisons to –
>
> (*a*) another person so licensed;
>
> (*b*) an authorized seller of poisons;
>
> (*c*) a person licensed under s. 28 to sell poisons for mining, agricultural or horticultural purposes;
>
> (*d*) a duly qualified medical practitioner, dentist or veterinary surgeon for purposes of medical, dental or veterinary treatment respectively;
>
> (*e*) an institution or department of a Government of the East African territories requiring the poison for purposes of public service;
>
> (*f*) a hospital, dispensary or similar institution or a person or institution concerned with scientific education or research, whether within the Protectorate or outside it, where such hospital, dispensary, institution or person has been approved in that behalf by an order, whether general

or special, of the Minister:

"Provided that notwithstanding the provisions of sub-s. (4) of s. 27 of this Ordinance it shall be an offence to sell Part I poisons to any of the

persons or institutions specified in paras. (*d*) and (*f*) of this sub-section unless a registered pharmacist is in direct control of the poisons at the premises from which they are so sold.

"(2) Subject to the provisions of this Ordinance, an authorised seller of poisons may sell Part I poisons to any of the persons, institutions and others referred to in sub-s. (1) of this section, and in addition may sell such poisons to any person who is –

(*a*) in possession of the prescription of a duly qualified medical practitioner, dentist or veterinary surgeon, in accordance with such prescription; or

(*b*) in possession of a written certificate to the effect that he may properly be supplied with the poison, such certificate having been issued by a person authorised by the Board in that behalf, a list of which persons shall be published by the Board in the Gazette from time to time; or

(*c*) a person known by the seller to be a person to whom the poison may properly be sold.

"(3) Subject to the provisions of this Ordinance, a person licensed under s. 28 to sell poisons for mining, agricultural or horticultural purposes may sell Part I poisons in accordance with such licence.

"(4) Any person who sells any Part I poison except in accordance with the provisions of this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment:

"Provided that nothing in this section shall make it illegal for any person to sell or resell to a wholesale dealer licensed under s. 27, or to an authorised seller of poisons, any stocks of Part I poisons which are found to be surplus to requirements and –

(*a*) are lawfully in possession of such person under the provisions of this Ordinance; or

(*b*) were lawfully in possession of such person under the provisions of the Pharmacy and Poisons Ordinance (now repealed) and are sold by him within a period of six months from the coming into force of this Ordinance."

"Duly qualified" in relation to a medical practitioner, dentist or veterinary surgeon (see para. (*d*) of sub-s. (1)) is defined in s. 2 of the Ordinance as meaning "permitted by law to practise that profession in any East African territory".

At the trial the prosecution adduced evidence which established that the appellants supplied Part I poisons to Musoke on the dates set out in the various counts of the charge; that, although Musoke had previously been licensed as a medical practitioner in Uganda, after September 3, 1959, he was neither licensed nor registered as a medical practitioner under the Medical Practitioners Ordinance (Cap. 93) and, accordingly, that during the period covered by the charge, he was not permitted by law to practice as a medical practitioner in Uganda.

At the close of the case for the prosecution it was submitted that there was no case for the appellants to answer on the ground that the prosecution had not affirmatively excluded Musoke from the list of persons in s. 29 to whom Part I poisons may be sold. It was pointed out that the prosecution had not proved that Musoke was not a "duly qualified" medical practitioner within the meaning of the definition, since he might have been permitted to practise in Kenya or Tanganyika. The trial magistrate ruled that s. 104 (1) of the Evidence

Ordinance applied and that the prosecution was under no obligation to do so. The appellants elected to call no evidence and were thereupon convicted.

It is convenient at this stage to quote the relevant portion of sub-s. (1) of s. 104 of the Evidence Ordinance which reads:

> "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:"

On appeal to the High Court the learned judge held that s. 104 (1) applied in the circumstances of this case, though for reasons which differed from those given by the trial magistrate. He said in his judgment:

> "It cannot be said in this case that it was either 'especially' (the word used in s. 104 (1) of the Evidence Ordinance) or 'peculiarly' within the knowledge of the accused in this case that Musoke was not licensed to practise.
>
> "If the Crown are to succeed therefore, they must rely on the first part of the section, i.e. that there were circumstances bringing the case within the exception to sub-s. 4 of s. 29 of the Pharmacy Ordinance.
>
> "Section 29 clearly implies that a Pharmacist cannot sell poisons to anyone except to those mentioned in sub-s. 1 of s. 29, otherwise they commit an offence. On the authority of *Mohamed Hassan Ismail v. R.* referred to above, it appears therefore that the burden of proving that Musoke was a person within the exception and to whom they could sell the drugs, fell on the accused persons. They deal in drugs and poisons at their peril. That being so, this appeal against conviction fails and is dismissed."

The sole question for decision in this appeal is whether s. 104 (1) of the Evidence Ordinance was correctly applied in the circumstances of the case for, if it was not, the prosecution failed to establish the charge and the appellants are entitled to be acquitted. Mr. Hunt for the appellants submitted that the learned judge was right in holding that the question whether Musoke was a person to whom Part I poisons might be sold was not a matter especially within the knowledge of the appellants, but that he was wrong in holding that s. 29 of the Ordinance prohibits the sale of Part I poisons except to those persons mentioned in the section and was, therefore, wrong in coming to the conclusion that the burden of proving that Musoke was a person falling within the exception fell upon the appellants. He contended that sub-s. (4) of s. 29 must be read with sub-ss. (1), (2) and (3) of that section in order to create an offence, that the Ordinance does not prohibit the sale of Part I poisons subject to certain exceptions, but prohibits the sale of such poisons to unauthorised persons and the prosecution must prove the sale to an unauthorised person. He referred us to *Roberts v. Humphreys* (1) (1873), L.R. 8 Q.B. 483, *Taylor v. Humphries* (2) (1865), 34 L.J.M.C. 54, *R. v. James* (3), [1902] 1 K.B. 540, and *R. v. Audley* (4), [1907] 1 K.B. 383.

Counsel for the Crown contended that both limbs of s. 104 (1) apply. First, he submitted that sub-s. (4) of s. 29 creates the offence and prohibits the sale of poisons subject to exceptions, the burden of proving which was on the appellants. Secondly, he submitted that, if Musoke was a person to whom Part I poisons might be sold under the provisions of s. 29, that was a fact especially within the knowledge of the appellants whose means of knowledge were greater than those of the Crown. He argued that it would be difficult, if not impossible, for the Crown to negative all the provisions of sub-ss. (1), (2)

and (3) of s. 29. He relied on the decision of the court in *Mohamed Hassan Ismail v. R.* (5) (1955), 22 E.A.C.A. 461.

We shall deal first with the submission of counsel for the Crown that, if Musoke was a person to whom Part I poisons were permitted to be sold under the provisions of s. 29, that was a fact especially within the knowledge of the appellants. Whether or not Musoke was a person included in sub-s. (1) of s. 29 was not, in our view, a fact which was especially within the knowledge of the appellants. It does not appear, for instance, that the appellants had any special knowledge of whether Musoke was or was not permitted by law to practise as a medical practitioner in Kenya or Tanganyika. The appellants' opportunities of knowledge in that respect would not appear to be any greater than those of the Crown. It may be that it would be especially within the knowledge of the appellants whether Musoke was a person to whom Part I poisons were permitted to be sold under sub-s. (2) of s. 29, but the burden would still remain on the prosecution in respect of sub-s. (1).

We turn now to the more difficult question whether the first part of s. 104 (1), which places on the accused person the burden of proving any exception, or exemption from, or qualification to, the operation of the law creating the offence, applies in the circumstances of this case. The principles followed in the cases cited by Mr. Hunt were summarised by Lord Alverstone, L.C.J., in *R. v. James's case* (3), in the following passage at p. 545:

> "That it is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception."

That passage was criticised by the Court of Criminal Appeal in *R. v. Oliver* (6), [1943] 2 All E.R. 800. The defendant in that case was charged with supplying controlled goods, namely, sugar, otherwise than under and in accordance with the terms of a licence, granted by and on behalf of the Minister of Food, contrary to art. 2 of the Sugar (Control) Order, 1940, the material provisions of which were as follows:

> "Subject to any directions given or except under and in accordance with the terms of a licence permit or other authority granted by or on behalf of the Minister no . . . wholesaler shall by way of trade . . . supply . . . any sugar."

On a submission that the prosecution had not discharged the onus of proof, which rested on the prosecution, to show that the defendant had no licence to supply sugar, it was held that the onus of proving that he had a licence under the order was on the defendant. After referring to various authorities including the passage from *R. v. James* (3), cited above, Viscount Caldecote, L.C.J., delivering the judgment of the Court of Criminal Appeal, said at p. 802 of the report:

> "We do not think that these various passages are authorities for the contention of counsel for the appellant in the circumstances of the present case. There seems to us, indeed, no reason why an indictment should not have been framed without the averment that the supply was otherwise than under and in accordance with the terms of a licence granted by the Ministry of Food. It would have been sufficient, in our judgment, merely to charge the appellant with having supplied controlled goods contrary to the provisions of the Order. The appellant's answer would then be in the nature of a confession and avoidance assuming the fact to be that he had a licence to

> supply. We are not impressed with the argument based upon the form of the Order. With the greatest respect to the judgment of Lord Alverstone, L.C.J., in *R. v. James*, it seems to us to be very difficult to make the result depend on the question whether the negative is of a proviso or of an exception. We think it makes no difference at all that the Order was drafted as it now appears instead of being in a form which absolutely prohibits the supply of sugar except as thereinafter provided, with a later clause providing that, if a person is supplied under a licence, he should be excused. . . . As to the test suggested by Bowen, L.J., namely, that, when the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff, it seems to us, in this case, that it was not a necessary part of the case for the prosecution to assert or prove a negative. The prosecution had a complete case when proof had been given that there had been a supply by the appellant unless and until the appellant could escape the prohibition contained in the Order by proving the facts which were necessary to his case."

In effect, therefore, the Order in question absolutely prohibited the supply of sugar except under the terms of a licence, etc.

In *Mohamed Hassan Ismail v. R.* (5), relied on by the Crown, the accused was charged with being in possession of a firearm and ammunition without the requisite certificate contrary to s. 4 (1) of the Kenya Firearms Ordinance, 1953, which provides:

> "Subject to the provisions of the Ordinance, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time."

This court said, after quoting the relevant portion of sub-s. (1) of s. 105 of the Indian Evidence Act as re-enacted in Kenya, which is in the same terms as s. 104 (1) of the Uganda Evidence Ordinance:

> "In the present case we think the possession by the appellant of a firearm licence is a matter which falls twice over within the above provision for, not only is it in our view a circumstance bringing the case 'within an exception or exemption from' the operation of s. 4 (1) of the Firearms Ordinance, but also it is a fact 'especially within the knowledge of the appellant'."

Here again the Firearms Ordinance absolutely prohibited the possession of a firearm or ammunition followed by words of exception. The possession of a firearm prima facie constituted an offence just as in *R. v. Oliver* (6), the supply of sugar prima facie constituted an offence against the Sugar (Control) Order: See *Abdillahi Jama Awaleh v. R.* (7), [1958] E.A. 20 (C.A.) at p. 27.

Sub-section (4) of s. 29 of the Ordinance makes it an offence for any person to sell Part I poison, except in accordance with the provisions of that section. In our view that sub-section, in effect, creates an absolute prohibition against the sale of such poison, followed by words of exception as in *R. v. Oliver* (6), and *Mohamed Hassan Ismail v. R.* (5), The fact that those words of exception refer back to the earlier provisions of s. 29 is not, in our view, material, for those provisions merely specify a number of classes of persons, sale to any one of which is "in accordance with the provisions of this section" and accordingly consitute an exception to the otherwise universal prohibition created by sub-s. (4). We think that it is to be gathered from the authorities discussed above that the question whether a particular provision creates an exception affecting the burden of proof must be resolved by construing as a whole the legislation in which it is contained, in which task the fact that the exception is expressed before, within, or after the provision creating the offence may possibly be a relevant, but is certainly not a determining, factor.

We are therefore of opinion that the sale of Part I poison prima facie constitutes an offence, that the first part of s. 104 (1) applies in the circumstances of this case and that the burden of proving circumstances bringing the case within the exception to the operation of sub-s. (4) lay upon the appellants. In short, the onus was upon the appellants to prove not only that they were authorised to sell Part I poison, but also that Musoke was a person to whom they were authorised to sell Part I poison under s. 29.

The appeals are dismissed.

Appeal dismissed.

For the appellants:
Wilkinson & Hunt, Kampala
R.E. Hunt

For the respondent:
The Attorney-General, Uganda
J.M. Long (Crown Counsel, Uganda)

Hirji Pitamber v The Administrator-General and another
[1962] 1 EA 595 (CAZ)

Division:	Court of Appeal at Zanzibar
Date of judgment:	8 September 1962
Case Number:	28/1962
Before:	Sir Ronald Sinclair P, Sir Trevor Gould Ag VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Zanzibar – Horsfall, J.

[1] Limitation of action – Administration of estates – Action for accounts and repayment of losses – Waste – Action filed over three years after order for filing accounts – What period of limitation applies – Time from which limitation runs – Succession Decree (*Cap.* 13), *s.* 272 (1), *s.* 321 *and s.* 322 (*Z.*) – *Limitation Decree* (*Cap.* 11), *Schedule, art.* 29, *art.* 116 *and art.* 119 (*Z.*) – *Civil Procedure Rules, O. XXI*, r. 13 (*Z.*) – *Indian Limitation Act*, 1908, *Schedule, art.* 120 *and art.* 123.

Editor's Summary

Under their father's will the appellant and his two brothers, H. and D., were appointed executors and were also the beneficiaries. Probate was granted to the appellant and H. on April 7, 1942. In November,

1945, H. died leaving a minor daughter. In March, 1955, D. applied to the court for an order requiring accounts to be filed. These were filed by the appellant on April 28, 1955. No further action was taken until March 22, 1958, when D. and the minor daughter of H. applied to the court for the appointment of an officer of the court to scrutinize the accounts. The court held that the applicants' should file an administration suit. In May, 1958, D. and the minor daughter brought a suit against the appellant alleging that the accounts filed were not correct and sought an order for administration by the court and for payment by the appellant of the loss suffered by the estate as a result of the appellant's acts of waste. At the hearing of the suit the appellant took a preliminary objection that the suit was time barred under the provisions of art. 119 of the Limitation Decree, but the trial judge held that, as the suit was for administration, art. 116 was applicable and that the period of limitation was six years reckoned from the time the right to sue accrued, namely, six years, from April 28, 1955, when executors' accounts were filed. Before judgment was delivered D. died and the Administrator-General as administrator of his estate was substituted. On appeal it was submitted that even if the suit was an administration suit it was essentially for the payment of a legacy, and that art. 119 applied.

Held –

(i) the nature of the suit was essentially for administration and accounts and as such art. 116 of the Limitation Decree was applicable.

(ii) under art. 116 the period of limitation was six years and the time began to run from the date when accounts were filed, namely, April 28, 1955; accordingly the suit was not time barred.

(iii) in so far as the claim was founded upon waste or devastation it was time barred by art. 29.

Appeal allowed in part.

Cases referred to in judgment:

(1) *Salebhai Abdul Kader Basrai v. Baisafuabu* (1912), 36 Bom. 111.

(2) *Rajamannar v. Venkatakrishnayya* (1902), 25 Mad. 361.

(3) *Gajanan v. Waman*, 12 Bom. L.R. 881.

(4) *Khetramani Dasee v. D.N. Roy* (1913), 41 Cal. 271.

(5) *In re Blow*, [1914] 1 Ch. 233.

(6) *In re Hyatt* (1888), 38 Ch. D. 609.

(7) *Lacons v. Warmoll*, [1907] 2 K.B. 350.

(8) *Cursetjee v. Dadabhai* (1896), 19 Mad. 425.

(9) *Jenkins v. Jenkins*, [1928] 2 K.B. 501.

(10) *Gulati v. Reeves-Brown* (1939), A.I.R. Lah. 463.

The following judgments were read:

Judgment

Crawshaw JA: This is an appeal by the defendant in a High Court suit in Zanzibar against a judgment dated February 16, 1962, ordering him to pay to the respondents (plaintiffs) a sum of Shs. 55,504/35 and costs.

The original plaintiffs were Dayalji Pitamber and Indira Hansraj, the latter being a minor daughter of Hansraj Pitamber who had died in November, 1945, before the filing of this suit on May 10, 1958; she was represented by Dayalji, who was a brother of Hansraj and of the appellant. Dayalji himself died before judgment, and the Administrator-General was substituted as administrator of his estate. No party appears to have been substituted to represent Indira Hansraj if, which is not known, she is still a minor.

Pitamber (hereinafter referred to as "the deceased") the father of Dayalji, Hansraj and the appellant, died on June 16, 1941, having made a will dated March 30, 1939, in which he appointed his said sons his executors. After stating in his will that he had during his life made provision for his wife after his death and that she would not therefore have a charge on the estate for maintenance for which Hindu law provides he said,

> "my three sons, the executors, after payment of my debts are entitled to inherit the property and assets in

equal one-third shares".

Probate of the will was on April 7, 1942, granted to the appellant and Hansraj, the right of Dayalji to apply being reserved; Dayalji was in India at the time and it was understood that he never did apply. The grant expressly stated that the appellant and Hansraj had undertaken to exhibit in court a true account of their administration within one year from the date of the grant or within such further period as the court may appoint, and such filing of an account is made obligatory by s. 272 (1) of the Succession Decree (Cap. 13) of the 1934 Laws of Zanzibar.

It seems that the appellant largely, if not solely, attended to the administration of the estate. By a vesting deed dated October 17, 1942, the executors

vested in themselves and Dayalji as beneficiaries under the will three immovable properties. It is not necessary to comment on the unusual method of describing the parties at the commencement of the deed or to decide whether its effect was to vest the property in the beneficiaries as tenants in common or joint tenants. It is sufficient for the purposes of this appeal that the respondents pleaded that the deed had vested the property in the beneficiaries and that the appellant agreed with this in his written statement of defence. The vesting deed, according to the appellant, virtually completed the administration of the estate. The executors however did not file an account as required by law, nor did they obtain an extension of time for so doing. Hansraj, as I have said, died in 1945, and it was not until March 2, 1955, that Dayalji applied to the Probate Court for an order requiring accounts to be filed, having, he said, previously and unsuccessfully applied to the appellant personally for them; he said "I have been asking for accounts since 1945". On March 26, 1955, the court made an order that final accounts be filed, and accounts were filed (signed of course by the appellant only) on April 28, 1955, showing a balance to the credit of the estate of Shs. 79/35 on October 17, 1942. This was the date of the vesting deed and the accounts were said by the appellant to show a true account of the administration; in other words the estate was said to have been fully wound up by then and, apart from the sum of Shs. 79/35, to have been distributed to the beneficiaries.

No action appears to have been taken on the accounts until March 22, 1958, nearly three years later, when Dayalji filed in court an affidavit objecting to them, and he and Indira applied to the court for the appointment of an officer of the court to scrutinize the accounts. The court held that as the accounts did not reveal any prima facie impropriety it had no authority to make the order asked for, and that the correct procedure was for the applicants to file an administration suit. It was following this decision that Dayalji and Indira filed the present suit.

The plaint in para. 11 alleged that the accounts did not contain a true and full account of the administration and set out particulars of some items which it was said had been wrongly included or "wilfully" omitted. Paragraph 12 alleged that the appellant had "wasted the estate" and gave particulars of some of the waste complained of. (*a*) and (*b*) of the prayer in para. 13 read:

> "(*a*) to have the assets of the said Pitamber Ajramal, deceased, administered in this court and for that purpose to have all proper directions given and accounts taken. (For purpose of court fees the value of this prayer is unascertainable);
>
> "(*b*) the defendant be ordered personally to pay the sum of Shs. 43,971/47 being the total loss suffered by the estate because of the defendant's acts of waste as specified in para. 12 hereof;"

In his written statement of defence the appellant denied the allegations in para. 11 and para. 12 of the plaint and by way of counterclaim asked that Dayalji should give an account of the property of the deceased in his hands.

Section 321 and s. 322 of the Succession Decree read:

> "321. When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.
>
> "322. When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount."

These sections come under the heading "devastation". Particulars of "waste" alleged in para. 12 of the plaint come under three heads, (*a*) failure to recover

outstandings due to the estate, (*b*) wrongful payments out of the assets of the estate, and (*c*) misappropriation by the appellant to his own use of certain moneys belonging to the estate. It will be seen that all these particulars are covered by s. 321 and s. 322 above, and would constitute devastation, which perhaps is a more appropriate word than "waste".

Although the defence of limitation was not pleaded by the appellant, his counsel, Mr. Karai, who has also appeared before us, argued at the outset of the hearing in the lower court, that the suit was barred under the provisions of the Limitation Decree, Cap. 11 of the 1934 laws. He submitted that even if the suit was an administration suit it was essentially for the payment of a legacy, and that art. 119 applied. Article 119 reads:

"119	For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	Twelve years	When the legacy or share years becomes payable or deliverable."

Mr. Lakha, who appeared for the respondents in the court below as well as before us, maintained before the trial judge that in considering the question of limitation only the plaint could be looked at, presumably because it was not raised in the written statement. The suit was not, he said, for a legacy but was for the administration of the estate and for relief arising out of waste and that it fell within the residuary art. 116 which reads:

"116	Suit for which no period of limitation is provided elsewhere in this schedule.	Six years.	When the right to sue accrues.

Mr. Lakha submitted that the defence of limitation must fail "at least at this stage", whether art. 116 or art. 119 applied. He said the cause of action accrued in 1955 when the appellant filed the accounts.

Windham CJ., as he then was, held that although not pleaded it was the duty of the court to consider the question of limitation, but that when it was raised at that stage the court would look only at the plaint. He held that the appellant was not in the plaint claiming any legacy "whether in words or in effect" and that art. 119 did not therefore apply. He said:

> "I hold that the article which does apply is art. 116, the suit being for administration, with no prayer direct or indirect for the payment of any legacy, and for the payment of monies lost to the estate through alleged acts of waste. The term 'legacy' cannot cover the latter, since a legacy is a sum of money or other property left to a person under a separate provision of a will."

A residuary bequest is not of course a fixed sum, and it would be affected by devastation. The learned Chief Justice further held that the respondents could not have brought the suit until the accounts had been filed as until then he was in a position

> "neither to discover falsities in them leading to the necessity of asking the court to administer the estate nor to ask the defendant to make good those particular losses to the estate through waste which only came to his knowledge upon his examination of the accounts [that] since the date when a plaintiff's 'right to sue accrues' is the earliest date when he could have sued for the relief sought, then the right to sue in the present case accrued on April 28, 1955".

He therefore held that the suit was not time barred.

On the suit next coming on for hearing on November 18, 1958, Mr. Lakha applied to have a commissioner appointed to take accounts, and in so doing to consider the question of waste, and the "counterclaim". Mr. Karai objected, but the Chief Justice ordered that a commissioner should be appointed, it being a case involving accounts, and Mr. Rahim, the then Registrar of the High Court was duly appointed; the main term of reference was,

> "to determine to what extent the allegations in para. 11 and para. 12 of the plaint, and para. 10 of the statement of defence are true".

The commissioner filed his "report" on June 10, 1960, to which both parties filed objections, which were heard by Horsfall, J. On limitation the learned judge said, "I hold that the question of limitation was dealt with by Windham, C.J., . . ."; he then applied art. 116 and observed that the right to sue accrued on April 28, 1955, and that the suit was not time barred. Finally he said,

> "I enter a decree in accordance with the commissioner's report as varied by this decision;"

this was on April 27, 1961.

A date was fixed for settling the form of decree, but it does not seem that any formal decree was drawn up. Instead there was an order by Mahon, C.J., which commences,

> "The parties agree that it is necessary, as the court has already intimated, that this matter be again referred to the commissioner, this time for the purpose of taking of an account".

The order is chiefly concerned with whether the commissioner should waive a further fee, but after referring to the original terms of reference, with which he observed the commissioner had complied, the learned Chief Justice said,

> "It seems quite clear that the taking of accounts is not the same as deciding whether certain allegations in the pleading were true . . ."

On October 30, 1961, Mr. Rahim was again appointed commissioner

> "to determine what amount, if any, is payable by defendant to plaintiff having regard to the directions of this court in the judgment of 27.4.61".

The commissioner filed his report on this second reference on January 15, 1962, to which both parties again filed objections. Horsfall, J., heard the objections and on February 16, 1962, gave "judgment for the plaintiff for Shs. 55,504/35 and costs both here and before the commissioner"; earlier in his judgment he had said "I accept the commissioner's report as varied by me". A formal decree issued.

The appeal is headed:

> "(An Appeal from decisions, orders, judgment and decree of the High Court of Zanzibar at Zanzibar Mr. Justice Windham, Mr. Justice Mahon and Mr. Justice Horsfall on various dates in High Court Civil Case No. 34 of 1958,"

I think there can be no doubt that this was an administration suit, and I understood Mr. Karai to admit that Windham, C.J., was right in so holding. Mr. Karai complains, however, that administration was ancillary to the suit being a claim on a legacy and that anyway the procedure followed was incorrect in an administration suit. Whether the prayer for administration was merely ancillary to some other relief claimed is a matter which I will deal with later. As to administration, in Basu on the Indian Succession Act (4th Edn.), p. 916 (para. 2718) it is said that if a legatee is denied inspection of an executor's

account or is not satisfied with the result of his inspection, he may file an administration suit and ask for administration by the court. Such was generally the position here. Certainly no formal order for administration was made. Order XXI, r. 13 of the Civil Procedure Rules reads:

> "13(1) Where a suit is for account of any property and for its due administration under the decree of the court, the court shall, before passing the final decree pass a preliminary decree ordering such accounts and enquiries to be taken and made, and giving such other directions as it thinks fit."

The plaint had asked for administration by the court and Windham, C.J., in his ruling on limitation referred to the suit as "being for administration", and thereafter he appointed a commissioner to take accounts. Mr. Karai does not appear to have objected to the appointment of a commissioner or the ensuing procedure on the ground that no preliminary decree had been made, and I do not think it is an objection which should now be taken to invalidate the proceedings. Mr. Karai's objection to the appointment of a commissioner would appear to have been that there were "legal issues, e.g. waste", and, presumably he would have preferred that the court itself should have done the work of the commissioner. The form of preliminary decree in Appendix D to the Civil Procedure Rules (form No. 17) commences,

> "It is ordered that the following accounts and enquiries be taken and made, that is to say:–".

Then follow a number of paragraphs to cover a variety of circumstances which might arise in the administration of an estate, and at the end is a note saying

> "Such part only of this decree is to be used as is applicable to the particular case".

It seems to me that although no formal preliminary decree was drawn up in the present case, the orders of Windham, C.J., made respectively on November 18 and 20, 1958, together comprise an order in terms sufficient to cover the taking of accounts and enquiries in the particular circumstances of this case.

The final decree, to which Mr. Karai has taken exception, was, I think, appropriate to the circumstances. Paragraph 11 and para. 12 of the plaint were included in the terms of reference. Paragraph 11 challenged the accounts on general grounds and then went on to specify a "few items". Similarly in para. 12 waste was pleaded generally, and then, inter alia, particulars were given of certain items. It seems to me therefore, with respect to Mahon, C.J., that all matters in dispute were in fact covered by the original terms of reference. It was not suggested that there were at the time of the institution of the suit any recoverable assets to be brought into the estate; the only matter for investigation was whether, as between the appellant and the other beneficiaries, the appellant had properly accounted for his administration, and the only administration act in connection with the estate which the court could take was to see that these accounts were investigated and adjudicated upon. In most administration suits, no doubt, an order would be made for any money found due by a personal representative to be paid into court (as in form No. 18 of Appendix D) for the money would be subject to distribution for a variety of purposes such as costs, creditors, specific legacies, and only the balance, if any, would be payable to the residuary legatees. In the present case the beneficiaries were the only interested parties, and provided they were ascertained, I can see no prejudice to the appellant by the order being for payment to the respondents direct.

The appellant maintained that the commissioner's report as amended by the decisions of the judge should have been regarded as evidence in the suit and the

appellant should have been given an opportunity to reply to the allegations of waste, presumably by giving further evidence in court. In 22 I.C. 526 (unfortunately the case is not presently available to me, nor the names of the parties) the suit was for dissolution and partnership accounts. No formal preliminary decree was drawn up, but a commissioner was appointed and he filed his report. The plaintiff objected to the report but was not allowed to give evidence and judgment was given in terms of the report. The appellate court held (*a*) that the plaintiff could not call evidence on the merits as he had told the court that he did not wish to call any more evidence, and (*b*) that the plaintiff should have been allowed to examine the commissioner in court as to his reading of the evidence (which the plaintiff alleged was inaccurate) and as to his findings on the items of account. In the instant case neither counsel asked to call further evidence or asked that the commissioner should be called for examination, and in the circumstances I do not think that the appellant's objection can be sustained. The appellant also complained that the judge should not have made a money decree but should merely have given his decisions on the commissioner's report. An order for payment of the amounts found due is however in keeping with the form of decree in the Civil Procedure Rules. There were in my opinion no irregularities in the conduct of the suit which occasioned any injustice.

Mr. Karai submitted in the lower court that the family was a joint Hindu family and that the property could not therefore be subject to testamentary disposition or be divisible amongst the heirs; I understood him to say that the reason the will was not disputed was because it was a disposition to the sons jointly and not as tenants in common, which would have been the position anyway had there been no will. Horsfall, J., in his final judgment, held there was no substance in the objection that the family was a joint Hindu one. In ground 16 of his memorandum of appeal the appellant complains that the judge did not give proper consideration to the matter and that further evidence should have been taken as to the parties' rights in the deceased's estate. The appellant in para. 26 of the written statement said that he, Dayalji and Hansraj were members of a joint Hindu family. He alleged this in connection with his claim for management expenses, and not as a defence to the other parts of the plaint. One of his grounds of objection to the second report of the commissioner was in the following terms,

> "(4) The Commissioner failed to take into account that the property left by the deceased, Pitamber Ajramal, was a joint Hindu family property and as such not divisible amongst the heirs".

The deceased in saying in his will that his sons were "entitled to inherit the property and assets in equal one-third shares" may have been merely stating that they were so entitled under Hindu law. On the other hand, had he a right to dispose of his property as he wished, it could be argued that his failure to dispose of it differently and his reference to their entitlement was tantamount to saying that he wished and intended them to receive one-third share each, and that it was in fact a residuary bequest. In the vesting deed the appellant allowed a recital that under the deceased's will there was a "devise" to the sons "in three equal shares", and the executors by the deed purported to convey the property to the sons. This seems hardly consistent with the property being jointly held prior to the deceased's death nor, had it been jointly held, would it have been necessary for the deceased to have mentioned it in his will. In my opinion the learned judge was entitled to come to the conclusion he did on this question, and the fact that he did not give reasons does not mean that he did not consider the relevant evidence and facts.

Before dealing with the question of limitation it is convenient to dispose of grounds 14(*a*) and (*b*) of the memorandum of appeal which read:

"The learned judge erred in law and in fact to hold that:

(*a*) the defendant should account for rents received after 17.10.1942 and that he was answerable to the estate for such rents,

(*b*) the defendant should account for loss occasioned to the estate because debts of Pitamber Ajramal & Sons were paid from the estate."

As to (*a*) (involving a sum of Shs. 9,800/61 for which the appellant was held liable by the lower court), para. 6 of the plaint recorded that,

"By a vesting deed dated 17th day of October, 1942, . . . the immovable properties comprised in the estate of the said deceased, consisting of three houses in the town of Zanzibar were vested in the said beneficiaries".

Paragraph 7 and para. 11(*v*) of the plaint read as follows:

"7. After the 17th day of October, 1942, the defendant continued to manage and collect the rents accruing due from the said immovable properties purporting to do so as the executor of the will of the said deceased.

.

"11(*v*).The rent accruing due from the said immovable properties and collected by the defendant in the purported exercise of his powers as the executor of the will of the said deceased after the 17th day of October, 1942, is not shown in the said accounts."

In his written statement the appellant denied the contents of para. 7, and in regard para. 11(*v*) maintained that he was not bound to give any account of his administration of the properties after the date of the vesting deed; he alleged that anyway Hansraj and Dayalji had been collecting the rents for part of the time.

In dealing with paragraph 11(*v*) in his first report the commissioner said:

"It has, however, been urged that even after the execution of the vesting deed the defendant continued to deal with the properties as the executor of the will of the deceased and collected rent as such. This would appear to be so but I do not think that the fact of the defendant continuing to act in the wrong capacity invalidates the vesting deed. It is clear that the estate of the deceased was divested of these 3 houses from the date of the execution of the vesting deed and thereafter the defendant was answerable not to estate but to the three joint devisees for the management and disposition of these properties."

This was made a ground of complaint by Dayalji, and in dealing with it Horsfall, J., after referring to the vesting deed as having vested the houses in the three brothers "in undivided shares", went on to say that he considered the commissioner

"was wrong in not ordering the defendant to account for the rent collected from the three houses, the subject of the vesting deed after 17.10.42",

and that anyway the respondent was acting in a fiduciary position. He may have been acting in a fiduciary position as agent of the plaintiffs, but he was not sued as such; he was sued as executor in respect of the assets of the estate, and after October 17, 1942, the houses ceased to form part of the estate. As between himself on the one hand and Hansraj and Dayalji on the other there was no question of him acting as an executor, in whatever capacity he purported to sign receipts for rents and other documents. The vesting deed had been signed by the

appellant as attorney of Dayalji and Hansraj, and it has not been contested that the deed was validly executed. With respect to the learned judge I therefore think the commissioner was right in not taking into account the rents after October 17, 1942. I might add that no transactions of any kind appear to have taken place in connection with the estate after that date, which was over fifteen years before the suit was filed.

As to ground 14(*b*) of the memorandum of appeal, para. 12(*b*) of the plaint reads as follows:

> "12(*b*) The defendant paid debts due by Messrs. Pitamber Ajramal & Sons from the assets in his hands as executor of the estate of the said deceased which he had no right to do, and in doing so borrowed monies from various people on interest and sold house No. 138 belonging to the estate:"

The circumstances as found by Horsfall, J. (who found the appellant liable in a sum of Shs. 18,954/58 under this head) were that the appellant, Hansraj and Dayalji, trading as "Pitamber Ajramal & Sons", had filed their insolvency petition on December 3, 1940, on which they were adjudicated. On September 23, 1942, the appellant (who was apparently acting under the authority of the other partners) swore an affidavit that all the insolvency creditors had been paid in full, and the adjudication order was annulled. The learned judge then said:

> "It is clear that the debts of the firm of Pitamber Ajramal & Sons were paid out of the assets of the estate. The Commissioner has misdirected himself in para. 5(*b*) when he states
>
> > 'the defendant paid the debts of Pitamber Ajramal & Sons not from the assets of the deceased, but from the joint properties of the three heirs which had been devised by virtue of the vesting deed. No loss was occasioned to the estate in this respect'.
>
> This could not be so because the vesting deed was not entered into until 17.10.42."

The evidence of the appellant, however, supported the statement in the plaint that he had borrowed moneys to pay the insolvency debts. The evidence of the appellant was that having used this money to pay the creditors and obtain annulment of the adjudication, he vested the deceased's houses in the beneficiaries and subsequently sold two of them to repay the persons from whom he had borrowed the money. Dayalji in evidence also said that the houses were sold after the vesting deed. There is no suggestion that this evidence was not accepted by the commissioner or by the court. If this was the position, as it would seem it was, then no moneys or property belonging to the deceased's estate were involved. The money borrowed came from outside sources, not the credit of the deceased's estate but to pay off the insolvency creditors, and the money so borrowed was repaid, not from property belonging to the deceased's estate, but from property which had already been transferred to the beneficiaries. None of these transactions therefore would appear to have affected the deceased's estate, even though, in part anyway, they appeared in the accounts filed in court by the appellant as executor. The appellant explained, no doubt quite rightly, that had he not himself made arrangements to pay off the creditors, the Official Assignee would have taken possession of the insolvents' interests in the deceased's estate. I cannot personally see that even had the appellant sold assets of the estate to pay the insolvency creditors before vesting the assets in the beneficiaries, he would have done anything wrong as they were assets in which the insolvents had an interest which was liable to be sold in payment of their debts, if not by the appellant then by the Official Assignee.

The first two grounds of appeal taken together are that the suit ought to have been dismissed on the ground of limitation. Ground 2 reads:

> "The suit being one for the claim of Shs. 43,971/43 – a specific sum for loss suffered to the estate, and the said sum being part of the heritable estate as residue of legacy, and the prayer for accounts only being ancillary, art. 119 of the Limitation Decree (Cap. 11) (now art. 110 Limitation Decree (Cap. 12)), ought to have been applied, and not art. 116 of the Limitation Decree."

There is no need to refer to the Limitation Decree (Cap. 12) as it was not in force at the relevant times. We have been referred to a considerable number of authorities on the application of art. 119 and art. 116 in circumstances not altogether dissimilar from the present. If art. 119 applies, there can be no doubt that the suit was time barred and I propose therefore first to decide whether art. 119 does apply. Article 119 seems clearly to cover suits by residuary legatees, and in Mitra on the Indian Limitation Act (in which art. 123 is similar to our art. 119) (13th Edn.) at p. 599, this is expressly stated, and whether the claim is for the whole of the residue or a part. At p. 598 it is said:

> "Where a person has received a large portion of the legacy but he is not satisfied that he has received the whole of it, and brings a suit for account against the executors, the suit falls under art. 120 and the plaintiff is entitled to accounts for six years before the date of suit. The fact that the principal object of the suit is to be put in possession of the legacy does not bring the claim for accounts under art. 123 so as to extend the taking of accounts for a period of 12 years – *Gajanan v. Waman*, 12 Bom. L.R. 881; 8 I.C. 189 (190). But if the suit is in effect a suit for a legacy, a mere prayer for accounts will not oust the operation of art. 123. And if a suit is brought by a person who is entitled under a will to a legacy and to a share of the residuary estate, but he does not ask for payment of the legacy nor for the ascertainment of the share of the residue but sets forth certain alleged acts of misconduct on the part of the defendants (who are administrators) with respect to their dealings with the property, and asks for an account and for damages, *held* that the suit must be treated as a suit for recovery of legacy under this article (and the plaint should be amended accordingly), and not as a suit for accounts – *Cursetjee v. Dadabhai* (1896), 19 Mad. 425 (432)."

Article 120 of the Indian Act is similar to art. 116 of the Zanzibar Decree.

In Rustomji at p. 650, it is said in the text to art. 123 of the Indian Act,

> "where plaintiff has already been admitted to enjoyment of the legacy, and the suit is merely to define what that legacy really is, it is not a suit for a legacy within art. 123".

Windham CJ., referred to *Salebhai Abdul Kader Basrai v. Baisafuabu* (1) (1912), 36 Bom. 111, where it was held that the substantial claim was to recover a legacy, whether or not the suit involved the administration of the whole estate, and that art. 123 of the Indian Act applied. There, however, the executrix had denied the right of the claimants to inherit. In *Rajamannar v. Venkatakrishnayya* (2) (1902), 25 Mad. 361, also referred to by Windham, C.J., the executors denied that a sum of Rs. 10,000 was due to the claimant as a legacy. The appellate court held that it was, and that the claimant had received Rs. 6,000 of it and that the suit for the balance of Rs. 4,000 was not time barred, although eleven years after the deceased's death, as it was a suit for a legacy and art. 123 applied. The court said at p. 364:

> ". . . for though it is true the plaintiff prayed for an administration it was only ancillary to his getting his legacy; when a suit for a legacy, for which

> twelve years is specifically allowed under art. 123, entails administration of the testator's estate, it would be unreasonable to hold that that circumstance cuts down the period of limitation to six years under an indefinite article like 120, which does not refer to an administration or any particular suit but only to suits for which no other period of limitation is provided."

These two cases are referred to in Rustomji in support of the proposition that

> "when the suit is in effect for a legacy, and the prayer for administration is merely ancillary, art. 123 (and not 120) applies".

I find some difficulty in reconciling some of the Indian authorities with others. I do not find the position made easier in Mitra where at p. 578 (commentary on art. 120) reference is again made to *Gajanan v. Waman* (3), 12 Bom. L.R. 881, and the author says:

> ". . . A suit for accounts brought by a legatee against the executors of a will falls under this article; even if the plaintiff claims to recover a legacy and also claims an account of the property, the claim to legacy will be governed by the 12 years' rule of article 123, but the claim for account will not be extended to 12 years but will be limited to only six years before suit."

Referring to the case of *Khetramani Dasee v. D.N. Roy* (4) (1913), 41 Cal. 271, where a suit was filed by a residuary legatee involving the taking of accounts and art. 123 was held to apply, Mitra says at p. 599,

> "This article [i.e. art. 123] applies to a suit by a residuary legatee to recover his legacy or his share of residue under a will or an account for the purpose of ascertaining what that share is".

It seems to me that what must be looked for is the true nature of the suit and not merely how the suit is framed. In Rustomji at p. 42, and p. 43 it is pointed out that the courts in India do not all take this view, some holding that the court must look solely at the suit as framed and others holding that what matters is the real substance of the suit. The author then goes on to say,

> "But it is submitted that a plaintiff cannot be allowed to frame his suit so as to evade the law of limitation correctly applicable to the facts as stated in the plaint".

I agree. Article 116 is a residuary article and if the suit is in essence one coming within some other specific article then art. 116 cannot apply even though administration is also asked for. In Rustomji at p. 365, it is said,

> "Suit for account insofar as it is not specifically provided for by other articles is governed by the residuary art. 120. But art. 120 applies only when the suit is essentially and in its main object one for account and not when a prayer for account is merely ancillary".

I am inclined to the view that the nature of the suit is essentially in part for accounts and in part for devastation, and that so far as accounts are concerned art. 116 applies. It can of course be a suit for administration also.

In so far as part of the claim was founded on devastavit it was, I think, clearly time barred. Michael Franks on Limitation of Accounts, at p. 47 says (with reference to cases not available to me),

> "for purposes of limitation a devastavit has been treated as a tort, and it seems likely that this view would be followed".

In *Re Blow* (5), [1914] 1 Ch. 233, Phillimore, J., at p. 251, so referred to it. The claim on devastavit is clearly barred by limitation in the instant case. Torts

would appear to come within art. 29 of the Zanzibar Limitation Decree which reads:

"29.	For compensation for any malfeasance, misfeasance or non feasance independent of contract and not herein specially provided for	2 years	When the malfeasance, misfeasance or non feastakes place."

In so far as the suit was for accounts and art. 116 applies, an executor in accounting for what he has received on behalf of the estate cannot set up his own devastavit and thereupon claim the benefit of the Limitation Decree. As was said by Chitty, J., in *re Hyatt* (6) (1888), 38 Ch. D. 609, a man cannot take advantage of his own wrong, and the result is that the executor is considered to hold still in his own hands assets which he has improperly paid away or wasted. Chitty, J., then contrasted a claim for devastavit as follows (at p. 616):

> "The creditor in such a case elects to treat the executor as his own debtor. If the plaintiff chooses to say, it is not the estate of the debtor that is liable, but it is you, the executor, who are personally liable, the executor being then charged with his own personal wrongdoing or tort is entitled to avail himself of the benefit of the Statute of Limitations."

In *Lacons v. Warmoll* (7), [1907] 2 K.B. 350, Buckley, L.J., said at p. 367:

> ". . . The remedy in administration is upon the footing that a fund has been so dealt with that the executor has not discharged himself of it, and is therefore still liable to account for it; he cannot say he has parted with it; whereas an action for a devastavit proceeds upon the footing that the executor has parted with the fund, and is liable because he has parted with it."

In *Cursetjee v. Dadabhai* (8) (1896), 19 Mad. 425, where a legatee alleged misconduct by the executors and asked for accounts, the appellate court said at p. 432,

> "It is clear that in a suit for a legacy the administrators cannot defend themselves by pleading their own wrong and alleging that more than six years before suit they misappropriated or wasted the assets".

Certain of the items consisted of sums which at the date of the deceased's death were owing to the deceased by the appellant. The English Common Law in such circumstances is stated in the case of *Jenkins v. Jenkins* (9), [1928] 2 K.B. 501, where at p. 506, Salter, J., said,

> "By the common law the effect of the appointment by a creditor of his debtor to be executor of his will is to release the debt on the death of the testator, because a debt is a right to sue and the executor cannot sue himself"

At p. 507, Salter, J., said:

> "In equity the executor is held liable to pay the debt if the interests of the creditors require it and unless he can show a continuing intention on the part of the testator to make him a gift of the debt: *Strong v. Bird*, L.R. 18, Eq. 315; *In re Applebee*, [1891] 3 Ch. 422. When the executor is thus held liable, equity enforces payment by treating the debt as assets in his hands. He can be declared accountable in an administration action and ordered to pay, and on default he may be liable to attachment. In equity, therefore, it is plain that his debt to the estate has been paid: see *In re Bourne*, [1906] 1 Ch. 697, 708. In that case Romer, L.J., said of the executor debtor who was sought to be made liable: 'He was indebted to the testator in his life-time, and by the will he was appointed executor, and he proved the will. The effect of that was that at law the debt was extinguished because there

> was no one to sue or be sued, but in equity he as debtor is held to have paid himself as executor, and therefore as executor to have in his possession the full amount of the debt as having been paid to him as executor. That is the view of equity, and it is on that view that he can be made liable in an action to adminster the estate of the testator."

The law in India would appear to be the same. In Rustomji at p. 107, it is said,

> "if a debtor is appointed executor, the statute cases to run, because he is considered as having paid the debt as holding the sum as a part of the estate".

I can see nothing in the Zanzibar Limitation Decree to suggest that the law is any different there.

Support for the view that time begins to run under art. 116 from the filing of the accounts is to be found in *Cursetjee* (8), where the appellate court said at p. 431,

> "We agree with the district judge that in a suit for an account the plaintiff is not entitled to go back more than six years. If, therefore, the administration was closed in 1886 and the functions of the administrators had then ceased, it would follow that the suit could not be maintained".

The deceased had died in 1881 and the accounts had not been filed until 1886, the suit thereon not being brought until 1894. The ratio decidendi would seem to be that until an executor has filed the accounts he has not completed his statutory duties and is still the executor at least to that extent (*Gulati v. Reeves-Brown* (10) (1939), A.I.R. Lah. 463). Until the accounts were filed it was not possible for the plaintiffs to sue on them, dilatory as they were in not asking the court to order accounts to be filed. From a review of the authorities the position would seem to be that even so the claim for accounts is limited to six years before suit, although earlier accounts can be looked at to ascertain the balance of moneys in the hands of the executor at the beginning of the six-year period. Mitra, at p. 579 says,

> "accounts previous to the six years are only material as evidence of what the defendant actually had in hand at the date at which the accounts now to be taken is to run."

Rustomji, in citing *Gajanan v. Waman* (3), and other cases says at p. 635:

> ". . . When a suit for account is brought within time under art. 120 (e.g., within six years of the accrual of the right to sue), plaintiff is not thereby entitled to go back more than six years and open up the whole account without any further bar of time. But this does not mean that the earlier accounts cannot be required for any purpose whatever. So when a defendant is liable to make good monies which have been in his hands, the action is maintainable in respect of the balance in his hands six years ago and the monies received since, and what that balance was is a question with regard to which the earlier accounts are material. In other words, accounts previous to the six years are only material as evidence of what the defendant actually had in hand at the date from which the account now to be taken is to run."

It is now necessary to ascertain what moneys can be said to have been in the hands of the appellant at the commencement of the six-year period (no assets were received by him thereafter). The learned judge found the appellant liable in a sum of Shs. 55,504/35. Of this I would, for the reasons I have given, deduct Shs. 9,800/61 in respect of rent collected by the appellant other than as executor on behalf of the deceased's estate, and Shs. 18,954/58 in respect of the insolvency

transactions. This leaves Shs. 26,749/16, being two-thirds (the appellant being entitled as an heir to the other one-third) of the Shs. 40,123/74 made up as shown in para. 1 of the commissioner's second report. Items there set out, except for (*a*), consist of moneys which were due by the appellant to the deceased or other moneys which he had received and either wrongly paid out or converted to his own use. (*a*) was for a sum of Shs. 2,209/- being rent due to the deceased before his death which the lower court appeared to accept had not been collected by the appellant. It was not therefore money which had come into the hands of the appellant and he should not have been liable in respect of it. Two-thirds thereof (i.e. Shs. 1,472/66) should therefore be deducted from the Shs. 26,749/16 leaving Shs. 25,276/50, which sum I would substitute for the Shs. 55,504/35 found due by the lower court.

As to the counterclaim, the commissioner found in para. 6 of his first report that it had not been proved. Objection was filed in the lower court to this finding, but on the hearing was abandoned and is not included in this appeal. There are, however, two small items which appear to have been overlooked and to which Mr. Karai has drawn our attention: they were not, I think, contested by Mr. Lakha. They are the clock referred to in para. 11 (1) of the plaint valued at Shs. 165/- which the commissioner found to have been in the possession of Dayalji, and the proceeds of some machinery which the commissioner found had been sold by Dayalji for Shs. 500/-. These two sums will have to be allowed for in the judgment as re-adjusted. The appellant is entitled to set-off one-third of them as against Dayalji. The judgment should be therefore that the appellant pay to the Administrator-General as administrator of the estate of Dayalji the sum of Shs. 12,416/59 (being one-half of Shs. 25,276/50 less one-third of Shs. 665/-) and to Indira (or to such person as may be appointed to represent her if necessary) the sum of Shs. 12,638/25. I would vary the decree accordingly. It would appear that Dayalji is also liable to account to Indira for one-third of Shs. 665/- but that cannot be included in this judgment.

Without having made specific reference to each ground of appeal, I think I have covered them all except for number seventeen which was abandoned, and that part of number sixteen which relates to the parties' right of inheritance. Mr. Karai argued that evidence should have been allowed on the latter and that the second plaintiff, Indira, was only entitled to a life interest. This is quite inconsistent with the appellant's written statement of defence in which he admitted para. 8 of the plaint which stated that Indira was the sole heir of Hansraj. In his second report the commissioner observed that each plaintiff was entitled to one-third, and the appellant objected to this before the lower court. The court held there was no substance in the objection, without giving reasons, but on the pleadings I think he was entitled to so hold, and there was no application to amend the defence. As to Dayalji's entitlement it will be for the Administrator-General to decide who are Dayalji's beneficiaries and in what proportion they take. As I have said, it is not known whether Indira is still a minor, and if so who represents her.

As to costs, the respondents were in part successful in the lower court and I would order that the appellant pay half their costs there and half the fees of the commissioner, the respondents paying the other half. The appellant has correspondingly been in part successful in this appeal, and I would order that half his costs in the appeal be paid by the respondents.

Sir Ronald Sinclair P: The respondents' claim against the appellant was for administration of the assets of the deceased by the court, for accounts and enquiries and for an order that the appellant should be ordered personally to pay the sum of Shs. 43,971/47 being the total loss alleged to have been suffered by the estate by reason of certain specified acts of waste on the

part of the appellant. In my view the suit cannot be construed as being in substance a suit for a legacy or for a share of a residue bequeathed by a testator.

In so far as the claim is founded upon waste or devastation it is clearly barred by limitation. It seems from the authorities that for the purpose of limitation acts of devastation must be treated as torts which appear to come within art. 29 of the Zanzibar Limitation Decree.

By s. 272 of the Succession Decree an executor is required to exhibit an account of the estate showing the assets which have come into his hands and the manner in which they have been applied or disposed of. An executor has not discharged his duties until he has exhibited such an account which must cover the whole period of his executorship. A beneficiary may attack the accuracy of the account in an administration suit and for such a purpose time cannot, in my view, begin to run against him until the account has been exhibited. I think that in such case art. 116 applies and that, in so far as the respondents asked for administration of the testator's estate and for accounts and enquiries, they were within time. Such assets of the estate as the appellant in his capacity of executor was held to have misapplied or misappropriated are deemed to be still in his hands at the date of the account and the court had jurisdiction to order him to pay them into court. The appellant was not entitled to set up his own wrong and then plead that relief was barred by limitation. I agree with Crawshaw, J.A., that the appellant was not be prejudiced by the form of the decree and that the decree should not be set aside merely on the ground that the appellant should have been ordered to pay into court the amounts in respect of which he was held liable.

As to the individual items which the appellant was ordered to pay, I agree with Crawshaw, J.A., and for the reasons given by him, that the appellant is not liable to the respondents in these proceedings in respect of the rents collected by him after October 17, 1942, the amounts paid by him to satisfy the debts of Pitamber Ajramal & Sons and rents which he failed to collect. I also agree that the appellant is liable in respect of the other amounts specified by Crawshaw, J.A. As to the amounts which the appellant owed personally to the estate, it seems from the evidence that the appellant obtained an annulment of his adjudication as an insolvent on the ground that he paid his creditors in full and in those circumstances he must be deemed to have received the amount of the debts and to have the money still in his hands as executor.

I agree that the appeal must be allowed to the extent indicated by Crawshaw, J.A. The judgment and decree will be varied accordingly and there will be orders as proposed by him.

Sir Trevor Gould Ag VP: I have had the advantage of reading the judgments of the learned President and Justice of Appeal. I agree that in so far as the suit was for administration and accounts it fell under art. 116 of the Zanzibar Limitation Decree. The period of six years therein prescribed would not (at least in the circumstances of the present case) begin to run until the completion of the administration by the exhibiting of the executor's statutory accounts. The action (except to the extent that it contained a claim based on devastavit, which was clearly time-barred) was therefore brought in time. Once that is established and as it appears from the history of the case as set out in the judgment of Crawshaw, J.A., that such an action is a proper method of challenging the accounts exhibited by the executor, it seems to me that it must be within the power of the court to go into the whole of those accounts, which are required to embrace only the money which the executor has received and not what he might have received but for his own default: Williams on Executors and Administrators (14th Edn.), p. 1182. I think that in effect this is the

result arrived at by Crawshaw, J.A. in his judgment, though the approach may differ slightly.

Subject to these brief comments I agree with the reasoning and conclusions contained in both the judgments I have referred to above, and with the variation of the decree and judgment and the other orders proposed.

Appeal allowed in part.

For the appellant:
Dinshaw Karai, Zanzibar

For the respondents:
Lakha & Co., Zanzibar
Murtaz Lakha

Jivabhai Rahemtulla v Anwari Hotel
[1962] 1 EA 610 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	10 July 1962
Case Number:	70/1961
Before:	Sir Ronald Sinclair P, Sir Alastair Forbes VP and Sir Trevor Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Keatinge, J.

[1] Rent restriction – Statutory tenancy – Standard rent – Permitted increases of rent – Whether increase can be claimed without prior demand or notice – Rent Restriction Ordinance (*Cap.* 115), *s.* 3 *and s.* 11 (*U.*).

Editor's Summary

The respondents had claimed damages for an alleged illegal distress levied on their premises on behalf of the appellant who was the landlord. The premises were controlled and on the issue of the amount of the rent due, the trial judge found that only the standard rent was payable because the effect of Legal Notice No. 265 of 1956 was not automatically to increase the standard rent by 200%, but that some action, such as demand or notice, on the part of the landlord was required before advantage could be taken of it. On appeal, it was submitted of behalf of the appellant that the trial judge's finding was wrong as the Legal Notice contained no specific provision requiring notice to be given.

Held –

(i) the provisions of Uganda Legal Notice No. 265 of 1956 are permissive and it is envisaged by such phrases as “up to” and “not exceeding” that there may be cases in which the increase or the full increase may not be exacted

(ii) if no action is taken by the landlord, e.g. by demand or notice, the rent payable remains as it was, for no advantage has been taken of the permission given; in an appropriate case the requirements of demand or notice could be waived by words or conduct.

Appeal dismissed.

Cases referred to in judgment:

(1) *Suleman K. Osman v. Walji M. Dattani*, [1957] E.A. 796 (C.A.).

(2) *Dawoodbhai Sulemanji Dungerwalla v. Himatlal Amulakh Mehta*, Uganda High Court Civil Case No. 380 of 1957 (unreported).

(3) *Hassanali M. Lakhani v. Akbarali G. Sabur*, Uganda High Court Civil Case No. 761 of 1959 (unreported).

(4) *Shah v. Patel*, [1961] E.A. 397 (C.A.).

(5) *Alwi A. Saggaf v. Abed A. Algeredi*, [1961] E.A. 767 (C.A.).

(6) *Perkowski v. City of Wellington Corporation*, [1958] 3 All E.R. 368.

(7) *Esso Petroleum Co. Ltd. v. Southport Corporation*, [1956] A.C. 218; [1955] 3 All E.R. 864.

The following judgments were read:

Judgment

Sir Trevor Gould JA: This is an appeal against a judgment and preliminary decree of the High Court of Uganda at Jinja in an action brought by the respondent firm, Anwari Hotel, against the appellant Jivabhai Rahemtulla, and one Mohamed Abdulla. The claim was for damages for an alleged illegal distress levied on the premises of Anwari Hotel on or about January 31, 1958, by Mohamed Abdulla as bailiff for the appellant who was the landlord of the premises. The learned judge in the High Court found that the distress was illegal, but the issue of damages was postponed by consent and has not been dealt with. The present appeal has been brought by Jivabhai Rahemtulla; his co-defendant, Mohamed Abdulla, has not appeared, though the court was informed by counsel that he had been made a respondent.

The appellant acquired the premises in the year 1943 from Dial Singh Kalsi who had, by an agreement dated July 31, 1941, let them for a term of three years from January 1, 1942, at a rent of Shs. 150/- per month, to three persons trading under the firm name of Anwari Hotel. It would appear that upon the expiry of their agreement the three partners continued in possession as statutory tenants. A lady by the name of Sarabai next became tenant and apparently operated under the name of “Anwari Hotel”. Early in 1953, by a very homemade agreement stamped on March 5 of that year, she purported to sell the Anwari Hotel to a company named R.R. & Co. Ltd. This document contained statements that the appellant owned the plot of land and that there was no tenancy agreement with him; reference was also made to “a chain of sub-tenants” and there was something in the nature of an indemnity by R.R. & Co. Ltd. to Sarabai in case any objection was raised by the landlord to the sub-letting. In 1955 the appellant brought proceedings against Sarabai and R.R. & Co. Ltd. for the unlawful assignment or sub-letting of the premises, alleging in his plaint that Sarabai had a contractual tenancy from February, 1951, at Shs. 225/- per month, and afterwards continued in possession as a statutory tenant. In 1956 the case was settled, the appellant undertaking to accept R.R. & Co. Ltd. as tenant at a rent to be settled by the arbitration of one Mohamed Hafiz. By a letter dated November 24, 1956, addressed to “Messrs. Anwari Hotel”, and another in similar terms dated November 27, 1956 addressed to “Messrs. Anwari Hotel Ltd.” the advocate for the appellant gave notice to quit on January 1, 1957, referred to the addresses as “statutory tenants” and stated that the premises would be decontrolled with effect from that date. It would appear that at the time of the institution of this action Anwari Hotel was a partnership between R.R. & Co. Ltd. and one Abdul Sakur but nothing has turned in the action upon the question whether the tenancy was technically vested in R.R. & Co. Ltd. only or in the partnership.

I have narrated this short history of the premises partly because in the decision of one of the main issues in the case the question of their user was prominent, and, in the three-year tenancy agreement of 1941, between Dial Singh Kalsi and the then Anwari Hotel, there was a clause relating to that subject. It was suggested in argument before this court that the terms of that lease were still applicable, but I cannot accept that to be the case, though they would indicate the permitted user when the agreement was signed. The original partnership would hold over as statutory tenants as from the expiry of the

agreement, but if, as it appears from the action brought against her, Sarabai was a tenant and not a sub-tenant, her tenancy must have been contractual initially at least, as was in fact claimed in the action. Then, when the action was settled, the appellant agreed to accept R.R. & Co. Ltd. as tenant; that was contractual. The terms of the original lease could not in my opinion have survived these changes unless they were specifically included in the new arrangements; of that there is no evidence. However, this matter has little materiality, for the appellant in evidence indicated in effect that there was no restriction on the user of the premises. Throughout the action it has been common ground between the parties that the Anwari Hotel, after the settlement of the action against Sarabai and R.R. & Co. Ltd. was a statutory tenant and I will accept that position, though, as I have observed, I do not agree that the terms of the agreement of 1941 could be attached by operation of law to that tenancy.

In reply to the letters of November 24 and 27, 1956, above referred to, the advocate for Anwari Hotel wrote claiming that the premises included living quarters and that therefore they were not excepted from the provisions of the Rent Restriction Ordinance by Legal Notice 208 of 1956. His clients, he said, would continue to occupy the premises as statutory tenants. The position between the parties appears to have remained static until August, 1957, when there were negotiations for an agreement for a letting of four years from January 1, 1957, at a rental of Shs. 880/- per month. The question whether any legally binding agreement was arrived at was the subject-matter of one of the issues in the action, but rent at Shs. 880/- per month for thirteen months was claimed when the appellant, by his bailiff Mohamed Abdulla, took possession of the premises on January 31, 1958. The levying of that distress was the subject-matter of the action.

In the High Court the following issues were agreed:

"(1) On whose behalf was Anwari Hotel carried on from January 1, 1957, to January 31, 1958?

(2) At what rent was the plaintiff tenant of D. 1 from January 1, 1957, December 31, 1958?

(2A) Did the premises become decontrolled in January, 1957, by Legal Notice No. 10 of 1957?

(2B) If yes, was rent fixed at Shs. 880/- by Mohamed Hafiz or agreed between the parties?

(3) Was any rent due to D. 1 on January 31, 1958, and if so how much?

(3A) Were defendants or either of them guilty of illegal distress on January 31, 1958, by distraining when no rent at all was due?

(3B) Was Shs. 7,000/- paid as deposit against future rents or why?

(4) Did plaintiff tender full amount due to D. 1 for rent and any distress charges and fees payable?

(5) If defendants or either were guilty of illegal distress what damages?"

The finding on Issue No. 1, which was that Anwari Hotel was carried on on behalf of R.R. & Co. Ltd. and Abdul Sakur, has not been challenged in this court. The judge made no finding on Issue No. 3B and that matter also has not been made the subject of complaint. Issue No. 5 was postponed by consent. The remaining issues were answered as follows:

"(2) From 1.1.57 to 31.12.58 plaintiff was tenant of D. 1 at a rental of Shs. 150/- p.m.;

(2A) The premises did not become decontrolled in January, 1957, by virtue of Legal Notice 10 of 1957;

(2B) If the premises had become so decontrolled, the rent was agreed at Shs. 880/- p.m. subject to certain conditions which were not accepted by D. 1;

(3) On 31.1.58 the sum of Shs. 1,950/- was due for rent;

(3A) Both defendants are guilty of illegal distress on 31.1.58;

.

(4) Plaintiff tendered an amount in excess of the sum due to D. 1 for rent and any distress charges and fees payable."

The learned judge's answer to Issue No. 2A was first challenged on the appeal to this court. The effect of Legal Notice No. 10 of 1957 (Laws of Uganda, 1957, p. 7) was, inter alia, to exempt from the provisions of the Rent Restriction Ordinance (Cap. 115 of the Laws of Uganda, 1957):

> "Premises anywhere in the Protectorate which do not include any living quarters and are not included in one tenancy agreement or lease with any living quarters."

By the Ordinance itself "premises" means any building or part of a building let for business, trade, or professional purposes or for the public service. In his judgment the learned judge considered the purpose for which the premises were originally intended to be used as indicated by the approved plan exhibit 16, and found that it was quite clear that the premises were planned for use as a hotel. The lease of 1941, to which reference has been made, provided that the premises were to be used as "hotel, residential quarters, and as board and lodging house only". There was provision both in the plan and the lease for the building of an oven which was in fact built. He found that it was undisputed that the premises had never used as a hotel but that they had in fact been used as a bakery, eating house and bar. He said that there was undisputed evidence that for some years up to 1941 the premises had been lived in. He appears to have accepted the evidence of Ramnath Chuni, the managing director of R.R. & Co. Ltd., that members of his staff at some stage slept on the premises in the room marked "bedroom" on the plan, as he intimated that a defence witness, Jivabhai, who gave evidence to the contrary, appeared to be confused and that little weight could be given to his evidence. It is upon the existence and use of this bedroom that the plea that the premises contained living quarters was based, as it has not been claimed that two rooms each marked "passengers' bedrooms" on the plan have been used for other than business purposes. In fact in a letter of January 3, 1958, when Chuni was endeavouring to retain his bakehouse licence, he wrote to the town clerk, Mbale, that there was no one sleeping on the premises.

The learned judge considered an argument that the living quarters could not lawfully be used as such in view of r. 6(*e*) of the Public Health (Bakehouse) Rules (Vol. VII of the Laws of Uganda, p. 1736) which states:

> (*e*) No part of the bakehouse shall be used as or have direct communication with a living or sleeping room."

He dealt with this argument as follows:

> "It seems to me that this rule envisages sleeping quarters or living quarters being on the premises away from the bakehouse and does not prohibit such living quarters. Thus in my view there would be nothing illegal in using the room marked `bedroom' on the plan as a living quarter."

The learned judge then expressed his final conclusion on this point as follows:

> "There is nothing in the lease which prohibits the room being used as a living quarter, although even on Chuni's evidence the bedroom in question has not been lived in for a number of years. There is no evidence of any structural alteration.
>
> "As I have already stated the premises have not been used as a hotel but in my view there has not been such a change of character in the user of the premises as would suggest that the bedroom could not still be used as a living quarter. Indeed it seems to me that in view of the fact that at the material time plaintiff was having great difficulty in getting his licences (see correspondence exhibit A) and could not obtain an eating house licence and bakery licence for 1958 it might well be that he might wish to use the premises for its original purpose that is as a hotel.
>
> "After due consideration I have come to the conclusion that `the bedroom' is a `living quarter' within the meaning of Legal Notice 10 of 1957."

Before this court Mr. Nazareth, for the appellant, contended that all the evidence showed that, at least for a number of year, (as stated in the passage from the judgment last above quoted) there had been no de facto user of the premises as living quarters. There had been a change from the user for which the buildings were designed and they never had been used as a hotel. The consent of the local authority to this departure was evidenced by the various licences from time to time issued. He submitted also that the learned judge had misdirected himself as to the effect of the Public Health (Bakehouse) Rules by overlooking the definition of "bakehouse" in the rules. In r. 3 it is stated:

> "'bakehouse' means any premises on which the baking of bakehouse products is carried on for reward or for the purpose of selling the products;"

Therefore when r. 6(*e*) refers to "No part of the bakehouse" it means no part of the premises, and by s. 2 of the Public Health Ordinance (Cap. 98) for the purposes of the Ordinance and rules, "premises" includes any building together with the land on which it is situated and the adjoining land used in connection therewith. Prima facie it would seem that Mr. Nazareth's contention on this point is correct though, as was pointed out in argument, certain anomalies would follow, and implications arising from the use of the phrase "have direct communication" in r. 6(*e*) might tend to negative the applicability of the definition of "premises". I prefer to express no final conclusion upon this question, as even if Mr. Nazareth's contention is accepted as correct for the purposes of this case, I do not consider that it is a matter which goes to the essence of what must be decided to resolve this issue. I say that because it is established that there had been no de facto user of the premises as living quarters for some years and it does not seem particularly to matter whether that was so because such user in conjunction with the bakehouse might have been illegal or for other reasons. If the argument is that the illegality would prevent the use in futuro of the premises as living quarters, it is an illegality removable by the respondent at its option by discontinuance of the bakery. The learned judge considered that very possibility. I think the real basis of his decision was that the original design of the premises was such as to include living quarters for at least hotel staff; that there had been no structural alteration to the premises; that there was no restriction imposed by the landlord upon their mode of user; and that as (on the evidence) Chuni could not obtain an eating house and a bakery licence for 1958 he might well use the premises for other purposes involving the use of the living quarters.

The question for this court is whether the judge was wrong in arriving at his conclusion. Reference in argument was made to only one case in which

the meaning of the phrase "living quarters" has been considered. That is the decision of this court in *Suleman K. Osman v. Walji M. Dattani* (1), [1957] E.A. 796 (C.A.). There Briggs, Ag. V.-P., said, at pp. 797 and 798:

> "So far as I am aware, the phrase `living quarters' is, in reference to Rent Restriction legislation, novel. It is not defined and is not used in any special relation to other words now well-known, such as `dwelling house'. It has no status as a term of art and should prima facie bear its simple grammatical meaning. I understand the words `living quarters' to mean `quarters for living in', rather than `quarters being lived in'. In other words, I think `living' is primarily descriptive of the nature of the `quarters' and the purpose for which they were designed. It does not, I think, refer in the first place to their user at a specific time. It may do so, but I think that meaning is secondary."

He went on to say that if premises were let on terms forbidding residential user that might preclude their being held in law to include living quarters. The question did not arise in that case – nor does it here. He considered that the purpose of the letting could be a factor in arriving at a conclusion but where (as here) there is no prohibition as to user, the question is open and other factors must be looked to. The premises in *Osman v. Dattani* (1) consisted of a shop at the front with rooms at the back designed for and originally occupied as living quarters. The use of the latter as living quarters had been discontinued for some ten years, during which period they had been used for the purpose of the shop business. Some shelves for storage had been put in but there had been no structural alterations. On these facts Briggs, Ag. V.-P., said at p. 799:

> "It remains for decision whether, if the shop-premises `included living quarters' in 1945, the back portion later changed its character and ceased to be living quarters by reason of long non-occupation. I think it is clear that other reasons could produce such a change. Structural alterations could do so, and I think dilapidation rendering the premises unfit for human occupation might have the same effect. So might any supervening legal prohibition on user as living quarters; but such factors do not arise here. Either respondent might, as I have said, resume residence at any time. In the circumstances I think non-user for residence was at most a factor to be taken into account with others as leading, but not compelling, the court towards the conclusion that these premises were no longer living quarters. In view of the past history of the premises and the subsisting rights of the respondents, I think it was a factor of comparatively little weight and was rightly treated as inconclusive."

Much that is said there is applicable to the present case. There could have been a resumption of the use of the premises as living quarters at any time subject only to the necessity (on the law as I have accepted it for the purposes of the case) of discontinuing the bakery business. As this necessarily was one which, on the evidence, seemed likely to arise in any event through inability to obtain a licence, resumption of residence in the premises was at least a reasonable probability. The limitation imposed by law was therefore removable at the option of the respondent. I do not in the circumstances think that the user as a bakery, eating house and bar over a number of years necessarily changed the character of the premises. As Briggs, Ag. V.-P., observed, that is a question of fact and, I might add, perhaps one of degree. This is, I think, a borderline case, but it is for the appellant to show that the judge's decision was wrong and, with all respect to the arguments adduced, I do not think he has done so. This ground of appeal accordingly fails.

The next ground argued was related to the answer to Issue No. 2B. The learned judge held that in August, 1957, Chuni agreed to pay rent at Shs. 880/-

per month but subject to certain conditions (notably a condition relating to structural alterations to be performed by the appellant) which were not accepted by the appellant. He found that the parties were never ad idem and that there was no concluded agreement. It is obvious that, if the finding that the premises were not exempted from the operation of the Rent Restriction Ordinance after the end of the year 1956 is correct, no finding on this issue is necessary to the determination of the case. The only rent which could be distrained for would be the standard rent and (if applicable) permitted increases which amounted to a sum substantially less than Shs. 880/- per month. I will therefore deal very briefly with this question, the evidence in respect of which was considered at length by the learned judge in his judgment. He found himself in the unfortunate position of having to come to a decision upon a conflict of evidence between Chuni on the one hand and the appellant and his brother Gulham Hussein Alibhai on the other, none of whom he regarded as particularly trustworthy or as witnesses of truth.

The learned judge accepted the evidence of Mr. J.S. Patel, Advocate, that Chuni, Gulham and others came to his office to have an agreement prepared. Gulham told Mr. Patel the terms and Mr. Patel noted them down. Chuni agreed to them. Mr. Patel then gave Gulham the rough note to take to his brother (the appellant) for signature, saying that if he signed it he would later draw up the agreement. The suggestion that the rough notes should be signed emanated from Mr. Patel. The learned judge found as a fact that the rough note exhibit C was handed to Gulham for the purpose of having it signed, hat Gulham was fully aware of this, and that Chuni reported to Mr. Patel on the same day that the appellant had refused to sign. Having considered tin detail the subsequent correspondence between the parties and drawn inferences therefrom the learned judge said:

> "It is clear from the correspondence exhibit A which Chuni had with the Health Office, Mbale, and the evidence of Mr. Lewis that he was having the greatest difficulty in getting his licences for an eating house and bakery renewed, as the health authority were requiring considerable structural alterations to be made. It seems to me that it was essential to Chuni to have his landlord's agreement to pay for the structural alterations required before he, Chuni, agreed to pay a very considerably higher rent. D. 1's attitude to the premises has already been commented on. He has never done any repairs to the premises and his only concern is to get rent. I have no doubt that it was in fact a term of the proposed agreement that structural alterations were to be carried out by the landlord. As D. 1 and Gulham both say that they never agreed to this term, I can only conclude that the parties were never ad idem and I find that there was no concluded agreement."

Mr. Nazareth contended that the learned judge had confused the position which arises when two parties make a binding agreement and thereafter one denies or repudiates one or more of its terms, with a failure to reach any agreement at all. The learned judge ought to have found, in his submission, that there was a concluded agreement arrived at in Mr. Patel's office, even though the appellant and Gulham denied in evidence that they had agreed to the term regarding structural alterations. That is not the picture which the evidence conveys to me, and clearly Mr. Patel did not understand Gulham to be acting as authorised agent for the appellant (whatever his actual authority may have been) in the making of a binding agreement. He regarded himself as taking instructions to prepare a formal agreement and he wanted the appellant's confirmation of the terms. If Gulham had purported to act as a fully authorised agent to make a firm and binding agreement he would not have acquiesced in the proposal that he should obtain his brother's signature on exhibit C. He, of course, said in evidence that he did not do so but the judge's finding is against.

him on that point. I do not think that the appellant, who, together with his main witness, swore that no term concerning structural alterations was ever agreed though it is noted in exhibit C, is in a position to say in argument that the judge should have disbelieved him and found that he had entered into a binding agreement. In my opinion upon the whole of the evidence the learned judge was entitled to arrive at the finding he expressed.

The appellant next challenged the judge's finding on Issue No. 2 that from January 1, 1957, to December 31, 1958, the respondent was tenant of the appellant at a rental of Shs. 150/- per month. A precis of relevant pleadings and evidence was given by the learned judge as follows:

> "In his plaint plaintiff stated the controlled rent was originally Shs. 120/- per month. Dial Singh Kalsi, in evidence, given on February 2, 1959, stated that on January 1, 1942, rent was Shs. 100/- p.m. On this evidence being given Mr. Wilkinson for plaintiff immediately applied for leave to amend his pleadings by showing the controlled rent as being Shs. 100/- p.m. and making the further amendments which necessarily followed from this. On the other hand D. 1. gave evidence that the rent was Shs. 281/25 as at 31/12/56. I think this figure is made up by taking the rent as being Shs. 225/- p.m. plus 15% i.e. the 15% allowed by Legal Notice No. 121/54, Laws of Uganda, 1954, p. 138. When the case again came on for hearing on February 6, 1961, the lease, exhibit F., was produced. It would seem that this document was unearthed during the adjournment. It is quite clear from this document that the rent in 1941 was fixed at Shs. 150/-, and I find that the rent was controlled at this figure. One would have thought that the landlord at least would have found out when purchasing the premises what the rent was at that time. However, apparently he did not trouble to do so."

It would appear plainly, and there is now no dispute about it, that the standard rent was Shs. 150/- per month, and, as I have mentioned earlier, it was common ground that the respondent was to be regarded as a statutory tenant. The learned judge next dealt with the question of permitted increases and found that there was no evidence that the appellant ever gave notice of any sort that he proposed to increase the rent by 200%. On the authority of two decisions of the High Court of Uganda, *Dawoodbhai Sulemar ji Dungerwalla v. Himatlal Amulakh Mehta* (2), Uganda High Court Civil Case No. 380 of 1957 (unreported) and *Hassanali M. Lakhani v. Akbarali G. Sabur* (3), Uganda High Court Civil Case No. 761 of 1959 (unreported) he found that the effect of Legal Notice 265/56 was not automatically to increase the standard rent by 200 per cent. but that before advantage could be taken of it, some action on the part of the landlord is required. No such action had been taken. An argument that the pleadings contained an admission that the rent payable was three times the standard rent, whatever it might be, was rejected, and the final conclusion was that Shs. 150/- per month was all that was payable.

Before this court it was argued firstly for the appellant that the finding that some action on the part of the landlord was essential before a permitted increase became payable, was wrong. Counsel pointed to the fact that Legal Notice No. 265/56 contained no specified provision requiring notice to be given as was the case in the rent restriction legislation in some other countries. He asked the court to overrule the authorities quoted above. The relevant legislation is contained in s. 3(1) and s.11(*b*) of the Rent Restriction Ordinance and in the Legal Notice abovementioned. Section 3(1) prohibits letting at a rent "which exceeds the standard rent". Section 11(*b*) provides that the Governor in Council may, by notice in the Gazette, "allow an increase in rent over the standard rent". The operative words of Legal Notice No. 265/56 are:

> ". . . has been pleased to declare, with effect from the 1st day of January, 1957, a percentage increase in the standard rent as first determined . . . will be allowed . . . up to the amount shown . . . in the second column of such Schedule."

The relevant entry in the second column, which is headed "Permitted increase not exceeding", is "200 per cent." On this legislation I am unable to see how the submission of counsel can succeed. The provisions are permissive and it is envisaged by such phrases as "up to", and "not exceeding", that there may be cases in which the increase or the full increase may not be exacted. If it is true in fact that the great majority of landlords would demand all that the law allows, it remains open to them under the law not to do so, and all that the law does is to allow the increase – it does not confer it automatically. If no action is taken by the landlord, e.g. by demand or notice, the rent payable remains as it was, for no advantage has been taken of the permission given. The requirement of demand or notice could, of course, be waived by words or conduct, but that is a different question and one which must be considered in relation to the next submission.

Counsel's second submission on this point is one of greater substance. The history of the respondent's pleadings is given in the passage of the judgment which I have last quoted. Paragraph 4 of the original plaint is as follows:

> "4. The said premises were at all material times subject to rent control under the Rent Restriction Ordinance and the standard rent was and is Shs. 120/- per month but by virtue of legal notice No. 265 of 1956 the total rent which may lawfully be charged for the said premises is Shs. 360/- per month."

Paragraph 10 relates that the plaintiff tendered the sum of Shs. 4,680/-

> "being the total of the rents at the lawful rent of Shs. 360/- per month then due".

When, at a certain phase of the evidence, it seemed that the standard rent was only Shs. 100/- per month, leave was obtained to amend para. 4 so as to show the standard rent at that figure and the total rent lawfully chargeable at Shs. 300/-, The first established tender of rent in 1957, was made by Chuni with a letter dated September 26, 1957, and was at the rate of Shs. 360/- per month which, in the letter, was referred to as "the increased control rent". The appellant's defence contained a general denial of all facts not specifically admitted and para.14 reads:

> "14. The lawful rent is Shs. 880/- per month and not Shs. 360/- per month as contended by the plaintiff."

At a later stage of the trial of the action a copy of the agreement of 1941 was produced by Mr. Shah, an advocate called by the appellant as a witness, and it was found that the standard rent was Shs. 150/- per month. I think the last relevant fact is that the argument that no notice or demand had been given or made for the 200 per cent. increase in rent (which became permissible as from January 1, 1957) was presented for the first time in the reply of Mr. Wilkinson, counsel for the respondent, at the final stage of the trial. Mr. Nazareth's submission on these facts is that the whole conduct of the case by the respondent until the last minute was on the basis that the rent payable was three times the standard rent and that he should not be permitted to resile from that position; and that the pleadings contained an admission to that effect.

In the court below Mr. Nazareth put forward a similar argument upon the effect of the pleadings; he addressed the court before Mr. Wilkinson and had no real opportunity of dealing with the submission that no demand had been

made for the increased rent, though he might have been expected to protest when the argument was presented. The learned judge dealt with the matter as follows:

> "It is argued by Mr. Nazareth that these pleadings amount to an admission by plaintiff that the standard rent had been raised by 200 per cent. Thus, if the standard rent at the end of 1956 was Shs. 150/- p.m. it follows that from January 1, 1957, the rent was Shs. 450/- p.m. In my view the truth of the matter is that neither plaintiff nor D. 1 knew what the standard rent was as at December 31, 1956. Plaintiff though it was Shs. 120/- p.m. and D. 1 didn't consider it necessary to even try to find out. I think at the highest the pleadings mean that on the assumption that the standard rent was Shs. 120/- p.m. plaintiff was prepared to pay rent at Shs. 360/- p.m. and did in fact tender rent at that rate. I consider para. 4 merely states the effect of L.N. 265/56. In my view the pleadings do not include an admission generally to pay rent at an increase of 200 per cent. on whatever the standard rent might be, or in particular to pay rent at Shs. 450/- p.m. D. 1 gave no notice of his intention to increase the rent as allowed by L.N. 265/56 nor has he ever demanded rent at the rate of Shs. 450/- p.m. In fact in August, 1957, he was demanding rent at the rate of Shs. 880/- p.m. In my judgment the standard rent on 31.12.56 was Shs. 150/- per month and since the landlord (D. 1) took no action to take advantage of L.N. 265 of 1956 the standard rent remained at Shs. 150/- p.m. after 1.1.57."

In support of his submission that the argument concerning absence of notice should not have been allowed, counsel referred to *Shah v. Patel* (4), [1961] E.A. 397 (C.A.) in which this court held that a point taken for the first time in the final address could not be relied upon. It is to be observed though, that it was a point which ought to have been pleaded by the defendant (who sought at that late stage to rely upon it) in order that there should have been an opportunity for evidence to be called upon it. In the case of *Alwi A. Saggaf v. Abed A. Algeredi* (5), [1961] E.A. 767 (C.A.) a point under s. 139 of the Indian Contract Act was taken for the first time at a late stage in a first appeal and was given effect to by the judge. This court on second appeal, having examined a number of authorities on the subject, reversed the judge's decision on the grounds that there had been no pleadings of the essential facts, that the minds of the parties were not directed to the relevant issues and that the court could not be satisfied that the facts, if fully investigated, would have supported the new plea. It will be useful to reproduce here two of the passages quoted in that case from English authorities. The first is a passage taken from the judgment of the Privy Council in *Perkowski v. City of Wellington Corporation* (6), [1958] 3 All E.R. 368 at p. 373:

> "*In Connecticut Fire Insurance Co. v. Kavanagh*, [1892] A.C. 473, Lord Watson, in delivering the judgment of their Lordships' Board, after referring to the raising of points of law in an appellate court on facts admitted and proved beyond controversy said (ibid., at p. 480);
>
> > 'But their lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea'."

The second is from the speech of Lord Normand in *Esso Petroleum Co. Ltd. v. Southport Corporation* (7), [1956] A.C. 218 at p. 238:

> "The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue

> disclosed by them . . . To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

The legal principles being as stated above the question is how they apply to or effect the present case, the facts in which differ substantially from those of the two East African cases quoted. In those cases the issues were clear, whereas we have here an anomalous situation arising in the main from misapprehension of the factual position. I refer to the apparent absence of knowledge of the parties of the amount of the standard rent of the premises. In the action by the appellant against Sarabai and R.R. & Co. Ltd. he claimed that the rent was Shs. 225/- per month. Upon the settlement of that action arrears were paid at that rate but Chuni said that he also paid for the year 1956 at Shs. 281/25 per month: it can be deduced that the parties had increased the Shs.225/- by 25 per cent. (not 15 per cent., as mentioned by the learned judge), which was then a permitted increase. It would appear that at that stage the appellant was treating Shs. 225/- as the standard rent – why he did so is not known. Mr. Nazareth suggested that Dial Singh Kalsi may have represented that to be the rent when he sold the property to the appellant, in order to obtain a good price. Dial Singh Kalsi was in witness box but, during a two-year adjournment of the case, he went to India and his evidence was never completed. I regard the suggestion made as being highly unlikely, for the appellant bought the property from Dial Singh Kalsi in 1943, during the currency of the 1941 agreement, which fixed the rent at Shs. 150/- per month. He appears to have had every opportunity of knowing what rent was payable at the appropriate date.

When the dispute about the tenancy arose in 1957 Chuni said in evidence that he "found out" the standard rent from Dial Singh Kalsi. Mr. Wilkinson said to this court that what they had was a telegram, but that was not in evidence. However, there can be no reasonable doubt that the tender made in September, 1957, at the rate of Shs. 360/- per month must have been based on information from Dial Singh Kalsi. Mr. Wilkinson stated that the reason why his application for amendment of the plaint was made only after Dial Singh Kalsi entered the witness box was that the witness would make no prior statement. His evidence that the standard rent was Shs. 100/- was not correct, but I think that nothing now turns on this episode.

Chuni, then, made his tender at the rate of Shs. 360/- per month and it was rejected, but not on any ground related to the standard rent. The appellant was claiming, as he has done throughout the relevant period, a contractual rent of Shs. 880/-. Then came the plaint, in which the standard rent was stated to be Shs. 120/- per month and the "total rent which may lawfully be charged", Shs. 360/- per month. At this point I think blame attached to the appellant. His defence (apart from a technical point) threw everything upon his plea that he was entitled to levy distress on the basis of a contractual rent of Shs. 880/- per month. There was no alternative defence to cover the eventuality of his failing on this point, as he has done. It is true that the defence contained the general denial of all facts not expressly admitted, but, once the plea of a contractual rental is eliminated, that is all it contained. In my opinion that is insufficient and in the circumstances it amounted to an evasive denial. The question of the adequacy of tender was clearly important, and if the appellant proposed to rely upon a standard rent and a legally demandable rent which would show that the tender was insufficient in amount he should have pleaded it affirmatively as an alternative defence. The respondent would then have had an opportunity of stating his position. As I have mentioned, the appellant acquired the property during the 1941 tenancy, and I find it difficult to accept that he did not know the rental. He at least had means of knowledge had he acted with any diligence at all; the written agreement itself was in the hands

of the advocate who filed his defence and who stated that he had forgotten it. It might not have been too late to amend the defence when the agreement was finally produced, and though that would no doubt have necessitated an adjournment that might have been the preferable course. In some jurisdictions machinery is provided by rent restriction legislation to enable the tenant to obtain a statement of the standard rent from the landlord, but that does not appear to be the case in Uganda. The respondent could rightly claim to be taken by surprise by the production at such a stage, of the agreement, which raised a new issue, and the blame for the situation which arose attaches, in my opinion, to the appellant or his advisers.

As is indicated in the passage from *Perkowski v. City of Wellington Corporation* (6), an important consideration in deciding whether the taking of a new point is permissible, is whether all relevant facts have been fully investigated. In the present case Mr. Nazareth has submitted that the appellant was deprived of an opportunity of bringing evidence that he had made the requisite demand. Mr. Wilkinson contends that ever since notice to quit was given at the end of 1956 the attitude of the appellant has been that the premises were decontrolled and that the respondent must enter into a new agreement or go. There was no possibility in the circumstances of his having demanded increases under legislation from which he contended that he was exempt. That is, of course, the attitude adopted in the defence. Mr. Nazareth's reply to this is that the appellant might have protected himself by making the demand without prejudice. If so, one would have expected it to have been disclosed in the alternative defence which, as I have indicated, ought to have been put forward. Having read the evidence and the correspondence, and being influenced to some extent by my view that the blame for the situation which arose lay with the appellant, and having noted that no objection was made when the argument concerning lack of demand was tendered, I am satisfied that the possibility of the appellant being able to produce such evidence is so remote that it can with justice be disregarded, and I take the view that the submission upon this point fails.

There remains for consideration the allied submission that the plaint together with the tender at Shs. 360/- per month ought to be construed as an admission that the rent payable was three times the standard rent, whatever that might be. I do not think so. The tender might have created an estoppel if the appellant had altered his position on the strength of it, but it could go no further than to estop the respondent from denying that the rent payable was less than Shs. 360/- per month. As to the plaint, I agree with the learned judge that para. 4 in terms merely states the effect of Legal Notice 265/56, but, taken together with para. 10 and the tender, I think it amounts to an admission of willingness to pay Shs. 360/- per month; that amounts to a waiver of a demand for an increase over the standard rent up to that amount but, in my opinion, no further. This pleading was made under a misapprehension as to the amount of the true standard rent and there is no saying what would have been pleaded had the respondent been aware that it was Shs. 150/- per month, and it is not right therefore to imply any admission beyond that specifically made. In view of the tender at Shs. 360/- and of the pleadings I do not think the learned judge in the High Court was correct in his finding that only Shs. 150/- was payable, but the correct figure was, as I understood Mr. Wilkinson to concede, at the most Shs. 360/-.

The final question is whether there was a valid tender of the rent. The learned judge, on the basis of his finding that the rental due was only Shs. 150/- per month, found that there had been tender in excess of this amount both before and after the distress was levied. If the rent is taken to be Shs. 360/-, which I believe to be the better view, a question arises in relation to the tender after the seizure, out of the failure to tender bailiff's expenses. Counsel for the

respondent did not argue before this court that this tender could be relied upon, but confined himself to the earlier tender. It was common ground that a cheque for Shs. 2,880/- had been forwarded to the appellant by the respondent with his letter of September 26, 1957. This represented rent at Shs. 360/- per month for the period January 1, 1957, to August 31, 1957. The cheque was returned. The learned judge accepted Chuni's evidence that he paid to the appellant's shop at Mbale a cheque for Shs. 720/- for September and October on November 1, 1957, and another for November and December, 1957, on January 21, 1958. Neither cheque was presented at the bank. No tender was made before seizure in respect of January's rent but no point has been taken on this, no doubt as the seizure was on January 31, 1958, and the appellant would not have been called upon to pay his rent for January prior to the seizure. If these cheques were validly tendered then they covered the full amount.

In the High Court the argument for the appellant was limited to the question whether tender by cheque was in the circumstances valid. The learned judge held that the appellant had asked for payment by cheque and that the tender was accordingly valid. In this court that finding has not been challenged so far as the tender of the eight months' rent is concerned. Mr. Nazareth has contended that the learned judge should not have accepted Chuni's evidence of the payment of the two cheques for September-December at the shop at Mbale, and that in any event there was no evidence in those two cases that payment by cheque had been requested. In support of his first contention counsel claimed that there were a number of passages in the evidence in which Chuni had demonstrably lied. That is so, but the learned judge appreciated that fact, and also took the view that the appellant's evidence was untrustworthy. In those circumstances he was left to do the best he could and his acceptance of Chuni's evidence relative to these two cheques was based upon the fact that it had not been contradicted. It was not in fact put to Chuni in cross-examination that he had lied upon this particular point. Where both parties to a dispute are considered untrustworthy by a judge I think there is even more reason than in other cases for a court of appeal to refuse to interfere with his finding of primary fact. The judge's reason, that the evidence was uncontradicted, was in the circumstances a valid one, and I do not think that this court can properly be asked to assign that failure to a slip by counsel.

As to the payment by cheque of the rent for September-December, 1957, there are letters from the appellant in evidence dated August 15, August 27, September 4 and September 17 of that year, the first of which impliedly and the others expressly asked for rent by cheque. I think that there is a sufficient selection of a method of payment there to justify the respondent in continuing so to pay until countermanded. Furthermore, once it is accepted that the cheques were delivered, there is no evidence that they were rejected, either on account of the form of the tender or for any other reason. I think therefore that the finding of the learned judge that there was a sufficient tender is to be upheld.

For all of these reasons I would dismiss the appeal with costs and would certify for two counsel.

Sir Ronald Sinclair P: I agree. The appeal is dismissed with costs.

Sir Alastair Forbes VP: I also agree.

Appeal dismissed.

For the appellant:
Natwarlal & Manilal, Jinja
J. M. Nazareth, Q.C., and *J. K. Winayak*

For the respondents:
Wilkinson & Hunt, Kampala
P. J. Wilkinson, Q.C., and *B. E. D'Silva*

Re Yusuf bin Simbani (Deceased)

[1962] 1 EA 623 (HCZ)

Division:	HM High Court of Zanzibar at Zanzibar
Date of judgment:	17 September 1962
Case Number:	9/1962
Before:	Horsfall Ag CJ
Sourced by:	LawAfrica

[1] Bona vacantia – Intestacy – Deceased without widow or kindred – Deceased a British protected person – Neither Crown nor Zanzibar government entitled under law of succession – Administrator-Generral,s Decree (*Cap.* 23), *s.* 25(*Z.*) – *Succession Decree* (*Cap.* 21), *s.* 26 *and s.* 50 (*Z.*) – *Zanzibar Order-in-Council,* 1924, *art,* 24(*Z.*).

Editor's Summary

The deceased, who was born in Tanganyika when it was a trust territory administered by Great Britain, had immigrated to Zanzibar over twenty years before his death and died in Zanzibar intestate leaving neither widow nor kindred relatives. The administrator-general applied to the court under s. 25 of the Administrator-General's Decree (Cap. 23), for directions concerning the estate of the deceased. The sister of the deceased's wife claimed the estate on the ground that the deceased had during his last illness expressed a verbal desire in the presence of witnesses that all his belongings should be given to her after his death.

Held –

(i) the sister of the deceased's wife had no valid legal claim to the estate as the oral desire expressed by the deceased did not meet the requirements of a will under s. 50 of the Succession Decree.

(ii) Section 26 of the Succession Decree provides that the property of an intestate person who has left no widow or kindred shall go to the Crown, if he is a British subject, or to the Zanzibar Government if he is a subject of the Sultan of Zanzibar; but s. 26 was not applicable as the deceased was a British protected person;

(iii) the deceased's estate in Zanzibar had no legitimate claimants but, importing the English doctrine of bona vacantia into the law of Zanzibar by virtue of art. 24 of the Zanzibar Order-in-Council, 1924, the net estate of the deceased should go to the Government of Tanganyika as bona vacantia. *Re Barnett,s Trust*, [1902] 1 Ch. 847, applied.

Order accordingly.

Cases referred to in judgment:

(1) *Re Barnett,s Trust*, [1902] 1 Ch. 847.

(2) *Dyke v. Walford* (1848), 5 Moo. P.C.C. 434; 13 E.R. 557.

Judgment

Horsfall Ag CJ: This matter comes before the court in pursuance of an application by the administrator-general under s. 25 of the Administrator-General's Decree (Cap. 23), for directions concerning the estate of Yusuf bin Simbani, deceased. The deceased died intestate in the Hassanali Karimjie Jivanjee Hospital, Zanzibar on 14/5/60, leaving moveable property in Zanzibar of the gross value of Shs. 11,371/30 cash. He died leaving neither lineal descendants nor parents, nor brothers nor sisters, nor any relatives who are in kindred to him nor a widow. He was a Muheba African and was by religion a Protestant Christian. He immigrated from Tanganyika, then a trust

territory administered by the British Government, about twenty-three years prior to his death and he had a fixed abode at Mbweni, Zanzibar. By reason of his origins in Tanganyika his original domicile was Tanganyikan but he lost this by reason of his long residence in Zanzibar and acquired a Zanzibar domicile. By s. 18 of the Succession Decree (Cap. 21), succession of his moveable property here is governed by Zanzibar law. As he has left no person capable of inheriting from him the question I am asked to decide is: To whom should the net estate of the deceased be paid.

The claims of Mrs. Christable Majaliwa, the sister of a wife who predeceased the deceased, can be disposed of by saying that the verbal desire expressed by the deceased before witnesses during his illness at the hospital that all his belongings should be given to her after his death does not meet the requirements of a will under s.50 of the Succession Decree (Cap. 21).

Being born in Tanganyika the deceased was a British protected person and he did not lose that status by reason of his acquiring a Zanzibar domicile by reason of his long residence here. He never applied for naturalisation as a British subject nor for naturalisation as a subject of H.H. the Sultan of Zanzibar. Section 26 of the Succession Decree does not apply since the deceased was a British protected person. That section provides that the property of an intestate who has left no widow or kindred shall go to the Crown if he was a British subject or to the Zanzibar Government if he was a subject of the Sultan of Zanzibar.

I think that I must go back to first principles for guidance on this subject. In *re Barnett,s Trust* (1), [1902] 1 Ch. 847, an Austrian bastard, who was entitled to a fund in court in England, died in Vienna intestate and without heirs. The Austrian Government claimed the fund under Austrian law but it was held that the right claimed was not in the nature of a succession and that the British Crown, by the law of England, was entitled to the fund as bona vacantia. Kekewich, J., said at p. 857,

> "It is because there is no one who can claim through the deceased that the Crown steps in and takes the property. The Crown takes it because it is, as it is described in the cases, bona vacantia. It is property which no one claims – property at large – there is no succession. The Crown does not claim it by succession at all, but because there is no succession."

In *Dyke v. Walford* (2) (1848), 5 Moo. P.C.C. 434, it was said that the origin of the right shews that it must have existed from the foundation of the Monarchy; and that it is the right of the Crown to "bona vacantia" – to property which has no other owner. The principle is of general application and extends to a corporation as well as to a natural person.

The case in the decased's estate here has no legitimate claimants because there are no heirs. It is bona vacantia and by the above-mentioned principle of English law would have gone to the Crown if the estate had been in England. As s. 26 of the Succession Decree is not directly applicable to the particular facts of this case art. 24 of the Zanzibar Order-in-Council, 1924, will allow the importation of the doctrine of bona vacantia into the local law of Zanzibar subject to such qualifications as local circumstances render necessary. Substituting the Government of the Protectorate for the British Crown it is fit and proper that the net estate of the deceased here should go to that Government as bona vacantia.

Though Mrs. Christabel Majaliwa has no valid legal claim on the estate I consider that the Zanzibar Government might well respect the deceased's wishes, by making an ex gratia payment to her of the whole or such part of the deceased's estate as it shall deem proper. A precedent for such a payment of

merely persuasive force would appear to exist in the provision in s. 46 (1) (vi) of the English Administration of Estates Act, 1925.

> "The Crown may, out of the whole or any part of the property devolving on it, provide, in accordance with existing practice, for . . . persons for whom the intestate might reasonably have been expected to make provision."

Order accordingly.

For the petitioner:
The Administrator-General,s Office, Zanzibar
M. C. Patel

For the claimant:
Wiggins & Stephens, Zanzibar
A. S. Talati

Peter G Ellis v N G Bailey & Co (East Africa) Ltd
[1962] 1 EA 626 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	5 September 1962
Case Number:	61/1961
Before:	Sir Trevor Gould Ag VP, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Pelly Murphy, J.

[1] Company – Managing director – Resolution of directors appointing managing director – Meeting of directors convened at which managing director removed by resolution – No notice of meeting given to managing director – Whether managing director,s appointment effectively terminated – Companies Ordinance (*Cap.* 280), *s.* 150 *and Table A, Cl.* 67, *Cl.* 68 *and Cl.* 72(*K.*) – *Interpretation and General Provisions Ordinance*, 1956, *s.* 3, *s.* 17 *and s.* 47 (*K.*) – *Eastern African Court of Appeal Rules*, 1954, *r.* 62 *and r.* 63 – *Companies Act*, 1948, *s.* 199.

Editor's Summary

The appellant, who resided in Kenya, and three other persons who resided in England, one of whom was a Mr. P., were named in the articles of association of the respondent company as the first directors. Mr. P. was also managing director of a company in England which was the parent of the respondent company. At the first meeting of directors of the respondent company held in 1958, the appellant was by

resolution appointed managing director but he was given no service agreement. The appellant was paid at the rate of £2,500 p.a., the payments being entered in the respondent company's accounts as salary. The appellant was summarily dismissed on December 9, 1959, by an authorised representative of Mr. P., who had discovered that the appellant had been personally concerned in transactions with the respondent company of which the other directors were unaware. These transactions had resulted in the respondent company financing the appellant to the extent of about £1,000. At a meeting of directors held in England on December 11, the dismissal of the appellant was confirmed but notice of this meeting was not given to the appellant. On January 10, 1960, the appellant started his own business. The respondent company then sued the appellant for the amount owed by him in answer to which the appellant filed a defence and counterclaim admitting the amount owing, but claiming Shs. 16,666/68 salary accrued to the date of filing the defence. The ground for the counterclaim was that his directorship had never been lawfully terminated. The judge gave judgment in favour of the respondent company on its claim, and on the counterclaim the judge held that the appellant had not been effectively dismissed because the resolution of the directors confirming the dismissal was of no effect as it had not been passed in general meeting as required by cl. 68 of Table "A" of the Companies Ordinance, which was incorporated in the respondent company's articles. The judge further held that the appellant in opening his own business had repudiated his contract in a manner tantamount to resigning his position as managing director and gave judgment for the appellant on the counterclaim for his salary for December, 1959, and ten days of January, 1960. The appellant then appealed against the decision on the counterclaim on the ground that the judge had erred in holding that the appellant had repudiated his contract by opening his own business and the respondent company cross-appealed on the ground that the judge had erred in holding that the appellant's appointment as managing director had not been terminated on December 9, 1959.

Held –

(i) (per Sir Trevor Gould, Ag. V.-P. and Newbold, J.A.; Crawshaw, J.A., dissenting) the directors had power to dismiss or confirm the

dismissal of the appellant as managing director and the judge had erred in holding that as managing director the appellant could only be dismissed by the respondent company in general meeting.

(ii) even though the respondent company had power under cl. 68 of Table "A" to determine the appellant's appointment in general meeting, this did not derogate from the directors' full powers of management.

(iii) the appellant's appointment as managing director had been effectively terminated on December 9, 1959.

Appeal dismissed. Cross-appeal allowed.

Cases referred to in judgment:

(1) *Southern Foundries* (1926) *Ltd. v. Shirlaw*, [1940] A.C. 701.

(2) *Fowler v. Commercial Timber Co. Ltd*., [1930] 2 K.B. 1.

(3) *Lee v. Lee's Air Farming Ltd*., [1960] 3 All E.R. 420.

(4) *Nelson v. James Nelson & Sons Ltd.*, [1914] 2 K.B. 770.

(5) *Foster v. Foster*, [1916] 1 Ch. 532.

(6) *Read v. Astoria Garage* (*Streatham*) *Ltd*., [1952] 1 Ch. 637; [1952] 1 All E.R. 922; [1952] 2 All E.R. 292.

(7) *Federal Supply & Cold Storage Co. of South Africa v. Angehrn & Piel* (1911), L.J.P.C.1.

(8) *In re Homer District Consolidated Gold Mines* (1888), 39 Ch. D. 546.

(9) *In re Portuguese Consolidated Copper Mines* (1889), 42 Ch. D. 160.

(10) *Young v. Ladies' Imperial Club*, [1920] 2 K.B. 523.

(11) *Anderson v. Sutherland* (*Peterhead*) *Ltd.*, [1941] S.C. 203.

(12) *Barber v. Manchester Regional Hospital Board*, [1958] 1 All E.R. 322.

(13) *Vine v. National Dock Labour Board*, [1957] A.C. 488.

(14) *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888), 39 Ch. D. 339.

(15) *Boschoek Proprietary Co. v. Fuke*, [1906] 1 Ch. 148.

(16) *Kerr v. Marine Products Ltd*. (1928), 44 T.L.R. 292.

(17) *John Shaw & Sons* (*Salford*) *Ltd. v. Shaw*, [1935] 2 K.B. 113.

(18) *Browne v. La Trinidad* (1888), 37 Ch. D. 1.

(19) *Parker & Cooper Ltd. v. Reading*, [1926] 1 Ch. 975.

The following judgments were read:

Judgment

Newbold JA: On April 10, 1958, the respondent company (hereinafter called the company) was incorporated in Kenya as a private company with its registered office in Kenya. The appellant, who was resident in Kenya, and three other persons, who were resident in the U.K. and one of whom was a Mr. Pethed, were named in the articles of association of the company (hereinafter referred to as the articles) as the first directors, and under the articles a share qualification was not necessary for a director. Save in so far as they were excluded or varied by the articles, the regulations contained in Table "A" of the First Schedule of the Companies Ordinance (Cap. 288 of the Laws of Kenya), were applied to the company. Prior to the incorporation of the company Mr. Pethed, who was a director of N. G. Bailey & Co. (Overseas) Ltd., an English company having its registered office in Ilkley, Yorkshire (hereinafter referred to as the parent company) wrote to the appellant stating that it was proposed to form the company and offering him the post of managing director at a total salary of £2,500 a year. This offer was accepted and the company was formed with an issued share capital of 6,000 £1 shares, of which 5,999 shares were held by the parent company and one was held by the appellant as trustee for the parent company. The first meeting of the directors was held in Nairobi on

June 18, 1958, and minute 4 of this meeting reads as follows: “It was unanimously resolved that Mr. P. G. Ellis be appointed managing director”. No service agreement between the appellant and the company appears to have been executed, but the appellant was paid at the rate of £2,500 a year, the payments were entered in the company’s accounts as salary, and at no time were any director’s fees ever voted to the appellant. The articles state that a director may hold an office of profit under the company and may, without disqualification, have dealings with the company provided that the director

> “discloses to the meeting of directors at which such . . . dealing is first taken into consideration the nature of his interest therein . . .”.

Power was given in the articles to confer on a managing director all or any of the powers of the directors and at any time to revoke such powers.

The trial judge found that the appellant had been properly appointed as the managing director of the company on the terms that his salary as managing director was £2,500; and this finding is not challenged on appeal. In 1959, during which period the company was operating at a loss, the appellant wrote to Mr. Pethed saying that it was essential for the company to obtain further working capital and that as he would have to “charm a further overdraft this month end for wages etc., from a reluctant bank manager” the position of the company was “hardly confidence inspiring”. At the same time the appellant was, unknown to the other directors, having dealings with the company which in effect resulted in the company financing him to an amount which in the middle of 1959 was slightly less than £500 and by December, 1959, had risen to slightly less than £1,000. On December 9, 1959, a Mr. Flowitt, who was not a director of the company but who had arrived from England a few days before to investigate the unsatisfactory position of the company, learnt of these dealings, informed the appellant that he had laid himself open to criminal proceedings and told the appellant to leave the office at once and without any salary. Mr. Flowitt was armed with a letter of authority signed by Mr. Pethed to close down the company and dispense with the appellant’s services, which letter had been shown to the appellant on December 7. The appellant had then expressed surprise at the authority and stated that he was unaware of any meeting of the company or of the directors at which decisions of such gravity could have been made. On December 11, 1959, a meeting of the directors was held at Ilkley, Yorkshire, which endorsed the action of Mr. Flowitt in the

> “dismissal of Mr. P. G. Ellis . . . consequent upon his findings on his arrival in Nairobi”.

No notice of this meeting was given to the appellant. On December 17, 1959, the appellant wrote to the directors in the United Kingdom of the company referring to Mr. Flowitt’s actions, stating that he had in effect been “dismissed” from his position of managing director and asking to be informed whether he was “to stay on as managing director or be dismissed in a right and proper manner”. No reply was received to that letter and on January 10, 1960, the appellant opened his own business. On February 18, 1960, the company brought a suit for the amount owed to it by the appellant and on April 27, the appellant filed a defence and counterclaim admitting the amount claimed by the company but claiming in para. 3 as follows:

> “3. The defendant is a director of the plaintiff company at a salary of Shs. 4,166/67 per month and his directorship has never been lawfully terminated by the plaintiff company. The defendant is owed salary for the months of December, 1959, January, February and March, 1960, making a total to date of Shs. 16,666/68 and the amount owing to him is accruing at the above rate from month to month.”

The trial judge gave judgment in favour of the company on its claim in the suit. On the counterclaim the judge held that the appellant had not been effectively dismissed but that the appellant in opening his own business had repudiated his contract in a manner which was tantamount to resigning his position as managing director as from the date on which he opened his own business. Accordingly the judge gave judgment with costs in favour of the appellant on the counterclaim for the amount of his salary for the month of December, 1959, and 10 days in January, 1960. From the decision of the judge on the counterclaim the appellant appeals on the ground that the trial judge erred in holding that the appellant had repudiated his contract with the company, and the company cross-appeals on the ground that the trial judge erred in holding that the appellant's appointment as managing director had not been terminated on December 9, 1959.

The two main issues on the appeal are as follows: first, was the appellant's appointment as managing director effectively terminated on December 9, 1959, whether or not such termination was wrongful; secondly, if the appellant's appointment as managing director was not effectively terminated, did the appellant by his action in opening his own business repudiate his contract and in effect resign his appointment.

Before dealing with the first of these issues, I should like to state that in my view the appellant's counterclaim fails ab initio on the ground that it claims that the appellant is entitled to salary as a director and no evidence was led to support that claim. The undisputed evidence and the finding of the trial judge was that the appellant's entitlement to any remuneration arose from his position as managing director and not from his position as director. There is, in my view, a basic and not merely a technical difference between a claim for remuneration as a director and a claim for salary as a managing director, and a claim in one capacity cannot be supported by evidence of the other capacity. As was said by Viscount Maugham in *Southern Foundries* (1926) *Ltd. v. Shirlaw* (1), [1940] A.C. 701 at p. 712, when referring to the position of a managing director:

> ". . . the two positions, that of director and that of manager, involve different qualifications, duties and responsibilities."

In *Fowler v. Commercial Timber Co. Ltd*. (2), [1930] 2 K.B. 1, Scrutton, L.J., referred at p. 6 to

> "the two positions of the plaintiff (1) as managing director . . . and (2) as a director . . ."

and this passage was quoted with approval by the Privy Council in *Lee v. Lee's Air Farming Ltd.* (3), [1960] 3 All E.R. 420 at p. 427. This point appears to have escaped the learned judge, though it was touched on in the argument before him, and it has not been referred to in the notice of cross-appeal nor argued in the appeal. I shall, therefore, in considering the first main issue on this appeal assume that the claim is one for the salary of the appellant as managing director.

Turning now to the first of the main issues argued on the appeal, I understand the learned judge to have held that under reg. 68 of Table "A" the appointment of a managing director may only be terminated against his will if he ceases from any cause to be a director or if the company in general meeting determines the appointment. The learned judge, having examined the facts, held that the appellant had not ceased to be a director by reason of any disqualification and that the resolution of the board of directors confirming the dismissal of the appellant was of no effect as it was not passed in general meeting. Regulation 68 of Table "A", so far as it is relevant to this point, reads as follows:

> "The directors may from time to time appoint one . . . of their body to the office of managing director . . . for such time and at such remuneration. . . as they may think fit, and a director so appointed shall not . . . be subject to retirement by rotation . . . but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director . . . be determined."

Does this mean that though the appointment is made by the directors they have no power to determine it or does it mean that the directors may determine the appointment and in addition the company in general meeting has an overriding power of determination? Though there are obiter dicta to the contrary in *Nelson v. James Nelson and Sons Ltd*. (4), [1914] 2 K.B.770, in my view on first principles the directors who make the appointment have power to terminate it, and the matter is placed beyond doubt by s. 47 of the Interpretation and General Provisions Ordinance, 1956, which provides that, unless the contrary intention appears, a person having a power to appoint under any written law (and reg. 68 of Table "A" is a written law) shall also have the power to dismiss. A number of cases have been decided on the basis that the directors have effectively dismissed a managing director (see *Faster v. Foster* (5), [1916] 1 Ch. 532; *Read v. Astoria Garage* (*Streatham*) *Ltd*. (6), [1952] 1 Ch. 637; and *Federal Supply and Cold Storage Co. of South Africa v. Angehrn and Piel* (7) (1911), L.J. P.C. 1), and I cannot imagine that if the appellant had brought a claim against the company for wrongful dismissal it would have been open to the company to plead successfully that he had not been dismissed.

In my view reg. 68 of Table "A" gives to the directors a power to appoint a managing director on such terms as may be agreed. Such terms could include a provision that the managing director was to continue as such for a specified period or a provision that he was not to be dismissed without reasonable notice. In either of such cases the directors could not, unless there was justification for a summary dismissal, dismiss the managing director contrary to the agreed terms without laying the company open to an action for wrongful dismissal, but there remains the overriding power of the company in general meeting to terminate the appointment. But, subject to the dismissal not being contrary to any terms, express or implied, of the appointment, the directors, by having the power to appoint, inherently also have the power to dismiss. This being so. with respect to the learned judge, I consider that he erred in holding that the appellant could only be dismissed from his appointment as managing director by the company in general meeting; in my view the board of directors had power to dismiss or confirm the dismissal of the appellant as managing director. If this is so, then follows the question whether the appellant has effectively been dismissed by the board of directors. The appellant urges that he was not; the company urges that he was, whether or not the dismissal was wrongful. It is not, I think, in dispute that, assuming the board of directors have power to dismiss and that the meeting of the directors was properly convened, the directors could, in confirming the action of Mr. Flowitt, have effectively dismissed the appellant. It is urged, however, that the meeting of the directors on December 11, 1959, was not properly convened in that no notice of the meeting was given to the appellant and as a consequence, in the light of the decisions *In re Homer District Consolidated Gold Mines* (8) (1888), 39 Ch. D. 546 and *In re Portuguese Consolidated Copper Mines* (9) (1889), 42 Ch. D. 160, the resolution confirming the dismissal of the appellant was ineffective (see also *Young v. Ladies' Imperial Club* (10), [1920] 2 K.B. 523). Accepting for the purposes of this case that notice of the meeting should have been given to the appellant, even though the meeting took place in England and the appellant was in Kenya and could not under the articles have voted on the question of his dismissal, and that resolutions passed

at a directors' meeting of which due notice has not been given may in a number of cases be ineffective, was the resolution dismissing the appellant for reasons which the directors regarded, with some justification, as misconduct such that the courts would say that the dismissal is ineffective. The appellant is claiming under an implied service agreement the terms of which have not been set out in writing but which must I think consist of the terms referred to in the letter from Mr. Pethed to the appellant offering him the appointment and a term that the agreement is subject to the articles. The cases dealing with the service agreement of a managing director clearly assume that the ordinary law of master and servant would apply to the appointment of the appellant as managing director (see for example *Lee's* case (3), and *Anderson v. Sutherland* (*Peterhead*) *Ltd*. (11), [1941] S.C. 203), and with respect to the learned judge I see no reason, nor has he given any, for holding the contrary. As I understand the law of master and servant it is that unless the servant has a certain statutory status, a de facto dismissal is effective even though the dismissal may be wrongful and give rise to a claim for damages. This, perhaps, is merely another aspect of the principle that the courts will not normally grant specific performance of a contract of service.

I consider that the case of *Barber v. Manchester Regional Hospital Board* (12), [1958] 1 All E.R. 322 makes it clear that the post of managing director (whatever may be the position of a director) cannot be said to be an appointment having a statutory status so that any dismissal therefrom to be effective must comply with all the requirements in accordance with the principle set out in *Vine v. National Dock Labour Board* (13), [1957] A.C. 488. As Lord Wright said in the *Southern Foundries* case (1), at p. 722:

> "In the same way art. 105 which empowers the company by extraordinary resolution to remove any director is equally excluded in the case of a managing director by art. 91. If the company under art. 105 had passed an extraordinary resolution to remove the respondent during his term of ten years, he would not doubt have ceased to hold office because a claim by him for specific performance or kindred relief would, I assume, fail, but the removal would have been a breach of the agreement, unless for good cause . . . The case would have been simply a case of wrongful dismissal of a servant or employee. The servant or employee is in such a case effectively dismissed."

In this case the appellant is not claiming damages for wrongful dismissal but he is claiming salary on the ground that he still is the managing director – in effect therefore he is asking for specific performance of at least one aspect of a contract of service. In this case there has undoubtedly been a de facto dismissal of the appellant on December 9, 1959, which, however irregularly, was confirmed by the board of directors on December 11, 1959, and which the company two and a half years later is claiming to have been an effective dismissal. For the courts to say that the appellant was not effectively dismissed and is thus still the managing director of the company would, in my view, be quite wrong and would offend against the principles that a master can effectively even though wrongfully dismiss a servant, that a contract of personal service will not be specifically enforced and that equity will not interfere where an irregularity has been committed if it lies within the power of the person committing the irregularity to correct it at any time. It would, in my view, be all the more extraordinary to force on to an unwilling company a managing director who was considered by his fellow directors, with some justification, to have been guilty of misconduct justifying summary dismissal and to do so in the case of a private company where all the shares are held by the parent company who would thus have had full power at any time either to reinstate the appellant or to confirm his dismissal. My attention has not been drawn to any case in which the dismissal of a managing

director, however wrongful or irregular, has been held to be ineffective and any claim arising out of any such dismissal has almost invariably been for damages for wrongful dismissal and not for salary owing by reason of an ineffective dismissal: see *Read v. Astoria Garage* (*Streatham*) *Ltd*. (6), *Southern Foundries* (1926) *Ltd. v. Shirlaw* (1); *Federal Supply and Cold Storage Co. of South Africa v. Angehrn and Piel* (7).

In my opinion, therefore, the appellant was effectively dismissed on December 9, 1959, and there is thus no necessity to consider the second main issue. Apparently the appellant received no salary for any period of December, 1959. No argument has been addressed to us on any entitled to salary for the nine days in December, 1959, but it would seem, on the authority of *Boston Deep Sea Fishing & Ice Co. v. Ansell* (14) (1888), 39 Ch. D. 339, that the appellant is not entitled to it.

For these reasons I would dismiss the appeal with costs, allow the cross-appeal with costs, set aside that part of the judgment and decree as ordered the company to pay any sum of money and costs to the appellant and substitute therefor an order dismissing the counterclaim with costs. I might add that the appeal record was quite inadequate in that it included none of the exhibits which were of considerable importance in the determination of this appeal.

Sir Trevor Gould Ag VP: I have had the advantage of reading the judgments of Crawshaw and Newbold, JJ.A., and it is not necessary that I should recapitulate the facts. The first question is whether the appellant was effectively dismissed from the post of managing director. If he was, he cannot succeed upon his counterclaim whether the dismissal was lawful or unlawful from a contractual point of view, for he has made no claim for damages for wrongful dismissal . As Lord Wright said in *Southern Foundries* (1926) *Ltd. v. Shirlaw* (1), at p. 723

> ". . . the power to dismiss is to be distinguished from the right to dismiss".

In the court below the learned trial judge held that the resolution of the directors at the meeting of December 11, 1959, was of no effect (by which I understand him to mean that it was ultra vires the directors) in that it was not passed in general meeting of the company. This finding was based upon reg. 68 of Table "A" of the Companies Ordinance (Cap. 288 of the Laws of Kenya, 1948), which was, with one alteration not here material, incorporated into the articles of association of the respondent company, and which reads:

> "68. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary, or commission, or participation in profits or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation or retirement of directors; but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined."

A question of construction arising on that regulation read in the context of the articles of association is whether, because a company in general meeting has the power to determine the tenure of office of a managing director, the directors have no power to dismiss him from that office for misconduct. It appears that there is no direct decision on the point for in such cases as *Read v. Astoria Garage* (*Streatham*) *Ltd*. (6), and *Southern Foundries* (1926) *Ltd. v. Shirlaw* (1),

the effectiveness (as distinct from lawfulness) of the machinery used to accomplish dismissal was not in issue. Nor was it in *Federal Supply and Cold Storage Co. of South Africa v. Angehrn and Piel* (7), referred to by Newbold, J.A., though in that case the dismissal was effected summarily by one director. In his judgment NEWBOLD, J.A., considered that the matter was placed beyond doubt by s. 47 of the Interpretation and General Provisions Ordinance, 1956. That section, except for a proviso which does not appear to be relevant, is as follows:

> "47. Where by or under any written law a power or duty is conferred or imposed upon any person to make any appointment or to constitute or establish any board, commission, committee or similar body, then, unless a contrary intention appears, the person having such power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, any person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, any board, commission, committee or similar body appointed, constituted or established, in exercise of such power or duty, and to reappoint, reconstitute or re-establish the same:"

Having regard to the opening words of that section I am in some doubt as to its applicability in the present case to reg. 68 of Table "A". Can that regulation, in its capacity as one of the adopted articles of a limited company, be said to be a "written law"? There is a good technical argument in favour of such a construction in that in s. 3 of the Interpretation and General Provisions Ordinance, 1956, "written law" is so defined as to include "all Ordinances" and by s. 17 every schedule to or table in any written law shall be construed and have effect as part of such written law. Table "A" is therefore a written law, and as the sole purpose which the regulations in Table "A" is may serve is to take effect as articles of limited companies, those who adopt or do not exclude them must be deemed to know and accept the legal implications which follow. This is a possible view, however reluctant one may be to attribute to articles agreed by private persons the character of written laws, whatever their source, but I prefer to rest my own judgment upon other considerations.

Regulation 67 of Table "A", which is also one of the articles of the respondent company, is in the usual terms giving the directors power to manage the business and to exercise all such powers of the company as are not by the Ordinance or the articles required to be exercised by the company in general meeting. That, in the ordinary course of business, would include power to engage and dismiss employees, and in the circumstances of the present case, there being nothing in the articles of the respondent company which indicates the contrary, I would accept that the current of authorities shows that the position of the appellant qua managing director was that of employee.

Apart from authority, I would not think that because a power is given by reg. 68 to the company in general meeting to determine the appellant's tenure of office as managing director, it follows that there is any derogation from the full powers of management of the directors. This, by the way, is a question which would have to be answered, even if s. 47 of the Interpretation and General Provisions Ordinance, 1956, were held to apply, for that section contains the limiting words "unless a contrary intention appears". It is true that without specific authority in the articles directors may not appoint one of their number to the position of managing director or other salaried office: *Boschoek Proprietary Co. v. Fuke* (15), [1906] 1 Ch. 148 and *Kerr v. Marine Products Ltd* (16) (1928), 44 T.L.R. 292. Such an appointment would entail delegation of authority or payment of remuneration not authorized for directors. But where there is, as here, specific authority to appoint for such term and at such remuneration as

may be decided by the directors, is there any reason to suppose that reg. 68 is to be regarded as a complete code so far as appointment and dismissal is concerned? It contains no specific denial of the directors' power to dismiss, if one is implied from the powers contained in reg. 67, and only if the words "or if the company in general meeting resolve", in reg. 68, are to be construed as a requirement that the power to determine the office of managing director be exercised only in general meeting, would they detract from the powers conferred by reg. 67. As a matter of drafting of course it would have been easy to reserve a power of revocation to the directors in reg. 68, but it would have been equally easy to make it clear that only the occurrence of one of the two circumstances stated in the concluding words of that regulation could determine the appointment, otherwise than by the expiry of its term.

It would be my reading of reg. 68 that the power given to the company in general meeting is an overriding one, enabling the company to take that particular matter out of the hands of the directors if it wishes; that it is a recognition of the rule that a company cannot give directions to the directors as to management nor overrule their decisions unless the articles so provide: *John Shaw & Sons* (*Salford*) *Ltd. v. Shaw* (17), [1935] 2 K.B. 113, 134. As I see it, the power of the company in general meeting under reg. 68 and the power of the directors to manage in all which is not "required" to be done in general meeting can co-exist without conflict, and the existence of the power in the general meeting does not import a requirement that the tenure of office of a managing director may be determined in that way only. I should perhaps repeat that I am referring to power of effective determination, irrespective of whether it amounts to breach of contract.

What I have set out above would represent my view as a matter of construction and apart from authority; as I have said, there is no decision definitely in point. There are dicta however in the case of *Nelson v. James Nelson & Sons Ltd*. (4), which are apparently against this opinion. It will suffice if I quote what was said by Swinfen Eady, L.J., at p. 779:

> "The articles may give a power to the directors to appoint one of their number to be managing director, but no power to revoke or cancel the appointment. The company may keep that power in its own hands to be exercised in general meeting. That would be the law if the company were registered with articles under Table "A" in Schedule I to the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). Article 72 there provides:
>
> > 'The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration . . . as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation . . . but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.'
>
> With an article in that form it is manifest that the directors can only appoint a managing director subject to the right of the company in general meeting to resolve at any time that his tenure of the office of managing director is to be determined."

This dictum was not in any way a necessary part of the decision of the case, in which a specific power to revoke the appointment of the managing director was conferred upon the directors by the articles. It is of course an opinion to which I accord the greatest respect but I doubt if Swinfen Eady, L.J., was considering the situation which might arise where a managing director misconducted himself and the question was whether the directors could derive authority from their

powers of management (including all powers not required to be exercised in general meeting) to terminate the managing directorship. There might be substantial delay before a general meeting could be called and much harm might be done in the meantime. If powers of management in the terms of reg. 67 do not include power to dismiss for good cause there seems to be no good reason to say they include power to suspend a managing director from his duties even for the protection of the company.

I incline to the opinion that the dictum referred to above was not intended to cover circumstances such as the present, but I do not have to base my judgment upon that, as I am satisfied that, if the resolution of the meeting of directors of December 11, 1959, was ultra vires, the evidence and surrounding circumstances clearly indicate that the respondent company acquiesced in the resolution and dismissal. Acquiesence of this nature, to be effective, must be that of all the shareholders but the parent company N. G. Bailey & Company (Overseas) Limited held 5,999 of the 6,000 shares in N. G. Bailey & Company (E.A.) Ltd. and by art. 19 of the articles of association each share (upon which there were no calls in arrear) carried one vote. The managing director of the parent company, Mr. Pethed, was present at the directors' meeting of December 11, 1959; he it was who wrote the letter of June 3, 1957, offering the appellant the position in question. It would be to shut one's eyes to realities to entertain any possibility that the parent company, the real owner of the East African company, did not know and approve of the resolution of December 11, 1959. I am aware of authorities which indicate that where a person is director of two companies, his knowledge acquired as director of one is not necessarily notice to the other, but I do not think they apply here. Mr. Pethed, as managing director of the parent company, must necessarily have been on the board of directors of the respondent company to safeguard the interests of the parent company, which held virtually all the voting power. If the parent company did not approve of the action of the directors of the respondent company it would have been easy to take action to restore the appellant. Instead, the respondent company has fought and continues to fight the counterclaim of the appellant based upon an ineffectual dismissal. To assume that this was being done without the knowledge and approval of the only real shareholder would not, I think, be within reason. In my opinion, even if the resolution of December 11, 1959, was ultra vires the directors, it has clearly the acquiescence and concurrence of the sole beneficial shareholder, and thereby acquires validity. As Newbold, J.A., has observed in his judgment, a court will not give specific performance of a contract of service and that is in effect what the appellant seeks. In my judgment the respondent company has effectively excluded the appellant from his position as managing director and his remedy (if he has good ground on the merits) is in an action for wrongful dismissal or wrongful repudiation.

The opinion I have expressed covers the matter of the irregularities attendant upon the meeting of December 11, 1959, and I have nothing to add to what has been said on that subject by Newbold, J.A., with whose judgment I agree except to the extent that I am unable to rely upon certain considerations to which he has attached weight, and which I have discussed above.

The appeal is accordingly dismissed and the cross-appeal allowed; there will be the consequential orders and orders as to costs proposed by Newbold, J.A.

I desire to add a word to what has already been said by NEWBOLD, J.A., on the subject of the inadequacy of the record presented to the court in the present case. Rule 62 of the rules of this court makes it clear that copies of all relevant documentary evidence must be included in the record. If a cross-appeal necessitates reference to more material than would suffice for the appeal there is provision in r. 63 for a supplementary record. There has been a persistent tendency, in spite of frequent comment from the court, for advocates to neglect

to fulfil the requirements of these, rules, particularly in the matter of copies of relevant documentary exhibits, or the material portions thereof. It may well be deemed necessary in future, in a proper case, to adjourn an appeal until the deficiency in the record is remedied, calling upon the advocate responsible to show cause why he should not personally pay the costs thrown away.

Crawshaw JA: This is an appeal by the defendant and cross-appeal by the plaintiff company against the judgment of the Supreme Court awarding to the appellant on his counterclaim a sum of Shs. 5,616/- and costs. The appellant in his written statement of defence had admitted the claim of the respondent for Shs. 19,535/49, and judgment was entered for the respondent in that sum, with interest and costs.

The facts as found by the learned judge and not in dispute were as follows. The respondent was incorporated in Kenya on April 10, 1958, as a subsidiary of the parent company, N. G. Bailey & Company or, and there seems to be a little doubt as to this, N. G. Bailey & Company (Overseas) Limited (hereinafter referred to as the "English company"), a company incorporated in England. The respondent's registered office was in Nairobi. The appellant was one of teh four original directors of the respondent. The first meeting of directors was held in Nairobi on June 18, 1958, when it was resolved that the appellant be appointed managing director on a salary of£2,500 per annum and that he be allotted one share; this share he later declared he held as nominee of the respondent. On November 30, 1959, a Mr. Flowitt (who does not appear to have been an officer of the English company) was sent by the English company to investigate the affairs of the respondent and on December 7, he informed the appellant that the respondent's business was going to be closed and that the appellant should consider himself on one month's notice; Flowitt purported to be acting under the authority of Mr. Pethed, one of the original directors of the respondent. On December 9, 1959, Mr. Flowitt (according to the appellant) informed the appellant that he should regard himself as summarily dismissed as he had without permission been purchasing, through the respondent, building materials for a house he was building for himself; particulars of the appellant's indebtedness to the respondent in respect of these transactions were entered in the respondent's Installation Contracts ledger, and the respondent's claim for Shs.19,535/49 was in respect thereof. The building materials were presumably in the first place purchased by the appellant as managing director on behalf of the respondent which would have been made liable therefor. Then, as I see it, the appellant in his personal capacity purchased them from the respondent.

The learned judge held that these transactions constituted dealings with the respondent within the meaning of the provisions of art. 29 of the articles of association which read:

> "A director may hold any office of profit under the company (other than that of auditor) in conjunction with the office of director and may enter into contracts or arrangements or have dealings with the company, and shall not be disqualified from office thereby, nor shall he be liable to account to the company for any profit arising out of any such contract, arrangement or dealing to which he is a party or in which he is interested by reason of his being at the same time a director of the company, provided that such director discloses to the meeting of the directors at which such contract, arrangement or dealing is first taken into consideration the nature of his interest therein, or if such interest is subsequently acquired, provided that he discloses the fact that he has acquired such interest at the next meeting held after such interest was acquired. But except in respect of an agreement or arrangement to give any indemnity or security to any director who has undertaken or is about to undertake any liability on behalf of the

> company, or of a resolution to allot any shares or debentures to a director, no director shall vote as a director in regard to any contract, arrangement or dealing in which he is interested or upon any matter arising thereout, and if he shall so vote, his vote shall not be counted, nor shall he be reckoned in estimating a quorum when any such contract, arrangement or dealing is under consideration. A general notice given to the directors by a director to the effect that he is member of a specified company or firm, and is to be regarded as interested in any contract, arrangement or dealing which may, after the date of the notice, be entered into or made with that company or firm, shall, for the purpose of this article, be deemed to be a sufficient disclosure of interest in relation to any contract, arrangement or dealing so entered into or made."

The learned judge held that the appellant had not disclosed the dealings to the directors, but that disqualification as a director had not automatically followed as there had been no opportunity for the appellant to make the disclosure in the manner prescribed, there having been no meeting of the directors between June 18, 1958, and December 11, 1959, and at the general meeting held on October 9, 1959, the directors other than the appellant, had not been present. The learned judge further held that the purported dismissal by Mr. Flowitt was ultra vires the articles of association and of no effect. Section 150 of the Ordinance, which cannot be abrogated by the articles of association (Palmer (20th Edn.), p. 556), in referring to the similar s. 199 of the English Companies Act, 1948 might be construed as requiring in the instant circumstances that the appellant should have disclosed to a meeting of the directors his interest in his intended contract with the respondent prior to entering into the contract, but if that was so, I do not think his failure to have done so affected his directorship. Article 28 (which would appear to have displaced and not merely varied reg. 72 of Table "A") specifies (as does reg. 72) the circumstances in which the office of a director shall be vacated; it does not contain a paragraph similar to para. (*g*) of reg. 72, which, subject to the proviso thereto, disqualifies a director who enters into a contract with the company, and indeed such a provision would have been inconsistent with art. 29. I think the learned judge was right therefore in holding that the appellant had not been disqualified as a director, and I do not think this has been challenged on appeal.

On December 11, 1959, a meeting of directors of the respondent was held in England, at which the appellant was not present and of which he had received no notice. A resolution was passed at that meeting endorsing Mr. Flowitt's dismissal of the appellant, but the learned judge found that this resolution was of no effect as it had not been passed in general meeting as required by reg. 68 of Table "A" in the First Schedule to the Companies Ordinance (Cap. 288 of the Laws of Kenya, 1948) (since repealed but in force at the relevant times), Table "A" having been applied to the company subject to modifications; and he held therefore that the appellant continued to be managing director although excluded from carrying out his duties. It might be argued that as it was not in the interests of the respondent that the appellant as managing director should buy the building materials, it was a breach of his duty justifying summary dismissal, but that is not a matter we are asked to decide as there is no claim for wrongful dismissal. We are asked to decide whether the contract between the respondent and the appellant as managing director had in fact been terminated, whether lawfully or not, on December 9, 1959, or at any later time.

On December 17, 1959, the appellant wrote to the board of directors asking whether he was to continue as managing director or to be dismissed "in a right and proper manner"; he received no reply thereto. On January 10, 1960, he started in business in Nairobi on his own under the firm name of "Ellis Electrical". There was nothing in his contract with the respondent expressly precluding

him from engaging in business on his own whilst carrying out his duties as managing director, but the learned judge took the view that on the evidence before him it was understood by everyone concerned that the office of managing director was a full time one. He held, with, he said, considerable hesitation, that although the appellant had been prevented by the respondent from performing his duties it was still material to consider whether he had himself repudiated the contract by starting his own business, and held that he had, as his action was tantamount to resigning his position as managing director. In the result he held that the appellant was entitled to recover his salary only for the month of December, 1959, and the first ten days of January, 1960, on the basis of his still being in office with the respondent during that period.

The respondent maintained that he was a "director" at a salary of Shs. 4,166/67 per month and that his directorship had never been lawfully terminated, and that at the date of filing his defence in April, 1960, he was entitled to his salary for the months of December, 1959, and January, February and March, 1960, making a total of Shs. 16,666/68, and that his salary would continue to accrue monthly thereafter. By "director" it seems clear that he meant "managing director". He claimed to set off against the respondent's claim the amount due to him at the time of the hearing of the action. In the alternative he counter-claimed for the amount then found to be owing. In its reply to the defence and counterclaim the respondent denied being indebted to the appellant in any sum, asserted that the appellant had ceased to be a director, and that even if it was held that he was still a director he was not entitled to the salary as such, but as manager, from which appointment he was legally discharged on December 9, 1959.

The appeal and cross-appeal are therefore on the counterclaim alone. In his memorandum of appeal the appellant complained that he had not been allowed his counterclaim in full, and that the learned judge was wrong in holding that he had repudiated his contract and resigned his position as managing director. In its cross-appeal the respondent objected to any relief having been granted to the appellant, and asserted that the learned judge had erred in not holding that the appellant's appointment as managing director had not terminated on December 9, 1959.

Mr. Gledhill for the appellant argued that the law of master and servant applied, and that if a managing director is employed on terms which specify the only means by which he may be dismissed, that is the only way he can be dismissed, and that in the present case the provisions of the articles had not been complied with for the reasons given by the learned judge. Mr. Gledhill maintained that there was no evidence that the appellant's work as Ellis Electrical was a full time one or that it was generally understood that the office of managing director was a full time one. He pointed out that there was nothing in the terms of the contract with the respondent to prevent the appellant undertaking other work if it did not interfere with his duties to the respondent, and that at the time he started his own firm he was disallowed by the respondent from carrying out those duties; that the counterclaim was not for wrongful dismissal, as there had been no effective dismissal and that mitigation of damages therefore did not arise.

Mr. O'Donovan submitted that the only sensible interpretation of the contract is that given by the learned judge that it was a whole time one, but that the judge was wrong in holding that the appellant could not be dismissed as managing director except in general meeting; his appointment was effected by the directors and not by the company as such. He further submitted that the learned judge overlooked the fact that the appellant had dual and separate capacities, as manager and as director; as manager he received £2,500 per annum, and as director he could be paid fees under art. 26, although it seems that no remuneration had been voted. Mr. O'Donovan cited *Foster v. Foster* (5), as authority for

showing that a person may be removed from his managing directorship by the board of directors (and not in general meeting) without affecting his position as director. He agreed that the meeting endorsing Flowitt's action was irregular in that the appellant had not received notice of the meeting, but that it was a unanimous decision of the directors present, which constituted a quorum, and that the result would have been the same had the appellant been present; that the resolution could have been acquiesced in at a shareholders' meeting and that the general manager of the English company was present and that as such he could represent the English company, as shareholders; that although there was no evidence as to the powers of the managing director of the English company, it could be assumed that he could vote for the English company on the principle of omnia praesumuntur rite et solenniter esse acta; that anyway nothing had been done to set the resolution aside and that it had in fact been acted upon by both parties; that the meeting was not void but only voidable on steps being taken to set aside, and that the resolution was impliedly ratified at the next properly constituted meeting; that the appellant cannot in this action plead the irregularity of the meeting, though he could have applied to the court for its revocation; that the action of the respondent was sufficient to put an end to the contract, rightly or wrongly, and that the appellant's remedy, if any, was in damages.

I think Mr. O'Donovan is correct indistinguishing the contractual relationship between the appellant as managing director and the respondent, and the appellant's office as director which he held under art. 23. I do not think, however, that the distinction is really relevant in this appeal.

As I have said, the crux of the matter is whether the appellant's appointment was terminated in December, 1959. Article 29 provides that a director may hold any office of profit under the company in conjunction with the office of director. Regulation 68 of Table "A" permits the directors to appoint one of their body to the office of managing director or manager for such term and at such remuneration as they think fit, and provides that the appointment

> "shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of office as managing director or manager be determined".

The appellant did not cease to be a director and his appointment was not terminated in general meeting.

Foster v. Foster (5), does not, I think, support Mr. O'Donovan's submission that the directors could terminate the appellant's appointment – rather the reverse. In that case the managing director received no remuneration as such, and the court held that in such circumstances there was no contract but merely a delegation of powers. It held further that where there was remuneration and the director voted on his own appointment, there being a prohibition in the articles against a director voting in respect of any contract in which he was interested, the irregularity could be remedied in general meeting. The circumstances in the instant case are very different.

In *Nelson v. James Nelson and Sons Ltd*. (4), the articles allowed the directors to appoint from one of their number a managing director for such period as they thought fit, and to revoke the appointment. They appointed the plaintiff upon the terms of an agreement which provided he should, to certain conditions, hold the appointment during the time he remained a director. The directors subsequently revoked the appointment, whilst he was still a director, and it was held,

> "that the articles of association did not empower the board to revoke the appointment at will, or otherwise than in accordance with the terms of the agreement under which the plaintiff was appointed managing director, and that the plaintiff was entitled to recover damages against the company".

In the course of his judgment Reading, C.J., referring to the words in the articles, "and may revoke such appointment" said at p. 776:

> "If those last words had not been inserted in the article, the result would have been that the power to appoint a managing director would have been vested in the directors, but the power to revoke the appointment would have remained with the company."

To the same effect, Swinfen Eady, L.J., at p. 779 said:

> "Unless there is a power given to the directors by the articles to appoint a managing director it is not competent for them to make such an appointment. That was determined in *Boschoek Proprietary Company v. Fuke*, [1906] 1 Ch. 148, at p. 159. Therefore it is necessary to look at the articles to see what the power is. The articles may give a power to the directors to appoint one of their number to be managing director, but no power to revoke or cancel the appointment. The company may keep that power in its own hands to be exercised in general meeting. That would be the law if the company were registered with articles under Table "A" in Schedule I to the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69)."

Article 72 of that Table "A" is in similar terms to Kenya art. 68, whilst art. 71 giving to the directors power to exercise the powers of the company is in terms similar to Kenya art. 67. The statements of the Lord Justices of Appeal which I have set out, and which with respect I agree, certainly support the view of the lower court in the instant case, although they gave no reasons. The reasoning would appear to me to be that the directors, being agents of the company, cannot without express authority appoint one of themselves to the position of managing director nor revoke such appointment. In *Boschoek Proprietary Company v. Fuke* (15), the articles enabled the directors to appoint managers, etc., but Swinfen Eady, L.J., at p. 159 said:

> "The articles did not contain any provision enabling the board to appoint any managing director. Under these circumstances it was quite beyond the powers of the two remaining directors to appoint a third person (even if qualified to be a director) to be managing director of the company . . ."

In Stiebel's Company Law and Precedents (3rd Edn.), Vol. 3 at p. 321, it is said:

> "In the absence of powers conferred in the articles, directors can neither appoint nor dismiss a managing director."

There is not in art. 67 any power of the directors to appoint or determine the appointment of a managing director; art. 68 gives express power to the directors to appoint but not to determine, the power to determine remaining with the company in general meeting. The circumstances of the instant case are somewhat similar to the case of *Read v. Astoria Garage* (*Streatham*) *Ltd.* (6) (where *Southern Foundries* (1926) *Ltd. v. Shirlaw* (1), referred to by Mr. O'Donovan, and the *Nelson* case (4), were considered and distinguished) and as in that case the appointment of the appellant must be taken to have been on the terms of art. 68, for the resolution of the directors appointing him managing director contained no special terms except as to salary. The resolution, as shown by the minutes of the meeting of June 18, 1958, contain no more than "that Mr. P. G. Ellis be appointed managing director". No other terms of the appointment appear elsewhere except in a letter of June 3, 1957, written by the English company to the appellant in anticipation of the formation of the respondent company, where the proposed remuneration of the appellant when he became managing director was mentioned and reference made to an "agreement" – presumably in the future; so far as we know, no agreement was however drawn up.

Mr. O'Donovan submitted that the court should not anyway have questioned the validity of the resolution of the directors passed on December 11, 1959, owing to the failure of the appellant to take prompt steps to have it set aside; by this I took Mr. O'Donovan to mean that the court should, in the circumstances, have ignored both the irregularity of the directors' meeting and the failure to call a general meeting, if such was necessary. Had the directors had power to terminate the appellant's appointment, I do not think their failure to give notice of the meeting to the appellant would have been such an irregularity as to have invalidated the resolution, for it being connected with his service contract with the company he would not, because of the provisions of art. 29, have been entitled to vote had he been present. I do not think that *Browne v. La Trinidad* (18) (1888), 37 Ch. D. 1, cited to us by Mr. O'Donovan, is applicable to the circumstances of this case. In the instant case the appellant, according to Mr. Gledhill, first heard of the meeting of December 11, 1959, on December 17, 1959, when he wrote his letter of that date to the directors of the respondent, although in his evidence before the lower court given on December 6, 1960, the appellant said, "I first heard of that meeting yesterday". Howbeit, within a week of the meeting he had written to the directors complaining of the method of his purported dismissal by Flowitt and asking if he was "to stay on as managing director or be dismissed in a right and proper manner". To that letter he received no reply and, so far as I am aware, the next step taken was the filling of the suit on which the appellant in his defence raised the question whether his appointment had been effectively terminated; I do not think there was anything in the circumstances which estopped him from so doing.

Mr. O'Donovan also referred to *Parker and Cooper Limited v. Reading* (19), [1926] 1 Ch. 975. That case was concerned with acts which were intra vires the company though ultra vires the board of directors, and the effectiveness of those acts when done by the board if assented to by all the corporators. In the instant case, however, it has not, I think, been shown that those present at the meeting of December 11, 1959, consisted of all the shareholders, or authoritatively represented a majority of the shareholders.

Mr. O'Donovan has argued that even if the purported dismissal was ultra vires reg. 68, the actions of the respondent were sufficient to terminate the contract, and that the appellant's only remedy, if any, was in damages for wrongful dismissal. He cited *Barber v. Manchester Regional Hospital Board and Another* (12). In that case a medical consultant employed by a regional hospital board claimed under several heads against the regional board and the Minister of Health, maintaining that his purported dismissal by the regional board had never validly terminated his appointment, and that he continued to be entitled to his salary. There was a term incorporated into the contract that an employee dissatisfied with the board's decision could refer the matter to the Minister who then placed it before a professional committee for their advice, in the light of which he would confirm the dismissal or set it aside as he thought fit. This procedure was to be completed before the regional board's decision was carried into effect. The plaintiff complained to the Minister of his dismissal, but it was held on behalf of the Minister that no appeal lay to him, and the plaintiff therefore brought the action. It was held, inter alia, by Barry, J., in the terms of para. (iii)(*a*) of the headnote:

> "(*a*) the plaintiff's contract with the board was one between master and servant, the termination of which could not be a nullity, and the plaintiff was not, therefore, entitled to a declaration that his employment had never been validly determined but was entitled to recover damages for breach of contract."

There is, however, a distinction between the instant case and the *Barber* case (12), in that reference to the Minister was in the nature of an appeal from what

otherwise was dismissal by a competent authority, whereas in the instant case dismissal was not by a competent authority, which should have been the company in general meeting; in other words in the instant case the procedure was wrong ab initio.

For the reasons I have given I think the learned judge was right in holding that the appellant's appointment was never terminated by the respondent, although in the circumstances the appellant could, had he wished, have regarded the contract as discharged. From his letter to the directors of December 17, 1959, it is clear that up to then anyway he was not treating the contract as discharged. Further, he was entitled to expect a reply within a reasonable time before making up his mind what action, if any, to take. Receiving no reply and no redress within a reasonable time, he started up his own business on January 10, 1960, but took no action to obtain relief from the respondent or to obtain a declaration that he was still he was still in their employment, not at least until filing his defence to the respondent's suit. In all the circumstances I think that the learned judge was fully entitled to regard the conduct of the appellant as showing that at the time he started his own business he was treating the contract as at an end. It is not in the circumstances necessary to consider whether, in a contract such as this which depended on the co-operation of the respondent (which was withdrawn) for its performance, an employee could continue to saddle the employer with the burden of paying salary indefinitely, rather than claiming damages, on the employer persisting on his refusal to honour the contract. I do however think that the learned judge was entitled to award the appellant salary for the month of December, 1959, for up to the end thereof he was still, and without unreasonable delay in taking other action himself, waiting for the company to take "proper action" should they wish to dismiss him. The award of salary for the first ten days of January, 1960, was, I think, probably not correct, as it did not accrue from day to day but was, it seems, payable monthly; before the end of the month the appellant had recognised the contract as discharged and started up his own busines. Damages based on his salary might have been another matter, but he was not claiming damages. I would vary the order of the learned judge accordingly, making no order as to costs. The quantum of the award is not really pertinent however, as I understand that I unfortunately take a rather different view from that of my brother judges on the crucial question of determination of the appointment of the appellant.

Appeal dismissed. Cross-appeal allowed.

For the appellant/cross-respondent:
B. Sirley & Co., Nairobi
J. Gledhill

For the respondent/cross-appellant:
Hamilton, Harrison & Mathews, Nairobi
B. O'Donovan, Q.C. and *J. N. Desai*

Musau s/o Muya v R
[1962] 1 EA 643 (SCU)

Division: HM Supreme Court of Kenya at Nairobi

Date of judgment: 4 September 1962

Case Number: 694/1962

Before: Rudd Ag CJ and Edmonds J

Sourced by: LawAfrica

[1] Criminal law – Plea – Equivocal admission when charge read – Conviction recorded on plea – Whether fatal to conviction – Meaning of "nilikosa" – Maize Marketing Ordinance, 1959, *s.* 24 (1) (*K.*) – *Maize Marketing* (*Movement of Maize and Maize Products*) *Order*, 1959, *para.* 3 (*K.*).

Editor's Summary

The appellant was charged with moving maize without a valid movement permit issued by the Maize Marketing Board. When charged the appellant was recorded as saying in Swahili "I understand the charge. I admit I had no permit but I was taking the maize to Tala only. It was wrong". On this plea he was convicted. On appeal

Held – the appellant's plea as recorded was not an unequivocal plea to the offence charged and the word "nilikosa" meaning "I have done wrong" by itself should not be treated as an unequivocal plea of guilt without enquiry as to what the appellant admitted he had done.

Appeal allowed. New trial ordered.

Judgment

Rudd Ag CJ, read the following judgment of the court: The appellant was convicted of an offence under s. 24 (1) of the Maize Marketing Ordinance, 1959 for contravention of para. 3 of the Maize Marketing (Movement of Maize and Maize Products) Order, 1959 as amended by the Maize Marketing (Movement of Maize and Maize Products) (Amendment) Order, 1960.

The particulars of the charge were as follows:

> "Musau s/o Muya. On the 13th day of July at about 1.15 a.m. at Kangundo in the Machakos District of the Southern Province, failed to comply with para. 3 of the Maize Marketing (Movement of Maize and Maize Products) Order by moving 70 bags of maize by motor vehicle No. KGX 427 without valid movement permit issued by the Maize Marketing Board or some person authorised by the Board in writing for that purpose."

When asked to plead the appellant is recorded to have stated as follows:

> "I understand the charge. I admit I had no permit but I was taking the maize to Tala only. It was wrong."

He was convicted on this plea. After finding the appellant guilty the trial magistrate recorded the following comments:

> "This offence is occurring regularly and on every occasion the pleas are the same, to the effect that they were moving the maize to Tala or some other place. I know and have seen this maize being taken to other districts from Tala at night and even during the day. It is known in this district and specially in the division, that maize may not be moved without a permit. Accused is warned that an offence of this nature committed again will incur

a heavy sentence. On this occasion I don't intend to impose a heavy sentence."

It appears that Tala is a trading centre or market. Under sub-para. (2) of para.3 of the Maize Marketing (Movement of Maize and Maize Products) Order, 1959, as amended, the provisions of sub-para. (1) which prohibits the movement of maize or maize products by head load, pack animal, vehicle, train or vessel do not apply to the movement by the producer of maize from its place of production by the most direct or normal route – inter alia, in the case of maize produced outside a forest area or demarcated forest to the nearest trading centre or market within the same district. It is clear that the appellant's plea as recorded was not an unequivocal plea to the offence charged. It is well settled that the word "nilikosa" meaning "I have done wrong" by itself should not be treated as an unequivocal plea of guilt without enquiry as to what it was that the appellant admitted that he had done. The other admissions in the plea do not amount to an unequivocal admission of guilt of the offence. In all cases where an infringement of para. 3 (1) of the Order in question is charged a subordinate court should not accept a plea of guilt without first satisfying itself from admissions made by the accused that none of the exceptions contained in sub-para. (2) apply. It is all the more evident in this case that the magistrate erred since it appears from his comments recorded on the file that he was not prepared to accept the suggestion in the appellant's plea that the maize was destined for Tala.

In the circumstances the conviction and sentence are set aside and we direct a new trial before a different magistrate. The fine of Shs. 300/-, if paid, must be refunded and the order confiscating the maize is also set aside.

Appeal allowed. New trial ordered.

For the appellant:
Swaraj Singh, Nairobi

For the respondent:
The Attorney-General, Kenya
G. A. Twelftree (Ag. Senior Crown Counsel, Kenya)

N V Lakhani v R
[1962] 1 EA 644 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 September 1962
Case Number:	602/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Criminal law – Practice – New trial – Evidence – Confession – No trial within a trial – No objection

made to evidence of confession – Objection taken on appeal – Whether circumstances appropriate for ordering re – trial.

[2] Criminal law – Evidence – Confession – Admission of theft by clerk to branch manager – Admission made at interview sought by clerk – Whether confession voluntary.

[3] Criminal law – Evidence – Confession – Trial within a trial – Admission of theft by clerk to branch manager – Evidence of confession given at trial without objection – No trial within a trial – Confession denied by accused in evidence – Whether prejudice to accused resulted.

Editor's Summary

The appellant was convicted on two counts of theft by a clerk. At the trial it was proved that two sums were paid in cash to the branch of the appellant's employers whilst the appellant was employed there and that the money was

stolen. The evidence implicating the appellant was that the branch manager, in pursuance of a report made by another clerk at the instigation of the appellant himself, interrogated the appellant who admitted having taken the money and gambled with it. At his trial the appellant was unrepresented and did not object to the evidence of his confession being admitted and the magistrate did not hold a trial within the trial. Later the appellant in evidence denied making the confession. On appeal it was submitted that the confession could not be regarded as voluntary as the branch manager was a person in authority over the appellant and that there had been no trial within a trial.

Held –

(i) the magistrate ought to have held a trial within the trial as soon as the confession was repudiated by the appellant.

(ii) there was no evidence of any improper threat or inducement; in fact the appellant had invited the interview with his branch manager at which the confession was made; consequently no injustice or prejudice had been caused to the appellant.

(iii) had it been necessary to find that the omission to hold a trial within the trial was fatal, it was a case for ordering a re-trial, since on a proper consideration of the admissible or potentially admissible evidence a conviction might well have resulted.

Appeal dismissed.

Cases referred to in judgment:

(1) *Mwangi s/o Njeroge* (1954), 21 E.A.C.A. 377.

(2) *R. v. Thompson*, [1893] 2 Q.B. 12.

Judgment

Rudd Ag CJ, read the following judgment of the court: The appellant appeals against his conviction on two counts of theft by a clerk contrary to s. 282 of the Penal Code, the particulars of the counts alleging, in respect of the first, that while employed as a clerk by Messrs. Marshalls (East Africa) Ltd. he stole the sum of Shs. 3,500/- on or about January 13, 1962, and, in respect of the second count, while in the same employment he stole Shs. 2,965/14 between February 2 and 24, 1962. The learned trial magistrate found as a fact that these sums were paid in cash to the Nakuru branch of the appellant's employers, while he was employed in that branch as a clerk, and that the money was stolen. After hearing exhaustive evidence the learned magistrate finally convicted the appellant on the grounds that not only had he the opportunity of stealing the money but that he had confessed to doing so.

The evidence of this confession was given by the manager of the Nakuru branch of the complainant company, who was thus a person in authority over the appellant. This witness said that as a result of a report he had received from one Tulsidas he interrogated the appellant who then confessed that he had taken some Shs. 6,000/- and had gambled with it. The appellant took no objection to the admission of this evidence at the time it was adduced and did not cross-examine the witness upon it, but in his sworn statement in his defence he denied ever having made the confession. The appellant was not represented by counsel at his trial and, although the learned magistrate records in his judgment that the appellant did very well in defending himself and was not in any way prejudiced by the fact that he was not represented

by an advocate, the learned magistrate should nevertheless have asked the appellant at the time when the manager was about to give evidence of the confession whether the appellant wished to repudiate or retract it or whether he agreed to its admission in evidence. On finding that the confession was repudiated a trial within a

trial should have been held. That such a procedure applies equally to cases where an accused repudiates an alleged statement as to cases where he retracts it was made clear by the Court of Appeal for Eastern Africa in *Mwangi s/o Njeroge* (1) (1954), 21 E.A.C.A. 377.

We have, therefore, to consider whether the failure to hold such a trial within a trial at that stage could have prejudiced the appellant in the ultimate event.

On the question of voluntariness there is nothing in the record to suggest that if the confession was in fact made by the appellant it was not made completely voluntarily. There is no suggestion of any improper threat or inducement having been held out to the appellant to induce the confession, nor is it suggested that he was subjected to ill-treatment. The only objection to the statement was taken when the appellant, in the course of his evidence, suggested for the first time that the confession had never been made. The trial magistrate directed his mind to this vital issue in the course of his judgment and then found that in fact the confession had been made. It is, therefore, clear that if there had been a trial within the trial at an earlier stage the magistrate would have come to the same conclusion and, accordingly, we do not think that any injustice or prejudice resulted to the appellant by reason of the fact that no trial within a trial had been held upon the issue as to whether or not he had made the alleged confession.

It appears to us that what might be called the issue as to voluntariness was never a disputed issue in the trial and that it was raised as an afterthought by counsel before us upon a perusal of the record. We do not suggest that such a submission is improper and in a suitable case it could well lead to a successful result of the appeal, but we do not think that it carries anything like as much weight, in the circumstances, as it would have carried if it had been a live issue at the trial.

It is, of course, for the prosecution to prove to the satisfaction of the judge or magistrate that any confession or statement by the appellant was made voluntarily before it is admitted in evidence against him, but we do not think that the cases go so far as to suggest that there is a presumption that such a statement or confession was not made voluntarily until the contrary be proved. In our opinion the tendency of the cases, particularly in India, is the other way. In this connection we would refer to Sarkar on Evidence (10th Edn.), at p. 217 and p. 218, where, among other cases, that of *R. v. Thompson* (2), [1893] 2 Q.B. 12 is discussed. It is, of course, necessary, however, that the circumstances should be considered in order that the court may decide whether or not it required further evidence to satisfy itself that the confession was voluntary. Where, however, there is nothing to suggest that it was involuntary, and the appellant himself does not say that it was made involuntarily, and where, as in this case, it appears that the appellant had himself invited the interview at which he made the confession by asking Tulsidas to mention the matter of the shortage of money to the manager, we consider that to allow the appeal on the ground that it had not been proved to have been made voluntarily would be to decide the appeal upon an issue which was never contested at the trial and which is not supported by the evidence. We would point out that the question of possible inducement, though we allowed it to be argued before us, is not raised in the petition of appeal any more than it was raised at the trial itself.

It is our opinion, therefore, that the appeal should be dismissed, and we make order accordingly. We would add, however, that had we taken the view that the failure by the magistrate to conduct a trial within a trial in order to decide the issue of the admissibility of the statement was fatal to the conviction, we would have ordered a re-trial. For it appears that on a proper consideration of the

admissible or potentially admissible evidence a conviction might well have resulted.

Appeal dismissed.

For the appellant:
Kanti J. Patel, Nakuru

For the respondent:
The Attorney-General, Kenya
O. P. Nagpal (Crown Counsel, Kenya)

Voi Posho Mill v Kenya Sisal Estate

[1962] 1 EA 647 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	5 September 1962
Case Number:	77/1961
Before:	Webber J
Sourced by:	LawAfrica

[1] Execution – Attachment – Exemption from attachment – Implements of husbandry and agriculture – Tractors of sisal seized – Whether tractors are implements of husbandry and agriculture – Meaning of "*agriculturist*" *– Civil Procedure Ordinance* (*Cap.* 5), *s.* 34 (1) *and s.* 44 (1)(*b*)(*ii*)(*K.*).

Editor's Summary

The judgment debtor applied to the court under s. 34 (1) and s. 44(1)(*b*)(ii) of the Civil Procedure Ordinance for an order that two motors and two tractors seized under a warrant of attachment should be released from attachment on the ground that they were implements of husbandry and agriculture not exceeding Shs. 10,000/- in value and not liable to attachment. The judgment debtor was a sisal estate owned by a lady who depended for her livelihood upon the estate had no other income or means of support. It was submitted that she was an agriculturist.

Held –

(i) the motors and tractors seized were all implements of husbandry and agriculture used in connection with agricultural farming and as such were not liable to seizure if the applicant was an agriculturist.

(ii) the term "agriculturist" should not be restricted to persons who personally till the soil but should also apply to those farmers who employ servants to assist them; however, the term "agriculturist"

cannot be extended to a person merely because his sole income is derived from agriculture, because, in addition to this, his occupation as well as the chief source of his livelihood must be with the cultivation of land, or production of crops or the raising of stock.

(iii) the words "necessary to enable him earn his livelihood" in s. 44(1)(*b*)(ii) of the Civil Procedure Ordinance govern agricultural implements as well as agricultural produce and the proviso to the section is designed, not to protect agricultural production generally, but the agriculturist, to ensure that his livestock and implements are not seized and thereby deprive him of the means to earn his living.

(iv) the applicant had failed to prove that her occupation as well as the chief source of her livelihood was the cultivation of land or production of crops or the raising of the stock; accordingly the applicant was not an agriculturist within the proviso to s. 44 of the Civil Procedure Ordinance.

Application dismissed.

Case referred to in judgment:

(1) *Hanmantrao v. Dhruvaraj* (1948), A.I.R. Bom. 229.

Judgment

Webber J: This is an application by the judgment-debtor under s. 34(1) and s. 44(1)(*b*)(ii) of the Civil Procedure Ordinance that certain articles which have been seized under a warrant of attachment in execution of a decree should be released from attachment on the ground that they are implements of husbandry and agriculture not exceeding Shs. 10,000/- in value and are not liable to attachment.

In support of this application three affidavits have been filed by one Sheikh Javed Iqbal who swears that he is the Manager of Kenya Sisal Estate and the son of Rashida Begum who is the sole proprietrix of the estate. No counter-affidavits have been filed by the judgment-creditor and it is agreed by counsel for the parties that the only issues are (i) whether the implements seized are implements of agriculture, and (ii) whether the applicant is an agriculturist.

Section 44 of the Civil Procedure Ordinance describes what property is liable to attachment and sale in execution of a decree and contains the proviso that the following shall not be liable to such attachment and sale:

> "(*b*) (ii) where the judgment-debtor is an agriculturist, such livestock and implements of husbandry and agriculture not exceeding in value ten thousand shillings and such agricultural produce not exceeding in value five hundred shillings as may in the opinion of the court, be necessary to enable him to earn his livelihood.
>
> "For the purpose of this paragraph the expression 'implements of husbandry and agriculture' shall include all implements, tools, utensils, plant and machinery used in connection with agricultural, stock or dairy farming or the production of crops or plants;"

On behalf of the judgment-creditor it is conceded that the two motors which have been seized may be agricultural implements but not the two tractors. The applicant contends that the term "implements of husbandry and agriculture" should be interpreted in a fair and reasonable spirit and that the affidavits show that these tractors are necessary for the transport of sisal leaf from the field to the factory and for carrying away waste from the factory to the field and required for the proper running of the estate. For the judgment-creditor it is submitted that to come within the definition the tractors must be shown to be indispensable to agriculture and that this the applicant has failed to prove, as the sisal could be carried by labourers and production would not stop if the tractors were taken and sold.

I consider that this is too narrow a view to be taken of the matter. I am satisfied that the two tractors in question are required for the proper running of the sisal estate and as such are implements of husbandry and agriculture used in connection with agricultural farming. All the property seized therefore falls within the definition and none is liable to seizure if the applicant is an agriculturist.

The main question to be decided, therefore, is whether or not the applicant is an agriculturist. Although the defendant is the Kenya Sisal Estate which is an agricultural estate engaged in the production of sisal it is conceded that the applicant is Rashida Begum. She depends for her livelihood wholly upon the estate and has no other income or means to support or maintain herself apart from the said estate. It is submitted on her behalf that because of this and because the estate is engaged on agricultural production she is automatically an agriculturist. It is further submitted that the purpose of the protection of this proviso to s. 44 of the Civil Procedure Ordinance is not that a person, as such, should get an exemption but that agricultural production generally should not suffer, as it would if these implements were sold. The words "necessary to enable him to earn his livelihood" in the proviso only

refer to agricultural produce and do not refer back to agricultural implements. Indian authorities have no application because they are not directly in point.

For the judgment-creditor it is submitted that the applicant is not an agriculturist and I was referred to the Indian case of *Hanmantrao v. Dhruvaraj* (1) (1948), A.I.R. Bom. 229, in which it was held that:

> "The word 'agriculturist' denotes small-holders who personally till the land and cultivate it and whose livelihood depends upon the proceeds derived from such tillage and cultivation and cannot include large landed proprietors even though they may be tilling the land and cultivating it through their servants."

It is submitted that the affidavits do not show that Rashida Begum is the real tiller of the soil. They were sworn by her son who is the manager of the estate and there is nothing to indicate that she even resides thereon. The section is designed to protect people who cannot earn their livelihood in any other way.

I do not consider that the term "agriculturist" should be restricted to persons who till the soil in person and cannot therefore apply to those farmers who employ servants to assist them. The fact that "implements of husbandry and agriculture" include plant and machinery and that such implements to the value of £500 are not liable to seizure would appear to indicate the contrary, because a person not employing servants is unlikely himself to be able in every case to use all such plant and machinery. I have no doubt that in a proper case an agriculturist would include a person who himself takes a major part in the direction, management and running of a farm or estate even although he or she might not do the actual work of tilling the soil or driving a tractor with his or her own hands or himself using the agricultural plant and machinery. The words "necessary to enable him to earn his livelihood" clearly govern agricultural implements as well as agricultural produce and the proviso is designed, not to protect agricultural production generally, but the agriculturist, to ensure that his livestock and implements are not seized, therefore depriving him of the means to earn his living. However, I do not consider that the term agriculturist can be extended to a person merely because his sole income is derived from agriculture and I hold that in addition to this his occupation as well as the chief source of his livelihood must be with the cultivation of land, or production of crops or the raising of stock.

The applicant has not satisfied me that she is so engaged and I am not satisfied that she is an agriculturist within the proviso to s. 44 of the Civil Procedure Ordinance. The application therefore fails and is dismissed with costs.

Application dismissed.

For the respondent:
Sharma & Shah, Mombasa
C. Z. Shah

For the applicant:
H. A. T. Anjarwalla, Mombasa.

Nathan Godfrey Odhiambo Obiero v R
[1962] 1 EA 650 (SCK)

Division: HM Supreme Court of Kenya at Nairobi

Date of judgment: 1 October 1962

Case Number: 178/1962

Before: Rudd Ag CJ and Edmonds J

Sourced by: LawAfrica

[1] Criminal law – Revision – Sentence – Extent of powers of revision – Accused granted absolute discharge by magistrate – Whether an order of absolute discharge is a sentence – Penal Code (*Cap.* 24), *s.* 24, *s.* 35, *s. i s.* 356 (*K.*) – *Criminal Procedure Code* (*Cap.* 27), *s.* 169 (2), *s.* 215, *s.* 320 (2), *s.* 322 (3), *s.* 354 (3), *s.* 357, *s.* 358 *and s.* 364 (1) (*K.*).

Editor's Summary

The appellant was convicted of forging and uttering contrary to s. 352 and s. 356 of the Penal Code, and was given an absolute discharge under s. 35 of the Penal Code. The Supreme Court called for the proceedings under s. 362 of the Criminal Procedure Code and the case was listed for argument whether the sentence or final order should be altered under the powers of revision vested in the court. It was submitted for the appellant that an order of absolute discharge under s. 35 is not a sentence and that there was no power in revision to set aside such an order. The Crown submitted that an order of absolute discharge is technically a sentence inasmuch as it is a definite judgment pronounced in criminal proceedings.

Held –

(i) an order of absolute discharge under s. 35 of the Penal Code is technically a sentence and may be enhanced in revision under the powers contained in s. 364 (1) of the Criminal Procedure Code.

(ii) even if the absolute discharge were not technically a sentence it would be an "other order" and could be altered in revision under s. 364 (1) ibid.

(iii) in the circumstances the order of absolute discharge should be altered to one of conditional discharge.

Order accordingly.

Judgment

Rudd Ag CJ, read the following judgment of the court: The accused was convicted by the resident magistrate, Nairobi, of forging and uttering contrary to s. 352 and s. 356 of the Penal Code, and was granted an absolute discharge under s. 35 of the Penal Code in respect of these convictions. The matter was brought to the notice of this court by the acting deputy public prosecutor, whereupon the proceedings were called for and the matter was listed for argument as to whether the sentence or final orders should be altered in exercise of the revisionary jurisdiction of the court.

Mr. Hobbs, Crown Counsel and Mr. A. R. Kapila, counsel for the respondent, were heard.

The facts of the case are that the accused person rented a house in Parklands area on October 1, 1961, at a monthly rental of Shs. 600/-. The accused fell behind in paying his rent and on several occasions his landlord pressed him for payment. As a result of this pressure, the accused typed a letter addressed to himself, purporting to come from the General Manager of the Special Crops Development Authority,

signing the letter in the name of D. S. Penwill. In short, the letter stated that the accused would be paid housing allowance on or after May 4, 1962. The letter went on to say that his housing allowance for

the previous six months, not yet paid, would be paid direct to the landlord's agent as requested by the accused. Having forged this letter the accused then had it delivered to his landlord. As a result of this letter, which deceived the landlord, the landlord refrained from taking civil action to recover the arrears in rent.

The accused was employed as a public relations officer on a salary of £1,200 per annum, plus £25 a month housing allowance. He had no previous convictions. As a result of this case the accused was dismissed from his post and, in mitigation, it was stated that he had got into debt by reason of his brother's death which led to the accused being forced to support his brother's family.

Section 364 sub-s. (1) of the Criminal Procedure Code states the powers of the Supreme Court in revision, in so far as they are applicable to the present matter as follows:

> "364 (1) In the case of any proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the Supreme Court may –
>
> (*a*) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by s. 354, s. 357 and s. 358 and may enhance the sentence;
>
> (*b*) in the case of any other order than an order of acquittal, alter or reverse such order."

Section 357 and s. 358 are not material. The material part of s. 354 is sub-s. (3) which reads as follows:

> "354 (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may –
>
> (*a*) in an appeal from a conviction –
>
> (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial; or
>
> (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
>
> (iii) with or without reduction or increase and with or without altering the finding alter the nature of the sentence;
>
> (*b*) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;
>
> (*c*) in an appeal from any other order, alter or reverse such order, and in any such case may make any amendment or any consequential or incidental order that may appear just and proper."

Mr. Kapila suggested that an order of absolute discharge under s. 35 of the Penal Code is not a sentence and that there was no power in revision to set aside such an order or to substitute for it any other order in the nature of an enhanced sentence, while Mr. Hobbs submitted that such an order of absolute discharge is technically a sentence inasmuch as it is a definite judgment pronounced in a criminal proceeding and he referred to the definition of the word "sentence" in Earl Jowitt's Dictionary of English Law. He further submitted that if such an order of absolute discharge is not a sentence within the meaning of s. 354 and s. 364 of the Criminal Procedure Code it is an "other order other than an order of acquittal" and may be altered or reversed.

In our opinion an order of absolute discharge under s. 35 of the Penal Code is technically a sentence. It purports to be the definite final order of the court of trial in respect of a conviction. It is therefore the

sentence in respect of the

conviction and may be enhanced in revision under the powers provided in s. 364(1)(*a*) of the Criminal Procedure Code.

We do not think this view conflicts with the proper interpretation of s. 169 (2) of the Criminal Procedure Code which is in these terms:

> "169 (2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced."

In our opinion this sub-section means that in case of conviction the sentence is part of the judgment and must be specified. It does not mean that sentence must be pronounced contemporaneously with the conviction. It is true that the words "the punishment to which he is sentenced" might appear at first sight to suggest that sentence necessarily involves some form of punishment and, in the ordinary sense of the word, punishment does not appear to be an apt word to describe an absolute discharge. But the purpose of s. 169 (2) is to lay down the essential scope and content of the judgment and we do not think its provisions are intended to be exclusive. That this must be the case becomes evident by reference to sub-s. (1) of s. 35 of the Penal Code, by which it is provided that where a court considers it "inexpedient to inflict punishment" upon a person convicted of an offence it may make an order of absolute or conditional discharge. Section 35 appears under Chapter VI of the Penal Code which is headed "Punishments". Section 24, which is in the same chapter, sets out the various punishments which are open to a court to inflict. Section 35 thus provides an alternative to those forms of punishment and, in our view, is thus technically a sentence. This becomes even clearer on reference to s. 320 sub-s. (2) and s. 322 sub-s. (3) of the Criminal Procedure Code in connection with trials before the Supreme Court with the aid of assessors or with a jury. Each of these sub-sections provides that in the case of a conviction or where the jury find the prisoner guilty "the judge shall pass sentence on him according to law". Since the judge in a suitable case has power to order an absolute discharge under s. 35 of the Penal Code it necessarily follows that such an order is technically a sentence.

We think we should refer to s. 215 of the Criminal Procedure Code which provides as follows:

> "215. The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him."

This section applies to subordinate courts and would appear to draw a distinction between a sentence and an order made against the prisoner according to law. If this provision stood alone it might perhaps be arguable that an absolute discharge under s. 35 of the Penal Code was an order against the accused according to law as distinct from a sentence upon him. But we think that this section must be interpreted in the light of the other provisions of the code which, as we have shown, indicate that such an order must be a sentence within the meaning of the Criminal Procedure Code. It is to be noted that the words "or make an order against him according to law" as an alternative to sentence are, of course, quite appropriate to meet the case where the prisoner is committed to the Supreme Court for sentence and possibly could also for the purposes of s. 215 apply to the older procedure which used to be provided whereby a prisoner could be released on security to come up for judgment at a later date or when called upon. Furthermore, we think that in the context of s. 215, the words "pass sentence" have the same meaning as they have in s. 320 (2) and s. 322 (3) of the Criminal Procedure Code.

Finally on the point of jurisdiction even if the absolute discharge were not technically a sentence it would be an "other order" and could be altered in revision under s. 364 (1) of the Criminal Procedure Code.

We consider that the absolute discharge was much too lenient in view of the serious nature of the offences and indeed, in our opinion, a sentence of imprisonment would have been more appropriate. But the respondent has been at liberty since June 8 and has obtained other respectable employment. He appears to be making a successful attempt to rehabilitate himself and to earn an honest living. In the circumstances we do not feel inclined to deprive the accused of the existing real opportunity to rehabilitate himself by sentencing him to prison.

After carefully considering all the circumstances of the case we have decided that the absolute discharges should be altered to orders of conditional discharges, that is to say discharges under s. 35 (1) of the Penal Code subject to the condition that the accused commits no further offence during the period of twelve months from the date of his conviction, that is to say from June 8, 1962. The effect of this order in accordance with sub-s. (2) of s. 35 is that if the accused commits another offence during the period of conditional discharge he shall be liable to be sentenced for the original offences.

We make orders accordingly.

Order accordingly.

For the accused:
S. R. Kapila & Kapila, Nairobi
A. R. Kapila

For the Crown:
The Attorney-General, Kenya.
J. R. Hobbs (Crown Counsel, Kenya)

Surjit Singh Dhanjal v The Resident Magistrate, Nairobi
[1962] 1 EA 653 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	29 September 1962
Case Number:	124/1960
Before:	Edmonds and Wicks JJ
Sourced by:	LawAfrica

[1] Husband and wife – Separation and maintenance – Application by wife for order of separation – Application made under Civil Procedure (*Revised*) *Rules*, 1948 – *Whether civil or criminal procedure applicable – Criminal Procedure Code* (*Cap.* 27) (*K.*) – *Civil Procedure Ordinance* (*Cap.* 5), *s.* 16 (*K.*) –

Civil Procedure (*Revised*) *Rules*, 1948, *O. XXXVIII, r.* 1 (*K.*) – *Law Reform* (*Maintenance Orders*) *Ordinance*, 1961 (*K.*) – *Debts* (*Summary Recovery*) *Ordinance* (*Cap.* 8), *s.* 11 (1) (*K.*) – *Revised Edition of the Laws Ordinance*, 1948, *s.* 4, *s.* 5, *s.* 6, *s.* 7, *s.* 9 (*K.*).

Editor's Summary

The wife of the applicant filed notice of motion in the magistrate's court on December 16, 1960, under the Subordinate Courts (Separation and Maintenance) Ordinance for an order that she was no longer bound to cohabit with the applicant and for consequential relief. On the same date the wife applied to the magistrate ex parte by chambers summons for the issue of a warrant of arrest requiring the applicant to show cause why he should not furnish security for his appearance at the hearing of the motion. This application which purported to be made under O. XXXVIII, r. 1 of the Civil Procedure (Revised) Rules, 1948, was then granted and the applicant, having been duly arrested, was brought before the court when a temporary order was made that he should enter into a surety

bond to appear at the adjourned hearing of the motion. On January 4, 1961, the Supreme Court gave the applicant leave to apply for an order of prohibition directing the magistrate not to proceed with the application under O. XXXVIII, r. 1, and for an order of certiorari in respect of the order made on December 16, 1960. At the hearing of the applications for prohibition and certiorari it was submitted for the applicant that the notice of motion which had been filed on December 16, 1960, was misconceived since the proceedings should have been initiated under the Criminal Procedure Code in accordance with r. 2 of the Rules of Court made under s. 16 of the Ordinance. The respondent contended that as the Rules of Court were omitted from the Laws of Kenya (Revised Edition) 1948, they were no longer in force.

Held –

(i) proceedings brought pursuant to the Subordinate Courts (Separaion and Maintenance) Ordinance (Cap. 6) before its amendment in 1961, must be in accordance with the procedure prescribed by the Criminal Procedure Code and if they follow the procedure prescribed under the Civil Procedure Ordinance they are a nullity and any order made thereon is equally so.

(ii) there was no authority for the procedure adopted by the respondent and the magistrate had no jurisdiction under the Civil Procedure Ordinance to entertain the application.

Order accordingly.

Cases referred to in judgment:

(1) *Kashap v. Kashap*, Kenya Supreme Court Civil Appeal No. 4 of 1958 (unreported).

(2) *Palmieri v. Palmieri*, Kenya Supreme Court Civil Appeal No. 6 of 1961 (unreported).

Judgment

Edmonds J, read the following judgment of the court: This is an application for orders of prohibition and certiorari directing the resident magistrate, Nairobi, not to proceed with the hearing of an application under O. XXXVIII, r. 1, of the Civil Procedure (Revised) Rules, 1948, to show cause why the applicant should not furnish security for his appearance at the hearing of an application for separation and maintenance, and to remove into this court and quash an order made by the resident magistrate on December 16, 1961.

The applicant was originally the respondent to a notice of motion dated December 16, 1960, taken out by his wife under the Subordinate Courts (Separation and Maintenance) Ordinance (Cap. 6), of the Laws of Kenya, whereunder an order was sought that the wife was no longer bound to cohabit with the applicant and for consequential orders of custody and maintenance. On December 16, 1960, the wife applied ex parte by way of chamber summons in the resident magistrate's court for a warrant of arrest before judgment to issue to the applicant to show cause why he should not furnish security for his appearance at the hearing of the application for separation and maintenance. The application was purported to have been made under O. XXXVIII, r. 1, of the Civil Procedure Rules on the grounds that the applicant before this court was then about to leave the jurisdiction of that court. The resident magistrate granted the application and the applicant was duly arrested and brought before the court when a temporary or interim order was made that he enter into a surety bond to appear at the adjourned hearing of the application. On January 4, 1961, leave was granted for the present application before us and an

order was made staying the application before the resident magistrate for security.

The initial contention for the applicant is that the procedure adopted by the wife in applying by way of notice of motion under the Civil Procedure Ordinance was misconceived, as was the magistrate's action in assuming jurisdiction under that Ordinance. Two previous cases have come before this court in which the provisions of the Civil Procedure Ordinance were followed in respect of applications under the Subordinate Courts (Separation and Maintenance) Ordinance. In the one, *Kashap v. Kashap* (1), Kenya Supreme Court, Civil Appeal No. 4 of 1958 (unreported), the proceedings were instituted by way of plaint, and in the other *Palmieri v. Palmieri* (2), Kenya Supreme Court, Civil Appeal No. 6 of 1961 (unreported), by notice of motion. In both these appeals it was held by Templeton, J. and Mayers, J., respectively, that the proceedings were a nullity on the grounds that by virtue of r. 2 of the Rules of Court (Government Notice No. 85 of 1929) made under s. 16 of the Subordinate Courts (Separation and Maintenance) Ordinance, the proceedings should have been brought under the provisions of the Criminal Procedure Code. Rule 2 provides as follows:

> "2. All applications and other proceedings under the Ordinance shall, where provision to the contrary has not been made thereunder, be in accordance with the procedure prescribed by the Criminal Procedure Ordinance or such other law as may be substituted therefor."

We do not think there can be any doubt but that the procedure under the Ordinance must be in accordance with the Criminal Procedure Code, and we think that, if any doubt could exist, it is dispelled by the amendment of the Ordinance and Rules under the 1961 legislation, that is to say, by the Law Reform (Maintenance Orders) Ordinance No. 32 of 1961 and Legal Notice No. 342 of 1961. Under this Ordinance, s. 11 (1) of the original Ordinance, by which any sum ordered to be paid was made recoverable under the Debts (Summary Recovery) Ordinance (Cap. 8), that is to say, by procedure governed by the Criminal Procedure Ordinance, was amended by making such sum

> "without prejudice to any other mode of recovery, a civil debt recoverable summarily".

This amending provision clearly has the effect of allowing recovery by civil proceedings, and would certainly not have been made if there had been effective provision for such a remedy under the original Ordinance.

We respectfully agree with Mayers and Templeton, JJ., that where proceedings under the Ordinance of 1929 before amendment, are brought under the Civil Procedure Ordinance they are a nullity, and it must follow that any order made thereon is equally so.

It is, however, contended for the respondent to this application that, as the 1929 Rules were omitted from the revised edition of the Laws of Kenya, 1948, they no longer had the force of law after the date of publication of the revised edition. The powers of the commissioner appointed under the revised edition of the Laws Ordinance, No. 87 of 1948, for the purpose of preparing the revised edition are contained in s. 4 and s. 5. There is no provision in those sections enabling the commissioner to amend or revoke any enactment, and indeed s. 6 expressly limits the powers of the commissioner in respect of alteration or amendment of any enactment. Section 6 is in these terms:

> "6(1) The minor amendments set out in the Second Schedule to this Ordinance are hereby made to the Laws of the Colony and shall be deemed to have come into force upon September 21, 1948, and shall be incorporated by the Commissioner in the Revised Edition.

> "(2) Save as provided in sub-s. (1) of this section, nothing in this Ordinance shall be taken to imply any power in the Commissioner to make any alteration or amendment in the matter or substance of any enactment."

Furthermore, in relation to subsidiary legislation, s. 7 (5) and s. 9 contain the following provisions:

> "7.(5) In addition the Revised Edition shall contain a reprint of such Acts, Orders in Council, Letters Patent, Royal Instructions and Rules, Regulations, Proclamations, By-laws, Notices and other forms of subsidiary legislation as the Commissioner may consider necessary, and in reference thereto the Commissioner shall have the like powers to do all things relating to form and method as are conferred upon him by this Ordinance in respect of Ordinances."
>
> "9. The Governor may, by proclamation, approve the Revised Edition, and order that it shall come into force from such date as he shall, in such proclamation, specify.
>
> "Provided that the Governor may if he shall think fit, approve and bring into force with effect from such date as he may select those volumes of the Revised Edition containing the Ordinances of the Colony in force on September 21, 1948, and approve and bring into force from a subsequent date those volumes containing a re-print of such of the Acts, Orders in Council, Letters Patent, Royal Instructions, and Rules, Regulations, Proclamations, By-laws, Notices and other forms of subsidiary legislation as the Commissioner may consider necessary to include therein."

There is no room for doubt in our view that the omission by the Commissioner to re-publish in the Revised Edition of subsidiary legislation the provisions of the rules made by Government Notice 85/1929 under s. 16 of the Subordinate Courts (Separation and Maintenance) Ordinance had no bearing whatever upon their continuing legal effect. For reasons best known to the Commissioner, he considered it unnecessary to repeat the Rules in the Revised Edition, but their omission did not and could not have the effect of revoking them and they remained of full force and legal effect until they were finally revoked in 1961 by Legal Notice 342.

In our opinion, therefore, there was no authority for the procedure adopted by the respondent to this application in seeking the assistance of the subordinate court under the provisions of the Civil Procedure Ordinance, nor had that court any jurisdiction to entertain her application. The proceedings before the lower court were therefore a nullity, in our opinion. It must follow that the magistrate is directed not to proceed with the hearing of the respondent's application under O. XXXVIII, r. 1 of the Civil Procedure Rules. In view of the opinion we have expressed on the first submission for the applicant, it is unnecessary for us to consider the second ground urged in support of the application.

Order accordingly.

For the applicant:
Kean & Kean, Nairobi
M. Kean

For the wife:
E. P. Nowrojee, Nairobi

Ahmed Ali Mohamed Gabli and Others v Amoon Binti Mohamed Ali Saad

[1962] 1 EA 657 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	26 July 1962
Case Number:	23/1962
Before:	Sir Ronal Sinclair P, Sir Alastair Forbes VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden – Light, Ag. J.

[1] Mohamedan law – Succession – Distant kindred – Classes of heirs among distant kindred – Priorities of classes – Whether descendant from parents of deceased has priority over descendants of grandparents.

Editor's Summary

The respondent sought a declaration that, as the daughter of a full brother of the deceased, who had died childless and whose husband had predeceased her, she was the sole heir. The respondent claimed that being children of maternal uncles of the deceased, they were entitled to one-third of the estate. There was no dispute between the parties that the deceased was a Mohamedan and a member of the Shafei school of the Sunni sect, that the Shafei law of inheritance applied and they all fell within the category of heirs known under that law as "distant kindred" of the deceased. The trial judge held that the respondent came within a class having exclusive preference to the class within which the appellants came and was thus sole heir. On appeal,

Held – under the modern Shafei law of inheritance there is an order of exclusive priority between classes of heirs among distant kindred; since the respondent was decended from the parents of the deceased, whereas the appellants were descended from the grandparents of the deceased, the respondent was in a prior class and the judge was correct in declaring her to be the sole heir to the exclusion of the appellants.

Appeal dismissed.

The following judgments were read:

Judgment

Crawshaw JA: This is an appeal from a declaratory judgment of the Supreme Court, Aden, in which it was held that the respondent (plaintiff) is the sole heir of Noor Bint Ali Saad who died on October 27, 1960.

The facts are not in dispute. The deceased had no children, her husband had pre-deceased her, and she left surviving her no blood relations other than the parties to this suit. The respondent is the daughter of a full brother of the deceased. The appellants are all children of maternal uncles of the deceased, the first two appellants being children of one brother of the deceased's mother, and the third appellant being the child of another brother of the deceased's mother. The deceased was a Mohamedan, being a member of the Shafei school of the Sunni sect, and it is agreed, as it was in the court below, that the Shafei law of inheritance applies. It is also agreed that the Shafei law recognises three categories of heirs, (*a*) sharers,

(*b*) residuaries and (*c*) distant kindred, and that the parties are all distant kindred. The respondent claims to be the sole heir. The appellants say she is entitled only to two-thirds of the estate and that they are entitled to the remaining one-third.

With respect, the learned judge unfortunately appears to have become a little confused as to the law applicable, for although he commenced his judgment by saying, “All the parties are Shafei muslims”, a little later he said “The principles of priority under Shia law to which the parties are subject . . .”. He then proceeded to consider extracts from the book of Mohamedan law by the Aden author, Shaikh Abdul Kadir bin Muhammed Al-Mekkawi (hereinafter referred to as “Mekkawi”) on the Sunni law of inheritance, and also the Shia law of inheritance as expounded by other authors, and came to the conclusion that under both the respondent came within a class having exclusive preference to the class within which he found the appellants came. Both counsel agree that the Shia law of inheritance is different to the Shafei law in material respects, although Mr. Sanghani, who appeared for the respondent, submits that the learned judge’s decision was still correct. The only question we are called upon to decide is what is the relevant Shafei law of inheritance applicable to the instant case.

We have been referred to a number of books on Mohamedan law, some of which deal mainly with one sect or school and others with another. In the wellknown authority, Wilson on Anglo Muhammadan Law (6th Edn.), at p. 426 (para. 407) it is said

> “According to the ancient Shafei authorities there is . . . no place reserved in the order of succession for the (so called) Distant Kindred . . . so that in default of sharers and residuaries the property would escheat to the Bait-ul-Mal”;

the Bait-ul-Mal is a public fund. The learned author goes on to say that the modern procedure, however, is to admit blood relations who do not belong to the category of either sharers or residuaries, and that, “such blood relations may be classed under ten heads”. The heads are then set out. The third head reads, “Full or consanguine or uterine brother’s daughters;”, within which the respondent comes, and the ninth, “Maternal uncles and aunts;”, and the tenth “The kindred of all the above, whether male or female”; the appellants come within the tenth head read with head nine.

Mr. Kazi, who appeared for the appellants, submits that there is no exlusive priority amongst the distant kindred under Shafei law and that they all take a share. He says, as I understand him, that they take their shares through their nearest relative who, had he or she been alive, would have been an heir of the deceased, that is, a sharer or residuary, and that in the instant case the respondent would therefore step into the shoes of her father, the deceased’s brother, and the appellants into the shoes of the deceased’s mother as their respective fathers were not heirs of the deceased. He has not cited any authority for this proposition except to refer to Mekkawi which both he and Mr. Sanghani accept as reliable authority on the Shafei law; I will refer to this author later. Mr. Kazi submits that the appellants are entitled to the share of the mother of the deceased, that is, he says, one-third, and that the respondent is entitled to the share of the brother of the deceased, which, he says, is two-thirds. Mr. Sanghani submits that exclusive priority is attached to the classes or heads according to their order; in other words that no person in a lower class could inherit any part of the estate if there was a person in a higher class.

Mr. Kazi agrees I think with Mr. Sanghani that Wilson in his para. 407 (supra) was setting out the heads of relationship in order of priority. I think this undoubtedly was so, for he observes that this “order of succession” according to the modern practice of Shafeis differs very materially from the order of succession of distant kindred amongst the Hanafis (another school of the Sunni sect), especially in the “preference” of ascendants to descendants. Again, at p. 67, when considering the peculiarities of Shafei law, he observes that the

order is arranged in a manner rather more favourable to the male sex than the order under Hanafi law. Mr. Kazi is bold enough to say that Wilson is wrong and that the Minhaj, to which Wilson refers, does not say that there is any priority amongst the distant kindred under Shafei law, although it does not say that there is not – it is silent as to this. Wilson refers to "2 Minhaj 225, 226". This may be a reference to the original publication (13th Century) or to the French translation, for on the first page of chapter XIII in Wilson it is said that the contents of that chapter (which include para. 407 relating to the Shafei law of inheritance) are derived partly from the Hedaya (a book mainly on Hanafi law) which points out peculiarities of Shafei law, but "chiefly from Van Den Berg's French translation of the Fath-ul-Qarib and the Minhaj-at Talibin". Wilson then refers to the English translation from Van Den Berg published in 1914, which is the edition before us. It is clear, anyway, that Wilson gave full consideration to the passages in the Minhaj relating to Shafei law of inheritance, as well as to other authorities not available to us such as the Sirajiyyah and J. D. Luciani, which latter Wilson describes at p. 419 as a "valuable modern work on the Shafeite law of inheritance". Had Wilson taken a different view to that which he attributed to the Minhaj on such a vital question as priority he would, in view of his reliance on the Minhaj, no doubt have drawn emphatic attention to it, and his failure to do so leads one to the conclusion that, in the light of the authorities as a whole, he accepted the order of inheritance given by the Minhaj to be an order of exclusive preference. The Minhaj gives the same ten heads of relationship of distant kindred as does Wilson, and in the same order. Admittedly it does not expressly say that the earlier have preference over the later. Mr. Kazi suggests that the reason they are divided into ten different kinds of relationship (and by Mekkawi into four main classes) is merely for convenience of reference, but I find it difficult to appreciate that reasoning, and I prefer to accept Wilson's appreciation that it is an order of priority.

Such an order of priority would appear to be consistent with the general principles set out in Ameer Ali on Mohomedan Law (4th Edn.), at p. 49 where it is said:

> ". . . the Sunnis group the heirs under two heads, viz., agnates and cognates; the agnates and cognates are again respectively sub-divided into descendants, ascendants and collaterals. The object of this division and sub-division is to indicate the order of succession, and the rule applies to each class of heirs, . . ."

The placing under Shafei law of ascendants before descendants amongst distant kindred (as in the Minhaj) is different to the order under Hanafi law and, according to Ameer Ali is contrary to the usual order of the Sunni sect, but I think this in itself tends to show that the order is one of priority as otherwise one would have expected the usual order to have been followed. Although in Ameer Ali reference is made at p. 124 to the Minhaj and to the right of cognates of the Shafei school to inherit, the order is not mentioned.

Mekkawi says that Shafei law predominates in the Yemen and the Hadramout, and one would expect it to predominate in Aden also. His references are not however only to Shafei law, and in his preface to the edition which is before us he says he has adopted

> "the correct doctrines from the most approved authorities of Abu Hanafi and Ash-Shafa'ee"

(who I have been referring to as Hanafi and Shafei). In Chapter VI of Part I "uterine relations" are defined as implying

> "every relation of the deceased who is neither a legal sharer to whom a specific protion is assigned, nor a residuary";

counsel agree that they are synonymous with "distant kindred" and "cognates", and I refer to them as distant kindred. The chapter sets out four classes of distant kindred and I understand the author to mean that the classes apply to both Hanafi and Shafei law, for he then poses the question

> "what are the rules in constituting the uterine kindred as heirs, and how is their priority to each other to be determined?",

and in answer proceeds to set out separately the rules applicable to Shafei and to Hanafi law. It would appear however that these rules are meant to apply to persons within one of the classes, and not as between claimants in different classes, for he says each class takes

> "precedence over the others in an order similar to that of the residuaries, of whom the son takes precedence and the father follows".

I am inclined to think that by "residuaries" is here meant the four classes of "residuaries by themselves" (p. 54), where the sons in class I take precedence over the father in class 2. It will be seen that the order of distant kindred is similar to the order of the "residuaries by themselves" in that in both class 1 relates to descendants, class 2 to ascendants, class 3 to offspring of parents and class 4 to offspring of grandparents. The same order for distant kindred and residuaries under Hanafi law is to be found in Wilson at pp. 282 and 270 where it is said that each class in turn must be exhausted before any member of the next class can take anything; rules are then set out for settling the rights of persons within each class such as a person in a nearer degree excluding a person in a more remote degree. As to the Shafei rules of priority of distant kindred set out in Mekkawi, I think Mr. Kazi has misunderstood the following passage at p. 72

> "According to Ash-Shafa'ee, when the uterine kindred come together, each takes the place of that heir through whom he claims relationship;"

The expression "uterine kindred come together" is not, as I understand it, meant to mean uterine kindred of all classes together, but, as the learned judge understood it, uterine kindred within a particular class. Apart from other considerations this would appear so from the illustrations which follow, and the expression would also appear to have been so used at p. 66 where priority amongst residuaries was being discuessed.

Mekkawi, it has been seen, gives precedence to descendants over ascendants, contrary to the Minhaj (to which he does not appear to refer) and to Wilson. This, however, does not effect the priority as between the parties in this suit for the respondent comes within class 3 in Mekkawi, being descended from the deceased's parents, whilst the appellants come within class 4, being descended from the grandparents. It is to be observed that the ten heads of distant kindred given in the Minjah and in Wilson are divisible into the same four classes, (*a*) ascendants, (*b*) descendants, (*c*) (heads 3-5 inclusive) descendants of parents and (*d*) (heads 6-9 inclusive) descendants of ascendants e.g. of grandparents. Within classes 3 and 4 the order in Mekkawi does not appear to be quite the same as in the Minhaj and Wilson, but that is not a matter with which we need deal.

In the result I would say that the learned judge was correct in declaring the respondent to be the sole heir to the exclusion of the appellants, although in part he applied the wrong law. I would dismiss the appeal with costs.

Sir Ronald Sinclair P: I agree. The appeal is dismissed with costs.

Sir Alastair Forbes VP: I also agree.

Appeal dismissed.

For the appellants:
Westby, Nunn & Kazi, Aden
A. E. Kazi

For the respondent:
P. K. Sanghani, Aden

Sosipeter Opale s/o Idiawo v R
[1962] 1 EA 661 (HCU)

Division:	HM High Court of Uganda at Jinja
Date of judgment:	30 July 1962
Case Number:	33/1962
Before:	Bennett J
Sourced by:	LawAfrica

[1] Criminal law – Charge – Defect – Charge of arson – No allegation that setting fire was unlawful or wilful – Whether charge defective or bad – No substantial miscarriage of justice – Penal Code (*Cap.* 22), *s.* 307 (*a*) (*U.*) – *Explosive Substances Act*, 1883, *s.* 4 (1) – *Criminal Appeal Act*, 1907, *s.* 4 (1) – *Indictments Act*, 1915, *s.* 3 – *Criminal Procedure Code* (*Cap.* 24), *s.* 133, *s.* 136 *and s.* 331 (1) (*U.*).

Editor's Summary

The appellant was convicted of arson contrary to s. 307(*a*) of the Penal Code, under which the act of setting fire must be both unlawful and wilful. In the particulars of the offence there was no allegation that the appellant's act was either unlawful or wilful. On appeal,

Held –

(i) the charge was clearly defective but not bad and in the circumstances of the case no prejudice or embarrassment had been caused to the appellant at his trial by the defect in the charge.

(ii) no substantial miscarriage of justice had occurred and the proviso to s. 331 (1) of the Criminal Procedure Code was applicable.

Appeal dismissed.

Case referred to in judgment:

(1) *R. v. McVitie*, [1960] 2 All E.R. 498; 44 Cr. App. R. 201.

Judgment

Bennett J: The appellant was convicted by the District Court of Busoga of arson and sentenced to five years' imprisonment. He appeals against conviction and sentence.

There was abundant evidence to prove that it was the appellant who had set fire at night to the house of his father-in-law. At his trial the appellant did not give evidence or make an unsworn statement, so that there was no account by him of his whereabouts on the night of the fire. As to the complaint in his petition of appeal that he was not permitted to call a witness, it is plain from the record of the district court proceedings that when, at the close of the prosecution case, the appellant was called upon to make his defence, he said that he had no witnesses to call. It was not until after a conviction had been recorded

and the learned magistrate had delivered his finding that the appellant said that he wanted to call a witness.

There is only one matter which has caused me concern and that is that the charge is clearly defective. To constitute the offence of "arson" as defined in s. 307 of the Penal Code, the act of setting fire must be both unlawful and wilful. The charge in respect of which the appellant was tried and convicted reads:

"Statement of Offence:

"Arson: contrary s. 307(*a*) Penal Code.

Particulars of Offence:

"Sosipeter Opale s/o Idiawo on January 1, 1962, during night time at Budomero village, Gombolola Vukula, Busiki, in Busoga District did set fire to the house of Ojulong."

It will be observed that there is no allegation in the particulars of offence that the appellant's act was either unlawful or wilful, so that the facts as alleged in the particulars do not of themselves constitute the offence of arson.

A very similar situation arose in England in the case of *R. v. McVitie* (1), [1960] 2 All E.R. 498; 44 Cr. App. R. 201, in which the accused had been convicted of an offence contrary to s. 4 (1) of the Explosive Substances Act, 1883, which makes it an offence "knowingly" to have in one's possession any explosive substance under circumstances giving rise to a reasonable suspicion that possession is not for a lawful object. In that case the particulars of the offence omitted the word "knowingly" and, on appeal, it was argued that the accused had been tried and convicted in respect of an offence unknown to the law.

The Court of Criminal Appeal held that the indictment was defective, but that it was not a bad indictment. The court being of opinion that no prejudice or embarrassment had been caused to the accused by the omission of the word "knowingly" in the particulars of offence applied the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. After setting out s. 3 of the Indictment's Act 1915, (which is reproduced in s. 133 of the Criminal Procedure Code of Uganda) and r. 4, sub-rr. (3) and (4) of the Rules contained in the First Schedule to the Act (which are reproduced in s. 136 of the Criminal Procedure Code) the judgment of the Court of Criminal Appeal proceeds:

> "The indictment in the present case conformed to these provisions, save only in one respect. If the words in s. 3, 'necessary for giving reasonable information,' import an objective test (which we think they do) then the word 'knowingly' should have been included in the particulars. In our opinion, this did not make the indictment a bad indictment, but simply a defective or imperfect one. A bad indictment would be one disclosing no offence known to the law, for example, where it was laid under a statute which had been repealed and not re-enacted. In the present case the indictment described the offence with complete accuracy in the 'Statement of Offence.' Only the particulars, which merely elaborate the 'Statement of Offence,' were incomplete. The question of applying the proviso is to be considered, therefore, not upon the basis that the indictment disclosed no known offence, but that it described a known offence with incomplete particulars."

The observations of the Court of Criminal Appeal in *McVitie's* case (1), are clearly applicable to the instant case. It remains only to consider whether or not the appellant has been prejudiced or embarrassed by the fact that the charge contained incomplete particulars.

In a "charge and caution" statement which was produced in evidence by the prosecution and which the appellant neither repudiated nor retracted, the

appellant said that on the night of the fire he was at the home of one Beneketo. In his petition of appeal he contends that he was at Beneketo's house on the night of the fire, and denies having set fire to the house of his father-in-law. There is nothing in the appellant's "charge and caution" statement or in his petition of appeal to suggest that he wished to raise the defence that he had set fire to the house accidentally or, that in the circumstances of the case, his act in setting fire to the house was lawful. This being so, I am satisfied that no prejudice or embarrassment was caused to the appellant at his trial by the defect in the charge and, in my judgment, this is a proper case in which to apply the proviso to s. 331 (1) of the Criminal Procedure Code.

The appeal is accordingly dismissed.

Appeal dismissed.

The appellant in person.

For the respondent:
The Director of Public Prosecutions, Uganda
J. M. Long (Crown Counsel, Uganda)

Hamisi Lugenda v R
[1962] 1 EA 663 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	20 August 1962
Case Number:	317/1962
Before:	Bennett J
Sourced by:	LawAfrica

[1] Criminal law – Trial – Misdirection – Charge of stealing – Reference in judgment to contents of document not proved – No direction as to standard of proof – Circumstantial evidence – No direction as to doctrine of recent possession – Whether omissions fatal to conviction – Evidence Ordinance (*Cap.* 9), *s.* 155 (*U.*).

[2] Criminal law – New trial – Misdirection – Prosecution not to blame for misdirection – Grave offence – Prospect of conviction – New trial ordered – Evidence Ordinance (*Cap.* 9), *s.* 155 (*U.*).

Editor's Summary

On a charge of stealing a motor vehicle at Kampala on April 2, 1962, the evidence against the appellant was mainly circumstantial. It was proved that six days after the theft of the car the appellant was seen driving it and one, D., who had previously made a statement to the police gave evidence identifying the

appellant. D.'s statement to the police was read by the magistrate but was neither proved under s. 155 of the Evidence Ordinance nor adduced in evidence. The appellant's defence was an alibi and he called two witnesses to prove that he was not in Kampala on the date of the theft. In his judgment convicting the appellant the magistrate failed to direct himself on the standard of proof required in cases founded on circumstantial evidence or as to the doctrine of recent possession. The magistrate also referred to the statement made to the police by D. as being consistent with his evidence and found that the appellant knew on May 9, 1962, that he was charged with stealing on April 2, although no such evidence had been led. On appeal against conviction and sentence, it was submitted that in addition to the omissions to direct himself on circumstantial evidence and the doctrine of recent possession, the magistrate had seriously misdirected himself in other respects.

Held –

(i) the magistrate's failure expressly to direct himself as to the standard of proof and as to the doctrine of recent possession were not fatal to the conviction as he would have reached the same conclusion upon a fuller direction and there had been no failure of justice in this respect.

(ii) it is a fundamental principle of justice that a court shall not take into account documents which have not been proved and of which one or both parties to the proceedings are unaware; that principle had been violated by the magistrate.

(iii) since the magistrate had also taken into account other matters which had not been proved, it would be unsafe to allow the conviction to stand.

(iv) however, since the prosecution was in no way responsible for the misdirections and there was evidence which, if believed, would have justified a conviction, a re-trial before another magistrate would be ordered.

Braganza v. R., [1957] E.A. 152 (C.A.) followed.

Conviction quashed and sentence set aside. New trial ordered.

Cases referred to in judgment:

(1) *Sauzier v. R.*, [1962] E.A. 50 (C.A.).

(2) *R. v. Suke d/o Samwe and Others* (1947), 14 E.A.C.A. 134.

(3) *Braganza v. R.*, [1957] E.A. 152 (C.A.).

(4) *Salim Mushin v. Salim bin Mohamed and Others* (1950), 17 E.A.C.A. 128.

Judgment

Bennett J: The appellant was convicted by the district court of Mengo of stealing a motor vehicle and sentenced to two years' imprisonment. He appeals against conviction and sentence.

There was evidence, which the learned magistrate accepted, that six days after the theft the appellant was seen driving the stolen car. The appellant's advocate has attacked the judgment of the learned magistrate on a number of grounds. It is said that the case against the appellant rested entirely upon circumstantial evidence, and that the learned magistrate failed to direct himself that he ought not to convict unless the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation of any other hypothesis than that of guilt. It is said that the learned magistrate failed to consider whether or not the appellant was guilty of theft or receiving and that there was no mention in the judgment of the doctrine of recent possession. It is also contended that the appellant's possession of the car was not exclusive and that in these circumstances neither the learned magistrate nor an appellate court could properly invoke the doctrine of recent possession.

The appellant's defence was an alibi. He alleged that on the date on which the car was stolen in Kampala he was in Kyagwe. He said that he could not have been seen driving the stolen car six days after the theft since he did not know how to drive. He called two witnesses to support his alibi on the date of the theft.

It will be seen that the appellant denied that he had ever been in possession of the stolen car. In these circumstances the learned magistrate was entitled to convict the appellant of stealing the car if satisfied that the appellant had in fact been seen in possession of the car, since possession of property recently stolen which is unexplained is ordinarily evidence of theft rather than of receiving. The magistrate was

satisfied that the appellant had been in possession of the car six days after the theft, and there was evidence to support his finding. I am therefore of opinion that although the learned magistrate failed to direct himself in express terms as to the doctrine of recent possession and as to the standard of proof required in a case resting exclusively on circumstantial evidence, on the evidence which he accepted, he would have reached the same conclusion had he directed himself more fully. There is no substance in the contention

that the appellant's possession of the car was not exclusive since there was no evidence that anyone else was in the car when the appellant was seen driving it.

The non-directions in the judgment to which the appellant's advocate has alluded have plainly occasioned no failure of justice and they are not fatal to the conviction: *see Sauzier v. R.* (1), [1962] E.A. 50 (C.A.). If the matter rested there I should be disposed to dismiss the appeal.

Learned Crown Counsel, has however, drawn the court's attention to several passages in the judgment which contain misdirections. The first passage reads:

> "The witness Daudi has struck me as an honest and observant witness. I believe his evidence. I am convinced he made no mistake in the identification of the accused person. His statement to the police recorded on May 9, 1962, is consistent in all respects with his evidence in court and I have no reason at all to doubt his word."

It appears that the learned magistrate had read a statement made by Daudi to the police which was recorded on May 9, 1962. Such a statement would have been admissible under s. 155 of the Evidence Ordinance had it been proved by calling the police officer to whom it was made. However, the police officer who recorded it was not called as a witness. The statement was never adduced in evidence and the appellant was thus given no opportunity of cross-examining on it. It is a fundamental principle of justice that a court shall not take into account documents which have not been produced in evidence, and of which one or both parties to the proceedings are unaware. That principle has been violated in the instant case and the passage in the judgment to which I have alluded is a serious misdirection.

Another instance of the learned magistrate taking in account matters which were not proved in evidence is to be found in the following passage:

> "The accused on May 9, 1962, knew that he was charged with stealing a car on April 2, 1962. If he was in Buikwe, Kyagwe County, he would have said so to the police and would tell them that his family can confirm this."

The reference to the appellant's knowledge that he was charged with stealing a car, presumably, relates to an occasion when the appellant was charged by the police. The prosecution adduced no evidence of any charge and caution statement. There was thus no evidence to support the learned magistrate's finding that on May 9 the appellant knew that he was charged with stealing a car on April 2.

Finally, there is misdirection in the following passage:

> "At the same time it is extremely odd that members of his family should not go forward to the police to give statements to the effect that at the time of the alleged offence accused was with them."

This passage would appear to refer to admissions by both defence witnesses who had given evidence in support of the appellant's alibi that they had not gone to the police to make statements. With respect, it was quite wrong to depreciate evidence of these two witnesses on account of their failure to report to the police, since there was no evidence that they knew that the appellant had been arrested before they were summoned to give evidence as defence witnesses.

In all the circumstances it would be unsafe to allow this conviction to stand, since had the learned magistrate not misdirected himself and taken into account matters which were not proved by evidence he might well have taken a different view as to the credibility of Daudi and of the defence witnesses.

I have been asked by Crown Counsel to order a new trial. An appellate court will not order a new trial in order to allow the prosecution to fill a gap in its

case against the accused, and will hesitate to do so where the conviction is quashed on account of an irregularity for which the prosecution is responsible: see *R. v. Suke d/o Samwe and Others* (2) (1947), 14 E.A.C.A. 134. Moreover, a retrial should not be ordered unless the appellate court is of opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result: see *Braganza v. R.* (3), [1957] E.A. 152 (C.A.).

In the instant case the prosecution was in no way responsible for the misdirections in the judgment of the learned magistrate which rendered the trial unsatisfactory. Moreover, there was evidence which, if believed, would have justified a conviction.

The decision in *Salim Mushin v. Salim bin Mohamed and Others* (4) (1950), 17 E.A.C.A. 128, appears at first sight to support the contention of the appellant's advocate that this is not a case in which a retrial should be ordered. In that case the appellant was convicted by a district court of failure to pay wages and on appeal to the High Court the conviction was quashed and a retrial ordered. The appellant appealed to the Court of Appeal for Eastern Africa against the order for a retrial. The head-note of the case reads:

> "The High Court has a discretion to order a retrial, but in this case the discretion had not been judicially exercised. The conviction had been quashed by reason of misdirection by the magistrate. Although this may not have been the fault of the prosecution, the important consideration is that it was not the fault of the accused. The order for a retrial would be set aside."

The judgment was not reported in full. The excerpt from the judgment which is reported deals with an entirely different aspect of the case and contains no indication as to why the appeal court considered that the High Court had improperly exercised its discretion by ordering a retrial. In other words there is nothing in that part of the judgment which has been reported which could be regarded as authority for the proposition contained in the head-note. The charge in *Salim's* case (4), was trivial and it is readily understandable that the Court of Appeal was reluctant to order a retrial. Incomplete as the report of the case is, I hesitate to regard it as authority for the proposition that in no case in which a conviction is quashed by reason of a misdirection can an appellate court order a retrial.

In *Braganza v. R.* (3), the Court of Appeal upheld an order for a retrial by the Supreme Court of Kenya, the conviction having been quashed by the Supreme Court on account of wrongful admission of evidence by the trial magistrate. In the instant case the trial magistrate took into account matters which were potentially admissible but which had not been proved in evidence. It is difficult to discern any distinction in principle between the two cases.

In my judgment, having regard to the gravity of the offence with which the present appellant was charged, and the nature of the evidence which was given at the trial, this is a case in which an order for a retrial ought to be made.

Accordingly I quash the conviction and set aside the sentence and order the appellant to be retried by another magistrate. The appellant will remain in custody pending the retrial.

Conviction quashed and sentence set aside. New trial ordered.

For the appellant:
Dalal & Singh, Kampala
S. S. Dalal

For the respondent:

The Director of Public Prosecutions, Uganda
J. M. Long (Crown Counsel, Uganda)

Muindi s/o Kilonzo v R
[1962] 1 EA 667 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 October 1962
Case Number:	796/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Street traffic – Driving while under the influence of drink – Disqualification – Special reasons – Breakdown of vehicle – Vehicle unable to move – Driver after drinking returns to rest in vehicle – "Special reasons" for not disqualifying – Necessity of evidence to support "special reasons" – Traffic Ordinance, 1953, *s.* 43 (1) (*K.*).

Editor's Summary

After his vehicle had broken down the appellant, knowing that it would be some time before a mechanic could arrive to repair the vehicle, drank some alcohol and then went into the vehicle to await the mechanic. When the appellant was charged under s. 43 (1) of the Traffic Ordinance, 1953, with being in charge of a motor vehicle while under the influence of drink, he replied "I do not dispute this charge as I had been drinking. The vehicle was, however, found to be out of order". On appeal against conviction and disqualification it was argued on behalf of the appellant that the plea was not an unequivocal admission of guilt on the ground that the vehicle had broken down and was incapable of moving; and that s. 43 (1) can have application only to a case where the vehicle is capable of being driven.

Held –

(i) the circumstances did not relieve the appellant of liability for an offence of being in charge of a motor vehicle while under the influence of drink under s. 43 (1) of the Traffic Ordinance, 1953, although they justified a finding of special reasons against an order for disqualification.

(ii) in the circumstances the appellant was properly convicted on his plea.

(iii) where an accused charged under s. 43 (1) of the Traffic Ordinance, 1953, seeks to rely on special reasons for not having an order of disqualification made he ought to give evidence to support his plea of "special reasons".

Appeal against conviction and sentence dismissed. Order of disqualification set aside.

Case referred to in judgment:

(1) *Jones v. English*, [1951] 2 All E.R. 853.

Judgment

Rudd Ag CJ, read the following judgment of the court: This is an appeal against a conviction and sentence and an order of disqualification for holding or obtaining a driving licence on a charge under s. 43 (1) of the Traffic Ordinance, 1953. We dismissed the appeal against conviction and sentence, but set aside the order of disqualification. We now give our reasons for so doing.

The particulars of the charge alleged, inter alia, that the appellant was

> "in charge of a motor vehicle while under the influence of drink to such an extent as to be incapable of having proper control of the said motor vehicle".

In his plea to the charge the appellant is recorded as having said:

> "I do not dispute this charge as I had been drinking. The vehicle was, however, found to be out of order. I understand the charge."

The learned magistrate convicted the appellant on this plea.

At the hearing of the appeal it was argued on behalf of the appellant that the plea was not an unequivocal admission of guilt. The ground upon which this argument was based was that the vehicle had broken down and was incapable of moving and that the section can have application only to a case where a vehicle is capable of being driven. The circumstances under which the appellant had been drinking do not appear on the record and may well not have been stated to the learned magistrate. We were, however, informed by the appellant's counsel, and his statement of the facts was not disputed by Crown counsel, that after his vehicle broke down the appellant, knowing that it would be a considerable time before a mechanic could come to the scene to repair the vehicle, drank a certain amount of alcohol which he obtained from nearby premises. Thereafter he went into his car to rest and to await the arrival of a mechanic. Those circumstances do not in our view relieve the appellant of liability for an offence under sub-s. (1) of s. 43 of the Traffic Ordinance, although they do justify a finding of special reasons against an order for disqualification.

The facts in this case are very similar to those in *Jones v. English* (1), [1951] 2 All E.R. 853. There, a lorry after breaking down had been towed and parked in a side road. The driver then left the vehicle, drank three beers and returned to sleep in the lorry. On being charged with having been under the influence of drink while in charge of a motor vehicle to such an extent as to be incapable of having proper control of the vehicle, the driver pleaded guilty and was fined, but the justices ordered that for special reasons he should not be disqualified for holding or obtaining a driving licence. The matter went by way of case stated to the Court of Appeal on the question of the justices' order relieving the driver from disqualification. There was no question of the correctness of the driver's plea of guilty to the charge and his conviction on that plea, and it is clear that in the circumstances of the case before us the appellant was properly convicted on his plea.

With regard to our decision to set aside the order for disqualification, a decision which is supported by *Jones v. English* (1), we desire, however, to say that, although we have accepted the uncontested statement from the Bar as to the circumstances under which the charge against the appellant arose, his plea of special reasons should have been supported by evidence at his trial. The necessity for this was stated by Lord Goddard, C.J., in *Jones v. English* (1), at p. 854 of the report:

> ". . . where, on a plea of guilty or after evidence has been heard, a defendant has been convicted of an offence for which the penalty of disqualification is laid down by Act of Parliament and he seeks to rely on special reasons for the non-imposition of disqualification, he ought to give evidence, and the justices ought to hear evidence on the point and not merely to accept statements. This is highly desirable because the onus is on the defendant to show special reasons why he should not be disqualified."

The appellant was ordered to pay a fine of Shs. 200/-. We did not think this sentence was excessive.

Appeal against conviction and sentence dismissed. Order of disqualification set aside.

For the appellant:
B. D. Bhatt, Nairobi

For the respondent:
The Attorney-General, Kenya
G. A. Twelftree (Ag. Senior Crown Counsel, Kenya)

Rajabu s/o Mbaruku v R
[1962] 1 EA 669 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	15 August 1962
Case Number:	4/1962
Before:	Spry J
Sourced by:	LawAfrica

(Tanga District Registry.)

[1] Criminal law – Theft by public servant – Money received by servant while acting in breach of master's instructions – Driver transporting passengers in master's vehicle for reward without authority – Proceeds of hire retained by driver – Whether money received by driver "by virtue of his employment" – No formal evidence of employment adduced by prosecution – Penal Code (*Cap*. 16), *s*. 262, *s*. 265, *s*. 270 *and s*. 271 (*T*.).

Editor's Summary

The appellant was convicted of two counts of stealing by a person employed in the public service contrary to s. 270 and s. 265 of the Penal Code. The particulars of each count alleged that the appellant being a person employed as a motor driver by the East African Railways and Harbours Administration stole money the property of his employers which came into his possession by virtue of his employment. The prosecution did not offer formal evidence of employment but a booking clerk employed by the administration gave evidence that on April 3, 1962, he was on duty at the Korogwe Station and that "a railway bus left Korogwe for Tanga" driven by the appellant. The clerk further stated that the appellant's orders were to carry the Morogoro passengers on to Tanga and that he had no instructions to pick up fresh passengers. The trial magistrate did not deal specifically with the question of employment and made no finding of fact that the appellant was employed by the administration, but held that the evidence prima facie showed that the appellant was the servant of the administration. The main grounds of appeal were that the prosecution had not proved that the appellant was employed by the administration, nor that the appellant was acting in the course of his employment, nor that the appellant had authority to receive money for the administration nor that the appellant did steal the money referred to in the charge.

Held –

(i) the prosecution must prove the fact of employment beyond reasonable doubt but no failure of justice had resulted by the prosecution not offering formal evidence of employment.

(ii) the magistrate's failure to deal specifically with the question of employment and to make any finding of fact that the appellant was employed by the administration was a serious misdirection.

(iii) prima facie evidence that the appellant was a servant of the administration fell far short of discharging the burden of proof in a criminal case.

(iv) however, the booking clerk's evidence left no doubt that the appellant was an employee of the administration.

(v) the appellant in picking up passengers deviated from his master's instructions not to pick up passengers; he was not guilty of stealing by a person employed in the public service because picking up the passengers was in breach of his duty and the money obtained from the passengers was not therefore received by virtue of his employment. *R. v. Snowley* (1830), 4 C. & P. 390 followed.

Conviction quashed and sentence set aside.

Case referred to in judgment:

(1) *R. v. Salim Yambatu* (1950), 1 T.L.R. (R.) 98.

(2) *R. v. Snowley* (1830), 4 C. & P. 390; 172 E.R. 753.

(3) *R. v. Edmund L. Wilson and Michael Wilson* (1839), 9 C. & P. 27.

Judgment

Spry J: The appellant was convicted on two counts of stealing by a person employed in the public service contrary to s. 270 and s. 265 of the Penal Code (Cap. 16). Against that conviction he now appeals.

The particulars on each count alleged that the appellant

> "being a person employed as motor driver by East African Railways and Harbours Administration"

stole a sum of money

> "the property of East African Railways and Harbours Administration which came into his possession by virtue of his employment".

Mr. Jhaveri, who appeared for the appellant, submitted that the Crown needed to prove, first, that the appellant was an employee of East African Railways and Harbours Administration (to which, for the sake of brevity, I shall refer as "the administration"); secondly, that the bus he was driving belonged to the administration; thirdly, that he was acting in the course of his employment; fourthly, that he had authority to receive money on behalf of the administration; and, finally, that he did steal the moneys referred to in the charge.

I think it is quite clear that the prosecution must prove the fact of the employment beyond reasonable doubt. The learned resident magistrate considered this question when dealing with a submission that there was no case to answer. He then held that the evidence showed that the appellant was the driver of a railway bus. He went on

> "Prima facie, therefore, I think it is shown that he is a servant of the Railways. If he alleges otherwise it will be for him to prove his allegation".

When he gave judgment, the defence having rested on its submission, the learned resident magistrate said

> "I do not need to repeat the arguments which I have set out in my ruling and which I adopt".

He did not deal specifically with the question of employment and made no finding of fact that the appellant was employed by the administration. This amounts to a serious misdirection. Evidence that prima facie the appellant was a servant of the administration falls far short of discharging the burden of proof in a criminal case.

Mr. Taylor, for the Crown, submitted that the evidence showed conclusively that the appellant did in fact drive a railway bus on the day in question and he argued, if I have understood him correctly, that in the absence of evidence to the contrary, this raises an irresistible presumption that the appellant was employed by the administration. He argued also that the line of cross-examination adopted by the appellant showed that the case for the defence was based on the appellant being an employee of the

administration. I cannot accept either of these arguments. This is a criminal case and the onus is on the

prosecution to prove its allegations. Mr. Taylor submitted also that the question of employment was a matter particularly within the knowledge of the appellant. I cannot agree. The best possible evidence on the question could and should have been given by an officer of the administration.

There is, however, one piece of evidence which was not referred to in argument before me, which is most material. It is in the evidence of Ramadhani Sefu, who testified that he was a booking clerk employed by the administration. He said:

> "On April 3, 1962, I was on duty at the Korogwe Station. A railway bus left Korogwe for Tanga at 6.0 p.m. The accused was the driver. . . . The accused was not running a bus to pick up passengers – his orders were simply to carry the Morogoro passengers on to Tanga. . . . On this day the accused had no instructions to pick up fresh passengers."

This evidence was unchallenged. It establishes not merely that the appellant was driving the bus but that he was doing so under orders. Reading the evidence of this witness as a whole, there can be no reasonable doubt that those orders were given by an officer of the administration. This in turn leaves no reasonable doubt that the appellant was an employee of the administration. I am satisfied therefore that, although the prosecution was at fault in not offering formal evidence of employment, no failure of justice has resulted.

I do not think there is any merit in Mr. Jhaveri's second point, that it was not proved that the bus belonged to the administration. There is the evidence of William s/o Agutu, a police constable in the Railway Police, who said:

> "I saw a railway bus arrive at the station . . . The bus No. was RAA 694."

It is within the judicial knowledge of the court that the vehicles of the administration are given numbers with the initial letters RAA. Mr. Jhaveri contended that to say that it was a railway bus was not enough and he posed the question, which railway? I think that in this country, where there is only one railway administration, a reference to the railway must be construed as referring to the organisation of the administration. Nor do I think the strict question of ownership is material. I think it has been proved that the bus was under the control of the administration and that the appellant was acting under orders given on behalf of the administration.

The third and fourth questions posed by Mr. Jhaveri were whether the accused was acting in the course of his employment and whether he had authority to receive money. These questions relate to the part of the charge that alleges that certain moneys came into the possession of the appellant "by virtue of his employment". Mr. Jhaveri has pointed out that Ramadhani Sefu, a prosecution witness, testified, as I have observed above, that the appellant's orders were to drive certain people to Tanga and that he had no instructions to pick up passengers. That, in Mr. Jhaveri's submission, means that the appellant was not acting in the course of his employment.

In this respect, Mr. Jhaveri cited the case of *R. v. Salim Yambatu* (1) (1950), 1 T.L.R. (R.) 98. Mr. Taylor sought to distinguish that case, which was based on s. 265 and s. 271 of the Penal Code, from the present case, which is based on s. 265 and s. 270. Before dealing with that argument, I must consider the meaning of the words "by virtue of his employment" in s. 270. Section 4 of the Penal Code provides that

> "expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith".

The words “by virtue of his employment” were interpreted in England in relation to embezzlement at least as long ago as 1830, when it was held in the case of *R. v. Snowley* (2) (1830), 4 C. & P. 390, that an employee who deviated from his master’s instructions only in accepting a lower fee for a service than the master had directed, and who kept the fee, was not guilty of embezzlement because his acceptance of the lower fee was in breach of his duty and the fee was not therefore received by virtue of his employment. A similar conclusion was reached in *R. v. Edmund L. Wilson and Michael Wilson* (3) (1839), 9 C. & P. 27. So far as I can discover, that interpretation has never been over-ruled, partly perhaps because of statutory changes which it is not necessary to consider here.

The decision in *Snowley’s* case (2) is based on a very narrow interpretation and it is not without reluctance that I follow it, but I consider that I am bound to do so, having regard to the wording of s. 4 of the Penal Code. The distinction which exists in English law between embezzlement and larceny does not apply here; both are within the definition of larceny, because s. 262 of the Penal Code provides that, subject to certain exceptions not now relevant, where a person receives money on behalf of another, the money is deemed to be the property of the person on whose behalf it is received. It cannot, therefore, in my opinion be argued that the context in which the words “by virtue of his employment” are used in s. 270 justifies rejecting the interpretation which the English courts have applied in relation to embezzlement.

Returning to Mr. Taylor’s submission, I think the fact that the words “by virtue of his employment” constitute a term of art, as well as the facts of the case, would justify distinguishing this case from *Yambatu’s* case but that the proper line of reasoning leads to a similar conclusion.

There remains the question whether it would be proper to substitute a conviction for the lesser offence of stealing, contrary to s. 265, calling in aid the provisions of s. 262. There is, so far as I am aware, no English equivalent of s. 262 and I am not aware of any authority, English or East African, on the meaning of the words “receives . . . any money on behalf of another”. The plain meaning of the words seems to demand that at the moment when he receives the money the receiver must be acting on behalf of another. What is relevant is what is in the mind of the receiver, not what is in the mind of the payer. On this point the learned magistrate was satisfied that the appellant took the money for his own purposes. In other words, the money did not constructively come into the possession of the administration.

I confess that I find these conclusions unsatisfactory, but I see no alternative to quashing the conviction and setting aside the probation order, which I now do. It may well be, although I express no opinion on the point, that the appellant might properly have been convicted on a different charge.

Conviction quashed and sentence set aside.

For the appellant:
Patel, Desai & Jhaveri, Dar-es-Salaam
K. L. Jhaveri

For the respondent:
The Attorney-General, Tanganyika
A. E. Taylor (Crown Counsel, Tanganyika)

Musa Njuguna Gachuru and others v R

[1962] 1 EA 673 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 October 1962
Case Number:	621, 623, 624 and 625/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Criminal law – Trial – Irregularity – Accused discharged under s. 87 *of the Criminal Procedure Code – Accused recharged in respect of the original charge and proceedings continued – Whether accused prejudiced – Criminal Procedure Code* (*Cap*. 27), *s.* 82 *and s.* 87(*a*) (*K*.).

[2] Criminal law – Trial – Misdirection – Evidence – Credibility of witnesses – Evidence of two prosecution witness accepted despite discrepancies – Misdirection and non-direction.

Editor's Summary

The appellants were convicted of assault occasioning actual bodily harm contrary to s. 252 of the Penal Code. Their appeals were consolidated for hearing. The second appellant had pleaded guilty while the other three appellants had pleaded not guilty when they were first charged before a special magistrate. The case was then transferred to the senior resident magistrate's court where the appellants were again charged and pleaded as they had done before. The second appellant was thereupon convicted on his plea, and leave was granted to withdraw the charges against the first, third and fourth appellants in order that further investigation could be made. These three appellants were then discharged under s. 87(*a*) of the Criminal Procedure Code but the magistrate having heard the second appellant's reply to the allocutus altered his plea to not guilty and fixed a date for the trial of all four. At the trial all the appellants were recharged in respect of the original charge to which they pleaded not guilty and the trial proceeded. On appeal it was contended inter alia for the first, third and fourth appellants that, as the prosecution on the original charge against them had been withdrawn and they had been discharged, they could not and should not have been asked to plead again to that charge and in continuation of the original proceedings.

Held –

(i) the effect of s. 87(*a*) of the Criminal Procedure Code is, as it is in s. 82, to discharge an accused person in respect of the charge then before the court and the words "subsequent proceedings" in both sections contemplate proceedings de novo including a fresh charge, even though it may be in identical terms with the original charge.

(ii) the proper and regular course which the magistrate should have followed after the prosecution sought leave to discontinue proceedings against the appellants was to open a new case record and call upon them to plead to a fresh charge.

(iii) although the procedure adopted by the magistrate was irregular, there had been no failure of justice

and s. 382 of the Criminal Procedure Code would be invoked.

(iv) the magistrate had failed to direct his mind to the discrepancies in the evidence of the two tribal policemen and the court was unable to hold that if he had done so he would nevertheless have come to the conclusion which he did.

Appeals allowed. Convictions and sentences set aside.

Judgment

Rudd Ag CJ, read the following judgment of the court: The appellants in these four appeals, which were consolidated for hearing, appeal against their convictions on a charge of assault occasioning actual bodily harm contrary to s. 252 of the Penal Code.

The first ground of appeal taken by the first, third and fourth appellants attacks the procedure followed in the lower court, and it was urged on their behalf that the irregularities of which that court was guilty occasioned a failure of justice necessitating the setting aside of their conviction and sentence. The facts were as follows: On May 20, 1962, all appellants were charged before a special magistrate at Nakuru with the offence contrary to s. 252 of the Penal Code; the second appellant pleaded guilty while the other three appellants pleaded not guilty; the case was then transferred to the senior resident magistrate's court, and on May 31, 1962, the appellants were charged once again and they pleaded as they had done before. The second appellant was thereupon convicted on his plea, and leave was granted to the prosecutor to withdraw from the prosecution against the first, third and fourth appellants in order that further investigation could be made; these appellants were accordingly discharged under s. 87(*a*) of the Criminal Procedure Code. The prosecutor then outlined the facts of the case against the second appellant and, in reply to the allocutus, the latter made a statement which amounted to an equivocation of his plea. The learned magistrate thereupon altered this appellant's plea to one of not guilty and he was released on bail pending trial on June 14, 1962. On this date all four appellants were recharged in respect of the original charge. They all pleaded not guilty and the trial proceeded.

It was contended for the first, third and fourth appellants that as the prosecution on the original charge against them had been withdrawn and they had been discharged thereon, they could not and should not have been asked to plead again in respect of that charge and in continuation of the original proceedings. Section 87 of the Criminal Procedure Code (Cap. 27) provides as follows:

> "In any trial before a subordinate court any public prosecutor may, with the consent of the court or on the instructions of the attorney-general, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon such withdrawal –
>
> (*a*) if it is made before the accused person is called upon to make his defence, he shall be discharged, but such discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;
>
> (*b*) if it is made after the accused person is called upon to make his defence, he shall be acquitted."

Section 82 is in similar terms, and we think that the effect of sub-s. (*a*) of s. 87 is, as it is in s. 82, to discharge an accused person in respect of the charge then before the court. The use of the words "subsequent proceedings" in both sections contemplates proceedings de novo including a fresh charge, even though it may be in identical terms with the original charge. We think, therefore, that the proper and regular course which the learned magistrate should have followed after the prosecution sought leave to discontinue proceedings against these appellants was to open a new case record and call upon them to plead to a fresh charge. While we think that the procedure which he did adopt was irregular, we do not think that the irregularity has prejudiced the appellants or occasioned any failure of justice, and we think it proper therefore to invoke the provisions of s. 382 of the Criminal Procedure Code.

We now turn to the grounds of substance in the appeal. They attack in effect the findings of fact by the learned magistrate and his conclusion that the evidence of the prosecution witnesses was to be believed. The appellants were charged with assaulting a tribal policeman, Ngatia Munyeri. Evidence in support of the actual incident was given by this policeman and one other tribal policeman, Charles Gachanja. It is submitted for the appellants that there are a number of contradictions in the respective versions of these two witnesses as to the incident, and which affected the reliability of their evidence to which the learned magistrate failed to direct his mind.

Ngatia in his evidence states that while he and Charles were on patrol at about 8 a.m. they entered the house of the second appellant where they found some liquor – sixteen gallons in all. He says that one Kibei Kamiti saw the liquor, but this witness was not called to give evidence. He says that the second appellant was asked if he had a permit to brew the liquor and to whom it belonged, that the second appellant replied that it belonged to the first appellant, and that they then took the first appellant to a forest officer, leaving the liquor behind. He says that they returned to the second appellant's house and found only his wife present. They waited for his return and he arrived at about 4 p.m. The liquor was no longer in the house and after a search they were unable to find it. They questioned the second appellant who said he did not want any nonsense, picked up a panga and struck Ngatia with it on his shoulder. Ngatia took the panga from him and this was ultimately produced before the lower court. In his evidence-in-chief Ngatia said that only the first appellant's wife was present at this time, but in cross-examination he said that the third appellant was also present. He says that later various young men arrived, some armed with pieces of wood and that all the appellants were then included in the party. He says that the first, second and fourth appellants struck him with pieces of wood on the head and face. He was knocked unconscious and was later revived with water by an elder, who was attracted by the noise, and ultimately taken to hospital.

Tribal policeman Charles confirmed that while on patrol (he says at about 7 a.m.) he and Ngatia entered a house where they found liquor. He says the house was that of the first appellant, not, be it noted, the house of the second appellant, as stated by Ngatia. He further says that the only person present when they arrived at the house was a woman. This is again in contradiction of Ngatia's evidence. But then he adds that they took the first appellant to the forester, though he does not say where they found the former. After that he says they returned to the house to find it locked, with no one present, again contradicting Ngatia, who says the woman was present. Charles says they waited until the owner of the house returned when the house was searched, but no liquor was found. At this stage he describes the second appellant as the owner of the house and the wife is suddenly introduced into his tale. But he does not say where she had come from. He confirms Ngatia's evidence as to the second appellant's attack with a panga, but he says that at the time many others stood outside, though none of them was armed – this again is in contradiction of Ngatia. The second appellant was disarmed and then Charles says he saw the first, third and fourth appellants strike Ngatia with pieces of wood causing Ngatia to fall down. He did not see anyone revive him with water as he says that he had by then run to the forester.

The only other contradiction of note relates to the dress of these two witnesses. Ngatia says they were in uniform at the time of their patrol, while Charles says they were not. It is further to be noted that while both witnesses say they took the first appellant in the morning to the forester, they also say he was one of those who struck Ngatia later. No evidence was called to explain how it was

that the first appellant left the custody of the forest officer. The latter was called and confirmed that he received a report at about 8 a.m. from the two tribal policemen as to the finding of liquor, but he makes no mention of the first appellant having been brought to him. As to the time when the assault was committed, Ngatia appears to have said that it was at 4 p.m. or soon after. The elder who succoured Ngatia by pouring water over him says it was 7 p.m. The first appellant says it was 7 p.m., and his wife confirms this, while the medical assistant at the Londiani Hospital to whom Ngatia was taken for treatment says that he arrived at about 8 p.m.

In his defence the second appellant said he found the two tribal policemen in his house at 7 p.m. and that they were drunk. They asked him for drink and he said he had none. Ngatia caught him by the neck and pushed him to the floor. He took up a piece of wood which was lying there and struck Ngatia, who he says fell like a log. The other policeman ran off. His wife yelled and an elder came and revived Ngatia with water. Both he and his wife emphatically deny a visit to their house by the tribal policemen in the morning and deny the existence of any liquor in their house. The wife says that in the absence of the first appellant the two policemen arrived and asked her for liquor, and she told them that she had none. She confirmed the first appellant's evidence as to the events after his arrival. The other appellants denied being present or having any knowledge of the incident at the second appellant's house.

In his judgment the learned magistrate recited the substance of the evidence of each witness for the prosecution and the defence. He then gave his reasons for convicting as follows:

> "There are two stories in this case and I must decide whether the prosecution one is true and if it is whether it proves these accused guilty of this offence beyond any reasonable doubt. The prosecution witnesses told a credible, coherent story and they were steady in their telling of it. The accused were too wide-eyed in their innocence and too shrill in their denials for their stories to be true.
>
> "I find, therefore, that the injuries to Ngatia amounted to actual harm to his body and that each accused with the others caused this with pieces of wood. There was no lawful excuse for this and therefore their action amounted to a joint and unlawful assault. Thus the prosecution has proved the accused guilty beyond any reasonable doubt and I convict them of the charge as laid."

The learned magistrate does not deal with the contradictions in the evidence of the two tribal policemen, and we think that in view of the nature of the second appellant's defence and of the very pertinent evidence of the medical assistant, who stated that, when he examined Ngatia at 8 o'clock in the evening following the assault, Ngatia smelt of alcohol, a careful analysis of their evidence was necessary. The evidence of the medical assistant does seem to bear out the second appellant's claim that the tribal policemen had been drinking. We also think that the contradictions and rather confused evidence of these two witnesses indicate uncertainty in their mind as to what did occur – uncertainly which may well have been due to drink.

We think that the learned magistrate should have directed his mind to these issues, and we feel unable to hold that had he done so he would nevertheless have come to the conclusion he did. The second appellant has admitted striking and felling Ngatia with a piece of wood, but we are unable to say on the evidence whether he was justified in using the force which he did. If his version of the events is the correct one, we could not say that the force he used to defend himself was excessive. As we are unable to hold that the trial was entirely

satisfactory, we feel bound to uphold the appeals. The convictions and sentences are accordingly set aside and the appellants are acquitted.

Appeals allowed. Convictions and sentences set aside.

For the appellants:
Lawrence Long & Co., Nakuru
L. E. Long

For the respondent:
The Attorney-General, Kenya
G. A. Twelfree (Ag. Senior Crown Counsel, Kenya)

R v Somei Arap Barno
[1962] 1 EA 677 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 October 1962
Case Number:	198/1962
Before:	Connell and Edmonds JJA
Sourced by:	LawAfrica

[1] Criminal law – Sentence – Conviction of theft of stock – Fine – Recovery by distress – Statutory authority for distress on inhabitants of place where stock found if accused not ordinarily resident there – Order for distress against property of persons living where skin of beast found if fine not paid by accused – Factors which court must take into account before so ordering – Penal Code (*Cap.* 24), *s.* 279 (*K.*) – *Stock and Produce Theft Ordinance* (*Cap.* 206), *s.* 3 (*K.*).

Editor's Summary

The accused was convicted of stock theft contrary to s. 279 of the Penal Code and was sentenced to imprisonment and a fine. The magistrate purporting to invoke the proviso to s. 3 of the Stock and Produce Theft Ordinance made a further order that if the fine was not paid forthwith it was to be recovered by levy of distress against the accused's property and, if that was not sufficient, then against the property "of those living on Campbell's farm". The magistrate was informed by the prosecutor that the skin of the beast was found on the farm of one, Campbell, where it had been slaughtered. In revision

Held –

(i) before applying s. 3 of the Stock and Produce Theft Ordinance the court should be satisfied on such information as can reasonably be made available, that it is proper to order levy of distress

against an accused's family, tribe, etc. and particularly so when the court contemplates making an order against "the inhabitants of a village or place" where the accused does not ordinarily reside.

(ii) the court should also consider whether the stock was discovered and the offender apprehended as a consequence of a report by any of the inhabitants and in such a case the court should not make an order levying distress against those inhabitants.

(iii) the circumstances of the case did not justify the magistrate's order for levy of distress against the property "of those living on Campbell's farm".

Order accordingly.

Judgment

Connell J, read the following judgment of the court: In this case the accused was convicted of stock theft contrary to s. 279 of the Penal Code and was sentenced to thirty months' imprisonment and to pay a

fine of Shs. 1,000/-. The learned magistrate made the further order that in the event of the fine not being paid forthwith it was to be recovered by the levy of distress against the accused's property, and, if that was not sufficient, then against the property "of those living on Campbell's farm". We set the case down for hearing before us in our revisional jurisdiction, and, after hearing learned counsel for the Crown, who did not support the full terms of the order for distress, we set aside the order so far as it related to those persons living on Campbell's farm and intimated that we would give our reasons for doing so later. We now give our reasons.

The accused pleaded guilty to stealing one head of cattle from the farm of a Mr. Belbin in the Uasin Gishu district. The learned magistrate was informed by the prosecutor that the skin of the beast was found on the farm of a Mr. Campbell, where, he also said, it had been slaughtered. In making the order for distress against those persons living on the farm where the skin was discovered, the learned magistrate was purporting to invoke the proviso to s. 3 of the Stock and Produce Theft Ordinance, Cap. 206. Section 3 provides as follows:

> "3.(1) Whenever any African (including a Somali) is sentenced to pay a fine on conviction of theft of stock or produce, the court passing sentence may, unless the fine is paid within the time limited by the court for such payment, issue a warrant for the levy of the fine by distress and sale of any movable property of the offender or of the offender's family, sub-tribe or tribe or of any member of the offender's family, sub-tribe or tribe:
>
> "Provided that in any case in which it has been proved that the stock or produce in respect of which theft has been committed has been found in a village or place other than the village or place in which the offender ordinarily resides, then on the conviction of the offender the court may levy the fine or part thereof on the inhabitants of the village or place wherein such stock has been found."

We think it is clear that one of the purposes behind this section is, in addition to the provisions for punishment contained in the Penal Code in respect of the person who steals the stock or produce, to provide a means of punishing those who may be aware of his act, who do nothing to bring him to justice and who thus tacitly condone his offence, although they may not do this actively so as to be guilty of misprison of felony. It must be acknowledged that a person who steals stock usually takes the stock to the place where he normally lives and it thus becomes almost a certainty that his neighbours will become aware of the presence of strange stock or, if the stock had been killed, the presence of meat from an unexplained source. Their duty is to report the fact, but, if they do not and turn a blind eye to the matter, there is then the method provided by s. 3 of punishing them.

However, before applying the provisions of s. 3, it is necessary that a court be satisfied on such information as can reasonably be made available, that it is proper to order the levying of distress against an accused's family, tribe, etc. Still more must this be the case when a court contemplates making an order against "the inhabitants of a village or place" where the offender does not ordinarily reside. There should be grounds in that case to justify the inference that those inhabitants were or should have been aware of circumstances leading to the suspicion that stolen stock had been brought among them. In this case, as we have already noted, the skin of the stolen beast was found on "Campbell's farm", and it was said to have been slaughtered there. Was it reasonable to infer from this bare information that the persons living on this farm knew of this? It might well be that the beast was slaughtered in a part of the farm where no-one was living and the skin thereafter hidden without the possibility of anyone coming to know of this, and, if this was the fact, then it would be quite wrong to

invoke the provisions of s. 3. A further matter to which a court should direct its mind is as to whether the stock was discovered and the offender apprehended as a consequence of a report by any of the inhabitants. If such was the case, then clearly a court should not make an order levying distress against those inhabitants. Again there is nothing on the record to indicate where the accused normally lived. If he lived on Campbell's farm then the proviso to s. 3 would not apply.

We think that the absence of any information on this last point alone would be enough to set aside the order. In addition to that we do not consider that the magistrate applied his mind sufficiently to the other factors we have mentioned, particularly as to whether all the circumstances justified his order. Consequently we set the order aside.

Order accordingly.

For the appellant:
The Attorney-General, Kenya
G. A. Twelftree (Crown Counsel, Kenya)

The accused did not appear and was not represented.

R v Nyambura Ndungu
[1962] 1 EA 679 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	10 October 1962
Case Number:	193/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Criminal law – Vagrancy – Admissions of no home and no work – Order for repatriation – Insufficiency of evidence justifying finding an order – Procedure to be followed by court on a charge of vagrancy – Vagrancy Ordinance, 1960, *s.* 2 (1) *and s.* 4 (1) (*K.*).

Editor's Summary

N.N. was brought before a magistrate on a complaint under the Vagrancy Ordinance, 1960. The complaint was made under s. 2(1)(*b*) and (*c*) of the Ordinance and the particulars of the complaint stated that she was found on a street at night having no fixed abode and not giving a satisfactory account of herself. N.N., in answer to the complaint stated "No work. No money. From Nyeri". The magistrate found that she was a vagrant and ordered her to be taken to the district in which her home was situated. In revision,

Held –

(i) a complaint under the Vagrancy Ordinance, 1960, must be as accurate as a formal charge in a criminal case so that the person against whom the complaint is made is fully aware of the nature of the complaint.

(ii) the admission by the woman related to para. (*a*) of the definition of a vagrant in s. 2 (1) of the Ordinance and had no relation to para. (*b*) and para. (*c*) under which the complaint was made; the court was not satisfied that the woman had appreciated the nature of the complaint which she had to meet and accordingly the magistrate's finding and order should be set aside.

(iii) the fact that a person has no work and has no money does not satisfy the definition of a "vagrant" in para. (*a*) of s. 2(1) of the Ordinance and, therefore, these admissions did not amount, by themselves, to an unequivocal admission.

(iv) if a person is unemployed and is in possession of no money but if at the same time, he is living and kept by a relative, then that person could be said to have "lawful means of subsistence" within s. 2(1)(*a*) of the Ordinance.

(v) if a prostitute has a fixed abode and has money with which to maintain herself, she is not a vagrant as defined in the Ordinance.

(vi) before an order for repatriation of a vagrant is made under s. 4(1)(*b*) of the Ordinance the court must be satisfied that the vagrant has a home and as there was no finding that the woman had a home the magistrate's order for repatriation was not valid.

(vii) as the liberty of the subject is made liable to restriction under the Ordinance the enquiry under the Ordinance should follow closely the procedure provided for trials under the Criminal Procedure Code.

(viii) answers by an alleged vagrant to the particulars of a complaint should be accepted as an admission of vagrancy only when such answers fall within one or more of the definitions of a "vagrant" in the Ordinance; if there is no such clear admission by the alleged vagrant, the court should require the prosecution to lead evidence in support of the complaint; and when all such evidence has been taken and recorded the court should then inform the alleged vagrant of the right to give evidence or make an unsworn statement and to call witnesses for the defence.

(ix) the magistrate should then give his finding on the evidence and his reasons for deciding that the person is a vagrant and, if there is any reasonable doubt, the benefit of the doubt should be given to the alleged vagrant.

(x) if the court finds the complaint proved, the vagrant should be asked if there is any reason why the provisions of s. 4(1)(*a*) or s. 4(1)(*b*) of the Ordinance should not be applied in his case.

Magistrate's order set aside.

Judgment

Rudd Ag CJ: read the following judgment of the court:

Nyambura Ndungu was brought before the first-class magistrate at the Nairobi district court on a complaint under the Vagrancy Ordinance, 1960, and the magistrate found that she was a vagrant and ordered her to be taken to the district in which her home was situated. After inspecting the record of the magistrate's enquiry into the complaint, we were not satisfied as to the validity of his order or the procedure adopted by him and, in exercise of our revisional jurisdiction, we set the matter down for argument before us by learned Crown counsel. After hearing counsel we have come to the view that the magistrate's order cannot be allowed to stand.

A formal written complaint, set out on Form A as provided in the Vagrancy (Forms) Rules, 1960 (Legal Notice No. 407), stated that the alleged vagrant was brought before the court "as being apparently a vagrant as defined in s. 2(1)(*b*), (*c*) of the Ordinance". The particulars of the complaint were set out as follows:

> "Nyambura Ndungu was found at Victoria Street at 10.00 p.m. on August 10, 1962, having no fixed abode and not giving a satisfactory account of herself."

Having no fixed abode and not giving a satisfactory account of oneself comes within para. (*b*) of the definition of "vagrant" in the Ordinance. There is, however, no allegation in the particulars, that falls within para. (*c*) of the definition and the record of the magistrate's enquiry into the complaint, discloses that there was no reference to this paragraph. We wish to remark that the complaint must be as accurate

as a formal charge in a criminal case, for the obvious

reason that the person complained against must be made fully aware of the nature of the complaint which he or she is required to meet.

When the alleged vagrant was brought before the court she was informed of the complaint and invited to reply to it. She is recorded as saying, “No work. No money. From Nyeri. Twenty seven years of age”. The magistrate then added the words, “Obviously a prostitute” and we assume that he came to this conclusion either as a consequence of his observation of the woman or after receiving information about her from the prosecution. He then made a finding to the effect that she was a vagrant and made the order returning her to Nyeri.

The admission by the woman relates to para. (*a*) of the definition of “Vagrant” and has no relation whatever to para. (*b*) and para. (*c*) under which the complaint was made. She should have been asked specifically if she admitted the complaint under para. (*b*) that she had no fixed abode and could not give a satisfactory explanation of herself. Her answer did not relate to these particulars at all yet the magistrate came to the conclusion that she was a vagrant on a statement by her which was unrelated to the complaint, but which the magistrate decided constituted an admission of vagrancy under para. (*a*) of the definition. We think it is far from clear that the woman fully appreciated the nature of the complaint which she had to meet and, for this reason alone, we think that the magistrate’s finding and order should be set aside. There will be an order accordingly.

But there is a further ground for holding the magistrate’s order to be invalid. The fact that a person has no work and has no money does not necessarily satisfy para. (*a*) of the definition of a “vagrant” and, therefore, such admissions do not amount, by themselves, to an unequivocal admission that the person is a vagrant. A person may be unemployed and in possession of no money but may, at the same time, be living and kept by a relative and this would amount to “lawful means of subsistence”.

There is a further criticism of the grounds which the magistrate considered were a justification for finding that the woman was a vagrant. He appears to have considered that a person who is a prostitute is necessarily a vagrant, but, if she has a fixed abode and has money with which to maintain herself, she cannot be a vagrant within the definition in the Ordinance.

In any case a court cannot order the repatriation of a vagrant under s. 4(1)(*b*) unless it is satisfied that the vagrant has a home. There should be a finding as to this before an order for repatriation is made.

It is for these reasons that we considered that the magistrate’s order cannot be allowed to stand. As a number of records from courts which have made orders under s. 4 of the Vagrancy Ordinance have come before us and as, in a number of these records, the procedure followed by those courts is open to criticism, we think it would be of assistance generally to the courts if we set out the procedure which we think should be adopted.

We appreciate that no procedure is prescribed under the Vagrancy Ordinance but, nevertheless, as the liberty of the subject is made liable to restriction under the Ordinance, we think that the enquiry under the Ordinance should follow closely the procedure provided for trials under the Criminal Procedure Code. The answer by an alleged vagrant to the particulars of a complaint, should be accepted as an admission of vagrancy only when such answer falls unequivocally within one or more of the definitions of “vagrant” in the Ordinance. If there is no clear admission by the alleged vagrant which can justify the finding that he or she is a vagrant, the court should require the prosecution to lead evidence in support of the complaint. When all such evidence has been taken the court should inform the alleged vagrant of the right to give evidence or make an unsworn statement and to call witnesses for the defence.

The court should make a note of the evidence. The trial magistrate should then give his finding on the evidence and his reasons for deciding, if he so decided, that the person is a vagrant. If there is any reasonable doubt the benefit of that doubt should be given to the alleged vagrant. Finally, if the court finds that the alleged vagrant is in fact a vagrant it should ask him if there is any reason why the provisions of para. (*a*) or para. (*b*) of sub-s. (1) of s. 4 should not be applied in his case.

We do not wish to give the courts unnecessary work, but the desirability of the above procedure will, we think, be readily appreciated when it is realised that the effect of the Ordinance is to interfere with the liberty of the subject.

Magistrate's order set aside.

For the Crown:
The Attorney-General, Kenya
G. A. Twelftree (Crown Counsel, Kenya)

Katungo Mbuki v R
[1962] 1 EA 682 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 October 1962
Case Number:	104/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Criminal law – Sentence – Committal to superior court for sentence – Conviction by African court – Sentence passed by first-class magistrate – No information before African court as to accused's character and antecedents – Accused committed for sentence as offence grave – Penal Code (*Cap.* 24), *s.* 279 (*K.*) *– African Courts Ordinance*, 1951, *s.* 5 *and s.* 41*A* (1) *and* (2) (*K.*) *– Criminal Procedure Code* (*Cap.* 27), *s.* 221 (*K.*).

Editor's Summary

The appellant was convicted by an African court of stock theft contrary to s. 279 of the Penal Code. The court purporting to act under s. 41A of the African Courts Ordinance, 1951, ordered that the case should be transferred to the first-class magistrate, Kwale, for sentence, presumably on the grounds that the offence merited greater punishment than the lower court could impose. The magistrate purporting to act under s. 41A(2)(*a*) of the Ordinance sentenced the appellant to one year's imprisonment. On appeal,

Held –

(i) the magistrate should not have assumed jurisdiction for the purpose of sentence nor should the African court have committed the appellant to the magistrate for sentence; accordingly the order of the African court committing the appellant for sentence to the magistrate was a nullity and likewise the sentence.

(ii) it is only when an African court has information as to an offender's character and antecedents and is of the opinion that greater punishment should be imposed than the court has power to impose, that the African court should commit an offender to a subordinate court of the first class for sentence.

(iii) there was no information before the African court as to the appellant's character and antecedents and, therefore, it was evident that the African court decided to act under s. 41A (1) of the Ordinance in view only of the gravity of the appellant's offence; in doing so the court had erred.

Appeal allowed. Order of the African court and sentence set aside. Case remitted to the African court to deal with the appellant according to law.

Cases referred to in judgment:

(1) *Mdirango Njuma v. R.* (1953), 20 E.A.C.A. 190.

Judgment

Rudd Ag CJ: read the following judgment of the court:

The appellant was convicted on JUne 23, 1962, by the Kinango African court on a charge of stock theft, contrary to s. 279 of the Penal Code. Purporting to act under the provisions of sub-s. (1) of s. 41A of the African Courts Ordinance, 1951, the court made an order transferring the case to the first-class magistrate, Kwale, for sentence, presumably on the grounds that the African court conconsidered that the offence of which the appellant was convicted merited greater punishment than that court could impose. We are informed by learned counsel for the Crown that the Provincial Commissioner's warrant directed to the Kwale African court, and issued under s. 5 of the Ordinance limits that court's powers of punishment to a maximum fine of Shs. 500/- and to a maximum sentence of imprisonment of 6 months. On July 6, 1962, the first-class magistrate at Kwale, purporting to act under the provisions of sub-s. (2)(*a*) of s. 41A, sentenced the appellant to one year's imprisonment.

We are of the opinion that the first-class magistrate should not have assumed jurisdiction for the purpose of sentence nor should the African court have committed the appellant to the magistrate for sentence. Under sub-s. (1) of s. 41A it is only when,

> "on obtaining information as to an offender's character and antecedents, the African court is of the opinion that they are such that greater punishment should be imposed in respect of the offence than the court has power to impose,"

that it may commit the offender to a subordinate court of the first class for sentence. The provisions of sub-s. (1) are similar in terms to the provisions of s. 221 of the Criminal Procedure Code (formerly s. 217A (1) of the Criminal Procedure Code (Cap. 27), of the Revised Laws of Kenya, 1948). The Court of Appeal for Eastern Africa in *Mdirango Njuma v. R.* (1) (1953), 20 E.A.C.A. 190, when dealing with the powers of a court under sub-s. (1) of s. 217A, said at p. 191:

> "The power to commit under s. 217A (1) is only exerciseable if the subordinate court is of opinion that the `character and antecedents' of the offender are such that greater punishment should be inflicted than the subordinate court itself could inflict: the criterion is not the gravity of the offence of which the offender stands convicted."

In that case the Court of Appeal held that neither the Supreme Court nor the Court of Appeal could pass sentence and the matter was, therefore, remitted to the subordinate court for sentence within the ordinary power of that court.

In the case before us, there was no information before the African court as to the appellant's character and antecedents, other than a statement by him that he had not previously served any term of imprisonment. It is evident, therefore, that the African court, in this case, decided to act under sub-s. (1) of s. 41A of the African Courts Ordinance in view only of the gravity of the appellant's offence, and in doing so it erred. The responsibility for bringing a charge before an African court rests largely with the police and the prosecutor. It is only they who can be aware before a trial of the antecedents and character of an accused person and if these are not such as to justify a court in invoking the provisions of sub-s. (1),

and if the offence is one in respect of which the

prosecutor considers the court has insufficient powers of punishment, then it is his duty to take steps to bring the offender or to have him brought before a court which has adequate powers of punishment.

The order of the African court committing the appellant to the subordinate court of the first class at Kwale for sentence was, in the circumstances, a nullity and consequently the sentence passed upon the appellant was also a nullity. The only course open to us, therefore, is to set aside the order and sentence and remit the case to the African court with the direction that it deal with the appellant according to law. The appellant is remanded for production before the African court for sentence.

Appeal allowed. Order of the African court and sentence set aside. Case remitted to the African court to deal with the appellant according to law.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Kenya
J. R. Hobbs (Crown Counsel, Kenya)

Kigen Arap Chemoiwa v R
[1962] 1 EA 684 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	26 October 1962
Case Number:	877/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Criminal law – Charge – Attempt – Charge of attempted store-breaking with intent to commit theft – No evidence of breaking into store – Goods not removed – Court unable to convict of theft upon charge of attempted store-breaking – Advantage of charging completed offence – Penal Code (*Cap.* 24), *s.* 276, *s.* 307 *and s.* 308 (*K.*).

Editor's Summary

The appellant was charged with and convicted of attempted store-breaking with intent to commit the felony of theft contrary to s. 308 of the Penal Code. There was evidence that the appellant entered a maize store through a hole in some wire and moved a bag of maize with intent to carry it away, but he was arrested before he had removed the bag of maize from the store. There was no evidence that the appellant had made the hole in the wire or that it had not existed before the events in question. On appeal,

Held –

(i) there was no proper proof that the appellant had broken into the store and accordingly the conviction of attempted breaking into the store with intent to commit a felony could not stand.

(ii) the court had no power to convict the accused of theft upon a charge of attempted store-breaking contrary to s. 308 of the Penal Code.

(iii) if there is any doubt whether an accused person has completed an offence, it is preferable to charge him with the completed offence instead of an attempt, since it is always open to the court of trial to convict of an attempt upon a charge of the completed offence.

Appeal allowed. Conviction and sentence set aside. Order that accused be charged with theft and be remanded in custody for trial.

Judgment

Rudd Ag CJ: read the following judgment of the court:

The appellant was charged with and convicted of attempted store-breaking with intent to commit the felony of theft contrary to s. 308 of the Penal Code. He appeals against the conviction.

There was evidence that the appellant entered a maize store through a hole in some wire and moved a bag of maize with intent to carry it away, but he was arrested before he had removed the bag of maize from the store. There was no evidence that the appellant had made the hole in the wire or that it had not existed before the events in question. There was, therefore, no proper proof that the appellant broke into the store.

In the circumstances the conviction of attempted breaking into the store with intent to commit a felony cannot stand. The conviction is, therefore, set aside and the sentence must fall away with the conviction. We would add that if the appellant had made the hole in the wire then the other evidence disclosed that the appellant had gone beyond a mere attempt to break into the store and that he had actually entered the store and moved a bag of maize.

Had the appellant been charged under s. 307 of the Penal Code with breaking into the store and committing the felony of theft therein, he might have been convicted of theft of the bag of maize notwithstanding the fact that, according to the evidence, he had only succeeded in moving it a distance of three yards. This would be sufficient to constitute a completed offence of theft. In our opinion there is no power in this court to convict of theft upon a charge of attempted store-breaking under s. 308.

We think we should add that if there is any doubt as to whether or not an accused person has completed an offence it is preferable to charge him with the completed offence instead of an attempt, since it is always open to the court of trial to convict of an attempt upon a charge of the completed offence.

In all the circumstances of this case we order that the charge be amended to a charge of theft of one bag of maize punishable under s. 276 of the Penal Code and we order that the appellant be remanded in custody for production before the resident magistrate's court at Eldoret for trial on a charge of theft. The appellant must, of course be acquitted of attempted store-breaking.

Appeal allowed. Conviction and sentence set aside. Order that accused be charged with theft and be remanded in custody for trial.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Kenya
G. A. Twelftree (Ag. Senior Crown Counsel, Kenya)

Issa s/o Ramadhani v R.

[1962] 1 EA 686 (HCT)

Division:	High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	19 October 1962
Case Number:	663/1962
Before:	Spry J
Sourced by:	LawAfrica

[1] Criminal law – Evidence – No case to answer – Prosecution closed – No evidence on which accused could be convicted – Accused put on defence – Accused convicted on evidence of co-accused – Co-accused's evidence exculpating self – Whether court ought to have acquitted after prosecution closed – Penal Code, s. 125, *s.* 296(i) *and s.* 311 (1) (*T.*) *– Criminal Procedure Code, s.* 205 (*T.*).

Editor's Summary

The appellant was charge with breaking and entering a place of worship and committing a felony therein contrary to s. 296 (1) of the Penal Code. A co-accused was charged with receiving stolen property, namely a clock. When the prosecution closed its case the evidence against the appellant was that a clock and other property had been stolen from a Sikh temple, the clock was found in the possession of the co-accused who, at an identification parade, picked out the appellant as the person who had sold her the clock. On that evidence the magistrate put both the appellant and the co-accused on their defence. After the appellant had given evidence denying the charge, the co-accused gave evidence that it was the appellant who sold her the clock, and only after assuring her that it was his property. The magistrate accepted this evidence, acquitted the co-accused and convicted the appellant. On appeal it was contended for the appellant that at the close of the case for the prosecution there was in fact no evidence on which the appellant could properly have been convicted and that the magistrate should then have acquitted the appellant in accordance with s. 205 of the Criminal Procedure Code. The respondent submitted that case law had established the principle that when the defence filled the gaps in the prosecution case, an Appellate Court must look at the proceedings as a whole.

Held – it is repugnant to all principles of justice to convict a person on the evidence of a co-accused who, in seeking to exculpate herself, provides the prosecution with the only material evidence against the person convicted.

Appeal allowed. Conviction and sentence set aside.

Cases referred to in judgment:

(1) *Karioki v. R.* (1934), 1 E.A.C.A. 160.

(2) *R. v. Kinanda bin Mwaisumo* (1939), 6 E.A.C.A. 105.

(3) *D. M. Patel v. R.* (1951), 18 E.A.C.A. 188.

(4) *R. v. George*, 1 *Cr. App. R.* 168.

(5) *R. v. Power*, 14 *Cr. App.* R. 17.

(6) *Bakari Bin Mwamba v. R.* (unreported).

(7) *R. v. Abbott*, 39 *Cr. App. R.* 141; [1955] 2 All E.R. 899.

Judgment

Spry J: The appellant was charged together with one Anjelina d/o Petro. There were three counts in the charge; by the first, the appellant was charged with breaking and entering a place of worship and committing a felony therein contrary to s. 296 (1) of the Penal Code; by the second, the appellant was charged with doing an act insulting to the religion of the Sikh community, contrary to s. 125 of the Code; and by the third, the appellant's co-accused,

Anjelina, was charged with receiving stolen property contrary to s. 311 (1) of the Code. The appellant was convicted on the first charge (slightly modified) and acquitted on the second; the co-accused, Anjelina, was aqcuitted on the third count.

Mr. Troup, for the Crown, conceded that at the close of the case for the prosecution there was, in fact, no evidence on which the appellant could properly have been convicted and that the learned magistrate ought, at that point, to have acquitted the accused on both counts, in accordance with the provisions of s. 205 of the Criminal Procedure Code. He submitted, however, that on the authority of *Karioki v. R.* (1) (1934), 1 E.A.C.A. 160, *R. v. Kinanda bin Mwaisumo* (2) (1939), 6 E.A.C.A. 105 and *D. M. Patel v. R.* (3) (1951), 18 E.A.C.A. 188, these matters were no ground for upsetting the conviction. He conceded that none of those cases was exactly on all fours with the present case, but he argued that they have established a principle that when the defence has filled in the gaps in the prosecution case, an Appellate Court must look at the proceedings as a whole.

Before I deal with these authorities, it is desirable to summarise the evidence on which the appellant was convicted. The prosecution called witnesses who proved beyond doubt that the Sikh Temple at Morogoro was broken into or out from on July 7, 1962, and that a clock and other property were stolen and that the clock was found in the possession of the co-accused, Anjelina, on July 17, 1962. The only evidence that connected the appellant with these events was that of police officers who gave evidence of an identification parade at which the co-accused, Anjelina, picked out the appellant as the person who had sold her the clock. On that evidence, the learned magistrate put both accused on their defence. Both elected to give evidence and neither called any witness. The appellant gave evidence first. He denied having sold the clock to his co-accused and put forward as an alibi that he was then in prison and was not released until two days later. The co-accused, Anjelina, then gave evidence to the effect that it was the appellant who had sold her the clock and that she only bought it after he had assured her that it was his property. The learned magistrate then called, ex improviso, a prison officer who testified and produced records to show that the appellant had been released from prison two days before, not after, the date of the alleged sale of the clock.

The learned magistrate believed the co-accused, Anjelina, to be a truthful witness and he acquitted her. He convicted the appellant substantially on the evidence of his co-accused, after warning himself of the danger of relying on the uncorroborated evidence of an accomplice.

Turning now to the authorities, *Karioki's* case (1), was a case where two accused were charged with murder. They were convicted substantially on their own evidence. The Court of Appeal for Eastern Africa, relying on the English cases of *R. v. George* (4), 1 Cr. App. R. 168, and *R. v. Power* (5), 14 Cr. App. R. 17, dismissed their appeal. The court considered that they should follow the English cases, unless inhibited from so doing by the wording of the local (Kenya) statute. The judgment goes on:

> "Our decision must depend upon the meaning we attach to the expression 'if the court considers that there is no evidence that the accused committed the offence'. We think that that expression must be construed as it stands. It is for the trial court to consider whether there is evidence, and not for us to decide whether there actually was evidence."

In the case of *Bakari Bin Mwamba v. R.* (6) (unreported), Mc-Roberts, J., apparently disregarding the decision in *Karioki's* case (1), held that the law of Tanganyika differed from that of England, in that in Tanganyika there was a mandatory statutory provision (now s. 205 of the Criminal Procedure Code) requiring a court to acquit an accused person, if it appears to the court that a

case is not made out against him sufficiently to require him to make out a defence. This view was, however, rejected by the Court of Appeal for Eastern Africa in *Kinanda's* case (2), which re-affirmed the decision in *Karioki's* case (1). That decision was again re-affirmed in *D. M. Patel's* case (3).

The effect of these cases is that it is clear beyond doubt that where an accused has been put on his defence and by his evidence has brought about his own conviction, an Appellate Court will not set aside the conviction solely on the ground that the trial court should have held that there was no case to answer. The position is not so clear, however, where there are two or more co-accused. It is true that there were two accused in *Karioki's* case (1), but it appears from the rather brief report that each condemned himself by his own evidence.

A case which did concern two accused each of whom sought to incriminate the other was *R. v. Abbott* (7), 39 Cr. App. R. 141, a case later in date than any of those mentioned above. The court reviewed and explained *Power's* case (5), a case in which the decision in George's case (4), was re-affirmed. (It will be recalled that *Karioki's* case (1), was decided on the authority of these two cases.) Goddard, L.C.J., commenting on Power's case (5), said:

> "It is said that if a judge wrongly overrules a submission of no case and allows the case to go to the jury and then prisoners give evidence and one gives evidence against the other, this court is not bound to say that it will quash the conviction because it may take into account the whole of the evidence given. But *Power's* case supra, did not decide that, if there was no evidence against a man who was indicted along with another person, it was right to allow the case to go to the jury against that man, or that, if there was no evidence against him, it was other than a wrong decision in law to do so."

Later, the Lord Chief Justice said:

> "What the court said in that (i.e. Power's case), was that if the case did go to the jury, then the evidence given by the prisoners respectively was part of the sum of the evidence in the case, and this court when asked to quash a conviction might take the whole of the evidence into account. They did not say that this court must, but that it might take the whole of the evidence into account."

Abbott's case (7), was not on all fours with the present case because in that case there had been a submission that there was no evidence to go to the jury, a submission which was overruled, but that difference does not make the dicta of the Lord Chief Justice any the less relevant. Furthermore, the Lord Chief Justice went on to observe that it could not be right to leave a case to the jury where, as in that case, the whole of the structure upon which the prosecution had been built up had collapsed. Here, I think the circumstances are even worse. Nothing had gone wrong with the case for the prosecution, the witnesses had said all that they were expected to say; it was just a case so badly prepared that it had no possibility of succeeding until, after the appellant had given his evidence, his co-accused, like a deus ex machina, in seeking to exculpate herself, provided the prosecution with the only material evidence against the appellant. It seems to me that this is repugnant to all principles of justice. For this reason, I think the appeal must succeed.

Having so decided, it is not necessary for me to deal in detail with Mr. Troup's subsequent submissions, first, that since the learned magistrate found the co-accused, Anjelina, not guilty, he was being over-cautious in treating her evidence as accomplice evidence, and, secondly, that the appellant's false alibi could be regarded as equivalent to corroboration. I will only make two observations, first, that even though the co-accused may not have been an accomplice, her

evidence, coming when it did, needed to be regarded with just as much suspicion as that of any accomplice, and secondly, that where the falseness of an alibi rests on a question of dates only, the possibility must not be overlooked that while that evidence was untrue, it may have been mistaken rather than perjured.

The appeal is allowed; the conviction is quashed and the sentence set aside. The appellant is to be released immediately, unless lawfully held on any other charge.

Appeal allowed. Conviction and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika
A. M. Troup (Senior Crown Counsel, Tanganyika)

Umshanker Javerilal Joshi v Raojibhai Chotabhai Patel and another

[1962] 1 EA 689 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	29 June 1962
Case Number:	533/1958
Before:	Pelly Murphy J
Sourced by:	LawAfrica

[1] Negligence – Motor vehicle – Collision – Claim for damages against driver and passenger – Drunken passenger – Interference by passenger with driving – Whether passenger owes duty to other users of road.

Editor's Summary

The plaintiff claimed damages for negligence against two defendants in respect of a motor collision. It was alleged that the first defendant, the driver, failed to take precautions to prevent the second defendant, who was a passenger and intoxicated, from interfering with or obstructing his driving and control of the vehicle and that the second defendant "negligently and unlawfully gripped the steering wheel" of the vehicle, thereby causing the collision. Subsequently, the plaintiff discontinued the action against the first defendant and proceeded to a hearing against the second defendant only. It was not disputed that the collision took place through no fault of the plaintiff, and the only issue was whether the second defendant was wholly or in part responsible for the collision and, if he was, whether he was either wholly or, in part, liable to the plaintiff for damages for negligence. It was contended for the second defendant that, even if it was found as a fact that he had slumped or fallen towards the right in the car and that the result

was to impair the first defendant's steering of the vehicle, that would not establish the negligence alleged in the pleadings.

Held –

(i) the claim did not fail simply because the plaintiff had not established the precise acts of negligence which he had pleaded, as the second defendant knew substantially the basis upon which negligence was alleged against him: *Esso Petroleum Co. Ltd. and Another v. Southport Corporation*, [1955] 3 All E.R. 864 distinguished.

(ii) the second defendant was responsible for impairing the first defendant's control of the steering, but he was not conscious of what he did; in these circumstances the driver assumed responsibility for the consequences of having such a passenger beside him and was vicariously liable if he could reasonably have foreseen them; in the present case he could have foreseen the consequences.

(iii) it may be that a passenger in a vehicle owes a duty to the driver to act reasonably and is under a duty not to interfere with the control of the vehicle,

but it is open to doubt if he owes any duty to the other users of the road in so far as the control of the vehicle is concerned.

Judgment for the second defendant.

Cases referred to in judgment:

(1) *Esso Petroleum Co. Ltd. and Another v. Southport Corporation*, [1955] 3 All E.R. 864.

(2) *Morriss v. Marsden and Another*, [1952] 1 All E.R. 925.

Judgment

Pelly Murphy J: In December, 1958, the plaintiff commenced these proceedings against two defendants. In May, 1961, he served a notice of discontinuance against the first-named defendant and the suit came before me for hearing against the second defendant only. Paragraph 4 of the plaint reads:

"4. On or about June 3, 1957, at about 10 p.m. whilst the plaintiff's motor vehicle no. KAK. 229 was standing lawfully and properly parked by the side of Makupa Road, Mombasa, a motor vehicle registration no. KAK. 301 belonging to and being driven by and/or under the control of the first defendant ran into, collided with and damaged the plaintiff's said motor vehicle. At the time of the said collision the first defendant had in his said motor vehicle certain passengers including the second defendant which passengers and in particular the second defendant the plaintiff avers were in an intoxicated condition. The said collision and damage was caused by the negligence of the first defendant and/or the negligence of the second defendant as hereinafter set out.

"A. Particulars of Negligence of the First Defendant.

The first defendant was negligent in that:

(i) Being the driver of and in charge of his said motor vehicle and knowing that he had intoxicated passengers and in particular the second defendant failed to take proper or reasonable precautions to prevent the second defendant whilst in the said condition of intoxication from interfering with or obstructing his, the first defendant's, proper driving and/or control of the said motor vehicle in that he failed to prevent the second defendant from gripping the steering wheel of the said motor vehicle thereby causing it to travel to the nearside of the road and run into, collide with and damage the plaintiff's said motor vehicle as aforesaid.

(ii) The second defendant having gripped the steering wheel as averred in the previous paragraph failed to take proper or reasonable precaution to prevent the said motor vehicle from travelling to the near side of the road and colliding with the plaintiff's said motor vehicle.

(iii) In the circumstances as hereinbefore averred and in particular having intoxicated passengers in his vehicle and/or generally

(*a*) drove too fast or too fast to stop;

(*b*) drove too fast or too fast to stop in the circumstances;

(*c*) failed to keep any or a proper lookout;

(*d*) failed to apply his brakes sufficiently or in time or to manoeuvre his said motor vehicle so as to avoid hitting the plaintiff's said motor vehicle.

> "B. Particulars of Negligence of the Second Defendant.

The second defendant was negligent in that:

> "Whilst a passenger in the said vehicle no. KAK. 301, which was being driven by or under the control of the first defendant negligently and unlawfully gripped the steering wheel of the said motor vehicle causing the said motor vehicle to travel to the nearside of the road and to run into, collide with and damage the plaintiff's said vehicle as aforesaid."

Paragraph 3 of the second defendant's defence reads:

> "3. With regard to allegations in para. 4 of the plaint, the second defendant admits that on the night of June 3, 1957, the second defendant in company of other friends including the first defendant, was drinking at the said Society Bar and Restaurant but the second defendant does not admit any one or more of all the other allegations in the said paragraph and in particular the second defendant does not admit that he was negligent or that he unlawfully or negligently or otherwise gripped the steering wheel of the first defendant's vehicle or that collision, if any, occurred due to his negligence."

Mr. Manghnani for the second defendant argued as a preliminary point that the plaintiff was not entitled to sue in that he was not the legal owner of the vehicle alleged by him to have been damaged but I ruled that the plaintiff having been in possession of it at the material time was entitled to maintain this action for damages.

The evidence of Raojibhai Chotabhai Patel who was the first defendant was taken on commission and his evidence so taken was read and admitted as evidence on behalf of the plaintiff at the hearing.

Mr. Manghnani conceded the figure claimed as damages (while, of course, denying liability for that damage).

The only other evidence led by the plaintiff was that relating to the conviction on his own plea of the second defendant on a charge of obstructing the driver of car no. KAK. 301 (the vehicle driven by the first defendant on the night in question).

It is not in dispute that the first defendant's vehicle collided with and damaged the plaintiff's vehicle through no fault of the plaintiff. The issue which I have to decide is whether the second defendant was wholly or in part responsible for the collision and, if he was, whether he is either wholly or in part liable to the plaintiff in an action for damages for negligence.

I am satisfied that the second defendant was drunk when he got into the first defendant's vehicle and that, notwithstanding the evidence of the witness Lalbhai, while in the passenger seat beside the first defendant (who was driving) he slumped or fell towards the right and, as a result the first defendant's steering of the vehicle was impaired. I do not believe that the second defendant was "sitting straight" immediately before the accident. In the first place there is the evidence of the first defendant to the contrary; and, although his evidence must be weighed with some care because, presumably, he wishes to disclaim responsibility for the accident, his evidence that the second defendant "fell on the steering wheel" is borne out by the evidence of Lalbhai that, after the accident, the second defendant was between the two front seats. In the second place, Lalbhai had been sitting on the floor at the rear of the vehicle and I doubt whether he was in a position to see, or was in fact closely observing, the position of the second defendant at the material time.

It is convenient to consider here Mr. Manghnani's submission that even if I find as a fact that the second defendant slumped or fell towards the right and

that the result was to impair the first defendant's steering of the vehicle, that would not establish the negligence alleged against the second defendant which is that he

> "negligently and unlawfully gripped the steering wheel . . . causing the said motor vehicle to travel to the nearside of the road and to run into, collide with and damage the plaintiff's said vehicle".

The first defendant's evidence on this point was:

> "I filled up . . . the claim form from my Insurance Company . . . truthfully and correctly . . . I said it was because N. M. Patel caught my steering wheel and pulled it and caused the accident . . . The sole cause of the accident . . . was that the man who sat with me was drunk and he fell down on the steering wheel and caused the wheel to turn to the left. I lost control because of this incident . . . I think it was as I said that N. M. Patel fell on the steering wheel and caused the accident."

In my opinion this somewhat confusing evidence should in its entirety be taken to mean that the second defendant fell towards his right and thus interfered with the first defendant's control of the steering and not that the second defendant gripped the steering wheel with his hand. Does that mean that the plaintiff must fail because he has not established the precise acts of the negligence which he pleaded? In my view it does not. I think that *Esso Petroleum Co. Ltd. and Another v. Southport Corporation* (1), [1955] 3 All E.R. 864, is distinguishable. In the present case the second defendant knew substantially the basis upon which negligence was alleged against him, namely, that he interfered with the steering. In my opinion Mr. Manghnani's submission on this point must be rejected.

I have found that the second defendant was responsible for impairing the first defendant's control of the steering. I am satisfied, however, that he was not conscious of what he did; I have come to the conclusion that, because of his intoxication, he was unconscious from the time when he got into the passenger seat of the first defendant's vehicle until after the accident. Was, then, the second defendant wholly or in part responsible for the accident? I think that the answer to that question depends in the first place upon the answer to another question – whether a person who is unconscious can be said to be responsible in civil law for his acts which cause damage? Whether, in the present case, the second defendant is wholly or in part liable to the plaintiff in an action for damages for negligence?

In *Morriss v. Marsden and Another* (2), [1952] 1 All E.R. 925 at p. 927H, Stable, J., said:

> "On the whole, I accept the view that an intention – i.e. a voluntary act, the mind prompting and directing the act which is relied on, as in this case, as the tortious act – must be averred and proved. For example, I think that, if a person in a condition of complete automatism inflicted grievous injury, that would not be actionable. In the same way, if a sleepwalker inadvertently, without intention or without carelessness, broke a valuable vase, that would not be actionable. I agree that there is much force in the contention that, in those cases where it has been held that an intention must be averred and proved, the act in itself was a legitimate piece of behaviour: e.g. in *Stanley v. Powell*, where a man shooting pheasants shot the beater, and *Holmes v. Mather*, where the defendant was being driven in his carriage along a highway when the horse bolted. Those cases may well be different from the present matter where the act complained of was a trespass, as direct an act of violence as possible. The injuries were not the indirect result of a legitimate activity gone wrong, but were the direct result of illegal behaviour, which was wrongful from the beginning and could

> not conceivably be anything else. The distinction may be succinctly stated as being between conduct tortious in its very essence and conduct innocent in itself, but becoming tortious by the addition of some ingredient such as intention, heedlessness, or malice. But though the argument is extremely attractive, I must hold that an intention to do the thing complained of must be alleged and proved."

If a person in the intoxicated condition of the second defendant drove a motor vehicle upon a road and, because of his intoxication, became unconscious with the result that his vehicle came into collision with a stationary vehicle lawfully parked upon the road, I have little doubt that he would be held to be liable in an action for damages for negligence. But I do not think that this applies to a person such as the second defendant who was sitting in the front passenger seat at least with the consent of the driver if, indeed, he had not (to use the first defendant's expression) been placed there by the driver "when he was just like a bag of rice". In these circumstances the driver, in my opinion, assumes responsibility for the consequences of having such a passenger beside him and is vicariously liable for the consequences if he could reasonably have foreseen them. I think that the first defendant could reasonably have foreseen that the very thing which I have found to have occurred was likely to occur. When a vehicle is upon a road, the person in control of the vehicle is under a duty to others lawfully on the road. It may well be that a passenger in a vehicle owes a duty to the driver to act reasonably and is under a duty not to interfere with the control of the vehicle. But it is, in my opinion, open to doubt if he owes any duty to other users of the road in so far as the control of the vehicle is concerned.

When a passenger is in the condition in which the second defendant was in the present case; when his interference with the control of the vehicle was involuntary; and when, in particular, he was in such a position as, in his condition, it could reasonably be foreseen by the driver that he might well interfere with the proper control of the vehicle, in my opinion the driver alone is responsible to other users of the road and the passenger owes no duty to them.

For these reasons I am of opinion that the plaintiff's claim against the second defendant must fail.

There will be judgment for the second defendant with costs.

Judgment for the second defendant.

For the plaintiff:
Kaplan & Stratton, Nairobi
J. A. Mackie-Robertson

For the second defendant:
Patel & Thakkar, Mombasa
J. L. Manghnani

Simon Petero Zirabamuzale v Andrew Corret and another

[1962] 1 EA 694 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	7 November 1962
Case Number:	637/1961

Before: Bennett Ag CJ

Sourced by: LawAfrica

[1] Practice – Appearance – Trial – Absence of defendant – Appearance entered – No defence filed – No notice of hearing given to defendant – Case heard ex parte – Judgment entered against defendant – Application to set aside ex parte decree – Whether failure to give hearing notice constitutes "sufficient cause" for non-appearance – Civil Procedure Rules, O. 8, *r.* 1 *and O.* 9, *r.* 8*A* (2), *r.* 24 (*U.*) *– Traffic Ordinance,* 1951, *s.* 104 (*U.*).

[2] Insurance – Motor insurance – Action against insured – Statutory notice to insurers given – Appearance entered by insured – No defence filed – Insurers so informed by letter – Judgment against insured – Whether insurers entitled to have decree set aside – Traffic Ordinance, 1951, *s.* 104 (*U.*).

Editor's Summary

The plaintiff claimed damages against both defendants for negligence arising out of a collision in which the plaintiff and vehicles belonging to the two defendants were involved. The statutory notice required by s. 104 of the Traffic Ordinance, 1951, was given to the first defendant's insurers by the plaintiff's advocates. An appearance was entered by advocates for the first defendant but when neither the first defendant nor his insurance company gave the advocates detailed instructions regarding his defence, the advocates wrote to the first defendant for instructions and stating that otherwise they would be compelled to abandon the case. A copy of this letter was also sent to the first defendant's insurance company. The suit was set down for hearing ex parte and, when called, the claim against the second defendant was dismissed by consent. The case against the first defendant was then heard ex parte and judgment against him was duly given. The first defendant then applied that the ex parte decree be set aside on the grounds that, despite the first defendant's failure to file a defence, he ought to have been given notice of the hearing and that failure to do so constituted "sufficient cause" for his non-appearance within the meaning of O. 9, r. 24 of the Civil Procedure Rules.

Held –

(i) the cause of the first defendant's non-appearance when the suit was called for hearing was his failure to give proper instructions for his defence to his advocates and this did not constitute a sufficient cause for non-appearance at the hearing.

(ii) the plaintiff's advocates were justified in withdrawing the case against the second defendant and the process of the court was not abused.

(iii) the first defendant's insurance company had had ample opportunity to defend the case on his behalf and had neglected that opportunity.

Application dismissed.

Case referred to in judgment:

(1) *Sarupsing Mangatsing v. Nilkant Bhaskar* (1953), A.I.R. Bom. 109.

Judgment

Bennett Ag CJ: This is an application by the first defendant to set aside an ex parte decree dated October 4, 1962. In his plaint the plaintiff claimed damages against both defendants for negligence arising out of a collision in which the plaintiff and vehicles belonging to the two defendants were involved.

The suit was filed on December 29, 1961. On January 6, 1962, the plaintiff's advocates gave the statutory notice required by s. 104 of the Traffic Ordinance, 1951, to the first defendant's insurance company. On February 7, 1962, the first defendant was served with a summons to enter an appearance.

The first defendant is an Italian and speaks no English, but he does speak Kiswahili. On February 19, 1962, one Dhana Singh, a friend or acquaintance of the first defendant, took the summons and a copy of the plaint to the offices of Singh & Treon, advocates, and informed Mr. Singh, a partner, that the first defendant wished his firm to undertake the defence to the suit. Mr. Singh promised to enter appearance, but told Dhana Singh that it would be necessary for him to see the first defendant in order to obtain detailed instructions. On February 21, 1962, Singh & Treon entered appearance on behalf of the first defendant.

The first defendant did not call at the offices of Singh & Treon to give detailed instructions as to the nature of his defence to the suit, nor did the first defendant's insurance company give any detailed instructions to the advocates. In consequence of this neglect, on March 14, 1962, Singh & Treon wrote to the first defendant asking for detailed instructions, and stating that if no instructions were forthcoming they would be compelled to abandon the case. This letter never reached the first defendant because it was wrongly addressed. A copy of the letter was sent to the first defendant's insurance company, and there is no reason to suppose that the company did not receive it.

It will be observed that the letter was not sent until after the time allowed by O. 8, r. 1, for filing a defence had expired. Neither the first defendant nor the insurance company appear to have taken any further action in the matter, and the suit was eventually set down for hearing ex parte.

On October 2, 1962, the case came on for hearing before JONES, J., when the plaintiff's advocate, with the consent of the second defendant's advocate, agreed to the dismissal of the suit as against the second defendant. The case against the first defendant was heard ex parte, and judgment against the first defendant for Shs. 40,000/- general damages and Shs. 250/- special damages was given on October 4, 1962.

On behalf of the first defendant it is contended that despite the first defendant's failure to file a defence he ought to have been given notice of hearing and that the failure to give him notice constitutes "sufficient cause" for his non-appearance within the meaning of O. 9, r 24. It is contended that there is nothing in the wording of O. 9, r. 8A (2) which can be construed as dispensing with the necessity of giving notice of hearing to the defendant. I am unable to accept this contention. In my judgment, the words "the plaintiff may set down the suit for hearing ex parte" connote that the hearing contemplated by the rule is to be in the absence of the defendant. To quote from Jowitt's Dictionary of English Law:

> "In its more usual sense, ex parte means that an application is made by one party to a proceedings in the absence of the other. Thus an ex parte injunction is one granted without the opposite party having had notice of the application. It would not be called ex parte if he had proper notice of it, and chose not to appear to oppose it."

It is plain that the cause of the first defendant's non-appearance when the suit was called on for hearing was his failure to give proper instructions to his

advocates to enable them to file a written statement of defence. It is for the client to seek out his advocate, not for the advocate to seek out his client. Failure to give proper instructions to an advocate cannot possibly constitute a sufficient cause for non-appearance at the hearing: See *Sarupsing Mangatsing v. Nilkant Bhaskar* (1) (1953), A.I.R. Bom. 109.

The court has been asked to set aside the decree on another ground. It is alleged in the first defendant's affidavit that the plaintiff's advocates took an unjust advantage of his absence at the hearing by withdrawing the case against the second defendant. It is contended that in these circumstances there was an abuse of the process of the court and that the court has inherent jurisdiction to set aside the decree. Having heard the plaintiff's advocate, Mr. Dalal, in the witness box, I am satisfied that he had solid grounds for consenting to the dismissal of the suilt as against the second defendant, and that the process of the court was not abused.

There is another aspect of the matter to be considered. It appears from the judgment of Chagla, C.J., in *Sarupsing's* case (1), that where the defendant's insurance company is under a statutory obligation to satisfy the judgment if given due notice of the institution of the suit, the court will set aside the decree under its inherent powers if satisfied that the insurance company did not have a proper opportunity to defend the suit. In the instant case the first defendant's insurance company was under a statutory obligation imposed by s. 104 (1) of the Traffic Ordinance to satisfy the judgment. The insurance company was served with statutory notice provided for by s. 104 (2) of the Ordinance so that it had notice of the institution of the suit. The insurance company was also informed by Singh & Treon's letter of March 14, 1962, that the first defendant himself had failed to give his advocates detailed instructions to enable them to defend the suit. The insurance company could have given the necessary instructions itself. Even after the insurance company had received a letter from the plaintiff's advocates dated May 25, 1962, giving the number of the first defendant's motor vehicle and the name of the first defendant's driver who was driving his vehicle at the time of the collision, the insurance company appears to have taken no action in the matter. Although by May 25, the time for filing a defence had long expired, applications to file defences out of time are readily acceded to by the courts and are not often opposed by the opposite party. In all the circumstances I am satisfied that the insurance company had ample opportunity to defend the case on behalf of the first defendant and that it neglected that opportunity.

In my judgment this application has no merits and it is dismissed. The first defendant is ordered to pay the plaintiff's costs of this application.

Application dismissed.

For the plaintiff:
S. V. Pandit, Kampala

For the first defendant:
Mayanja, Clerk & Co., Kampala
Anil Clerk

Victory Construction Co v A N Duggal

[1962] 1 EA 697 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	24 October 1962
Case Number:	1532/1958
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Practice – Want of prosecution – Dismissal of action – No step taken for over three years – Discretion of court – Whether informal reference to arbitration is a "step taken" under O. 16, *r.* 6 *of the Civil Procedure* (*Revised*) *Rules*, 1948 – *Civil Procedure* (*Revised*) *Rules*, 1948, *O. XVI*, *r.* 5 *and r.* 6 (*K.*) *– Rules of the Supreme Court, O. XXVII, r.* 1.

Editor's Summary

On March 23, 1962, a notice was issued to the parties by the court calling upon them to show cause why the suit, which had been filed on October 8, 1958, should not be dismissed under O. XVI, r. 6 of the Civil Procedure (Revised) Rules, 1948. It was common ground that in January, 1960, the parties had agreed to refer their dispute informally to a single arbitrator, and that this attempt at resolving their differences had failed . At the hearing it was contended for the plaintiff that the reference of the dispute to arbitration amounted in effect to a "step taken" under r. 6 and that, as three years had not elapsed from January, 1960, the rule did not apply.

Held –

(i) only a step taken on the record, such as an interlocutory application, could amount to such a step as is envisaged by O. XVI, r. 6; accordingly the reference to informal arbitration was not a step taken with a view to "proceeding with the suit".

(ii) where parties to an action are called upon to show cause why an action should not be dismissed for want of prosecution, the court should be slow to make an order if satisfied that the suit can be heard without further delay, that the defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the plaintiff.

(iii) the purpose of O. XVI, r. 6 is to provide the court with administrative machinery whereby to disencumber itself of case records in which the parties appear to have lost interest.

(iv) in the circumstances of the case the court would not exercise its discretion to dismiss the case but the parties would be ordered to set down the case for hearing within ten days.

Krakauer v. Katz, [1954] 1 All E.R. 244, distinguished.

Order accordingly.

Cases referred to in judgment:

(1) *Houlston v. Woodall* (1884), 78 L.T. 113.

(2) *Taylor v. Roe* (1893), 62 L.J. Ch. 391.

(3) *Krakauer v. Katz*, [1954] 1 All E.R. 244.

Judgment

Edmonds J: On March 23, 1962, the deputy registrar caused a notice to be issued to the parties to this suit calling upon them to shew cause why the suit which had been filed on October 8, 1958, should not be dismissed under the provisions of Order XVI, r. 6 of the Civil Procedure (Re-cised) Rules, 1948. This rule provides as follows:

> "In any case, not otherwise provided for, in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed. In such case the plaintiff may, subject to the law of limitation, bring a fresh suit."

Cause was sought to be shown on behalf of the plaintiff against dismissal, while on behalf of the defendant an order for dismissal was strenuously pressed. At the order of the court affidavits were put up by or on behalf of both parties, and, while there is a contest by the defendant as to some of the allegations contained in the affidavit of plaintiff's counsel, it was not disputed that both parties had agreed in January, 1960, to refer their dispute informally to a single arbitrator, and that this attempt at resolving their differences had failed.

It was contended for the plaintiff that this action by the parties amounted in effect to a "step taken" under r. 6 and that as three years had not elapsed from January, 1960, the provisions of the rule could not apply. I do not think this contention is right as the words of the rule are "step taken . . . with a view to proceeding with the suit", and the action in referring the dispute to informal arbitration cannot, I think, be said to be a step taken with a view to "proceeding with the suit". Only a step taken on the record, such as an interlocutory application, would amount to such a step as is envisaged by r. 6 – see *Houlston v. Woodall* (1) (1884), 78 L.T. 113; *Taylor v. Roe* (2) (1893), 62 L.J. Ch. 391.

However, in deciding whether or not to dismiss a suit under r. 6 it is my view that, where the parties have been called upon to show cause against such an order, a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship, and that there has been no flagrant and culpable inactivity on the part of the plaintiff. In regard to the latter two conditions, however, a defendant may find it difficult to persuade a court of hardship or of culpable inactivity on the part of a plaintiff if he, the defendant, has been guilty of inactivity in failing to take any step to protect himself under the provisions of r. 5 of O. XVI, which gives him a remedy in the event of a plaintiff failing to prosecute his suit. Rule 5 is in these terms:

> "5. If the plaintiff does not within eight weeks from the delivery of any defence, or, where a counterclaim is pleaded, then within ten weeks from the delivery thereof, set down the suit for hearing, then the defendant may either set down the suit for hearing or apply to the court to dismiss the suit for want of prosecution, and on the hearing of such application the court may order the suit to be dismissed accordingly, or may make such other order, and on such terms, as to the court may seem just."

In the case before me, there is no suggestion that the defendant will be put to any disadvantage or hardship, but it is urged on his behalf that the plaintiff in failing to take any step on the record, has been guilty of culpable inactivity. With this I cannot agree, as the fact that an attempt has been made to resolve a dispute by informal arbitration is a factor, as negotiations for a settlement would be a factor, which it would be proper to take into account in deciding whether there has been any such inactivity on the part of a plaintiff.

Counsel for the defendant drew my attention to the case of *Krakauer v. Katz* (3), [1954] 1 All E.R. 244, in support of his contention that the plaintiff had allowed his action to go to sleep and that consequently this court was bound to dismiss the suit. The facts of that case may with convenience be taken from the judgment of Denning, L.J., at p. 245, where he said:

> "The facts in this case are somewhat striking. On June 19, 1941, the plaintiff issued a writ against the defendant claiming damages for breach

> of contract, or, alternatively, an account. The writ was served on the defendant and an appearance was entered on his behalf on July 25, 1941, by his then solicitors, and the plaintiff's solicitors ought to have delivered a statement of claim within ten days thereafter. Time may not have run during the vacation, but at all events the statement of claim ought to have been delivered in due time after entry of appearance. In point of fact, the plaintiff did nothing. He did nothing for over twelve years, and in October, 1953, by his solicitors, he wrote to the defendant intimating that this claim was being revived, and eventually his solicitors gave, by letter dated November 27, 1953, notice of their intention to proceed with the action. The defendant went to new solicitors, who gave notice of change and took out a summons to dismiss the action for want of prosecution." (Under O. XXVII, r. 1.)

After dealing with a technical point, the learned Lord Justice then went on to say:

> "The real point is whether the plaintiff, having done nothing for twelve years in this action, should not be allowed to revive it. An affidavit was put in on his behalf, in which he said that his solicitors' offices were destroyed by enemy action and they could not proceed with the case, but when inquiries were made, it turned out that his solicitors' offices were destroyed before the writ was issued. They were destroyed on May 10, 1941, and the writ was issued on June 19, 1941. There was no difficulty in proceeding with the action. The defendant's solicitors were on the record all the time. Even if the plaintiff could not proceed with the claim during the war owing to various difficulties, there was no reason why he should not have pursued it during the eight years since that time. I am disposed to agree with what counsel for the defendant suggested, namely, that, by analogy with the Limitation Act, 1939, if a plaintiff allows an action to go to sleep for six years, the court in its discretion will usually dismiss the case for want of prosecution, unless the plaintiff can show some good reason why he should be allowed to go on with it. In this case, it is not six years, but twelve years, and I am quite clear that after this length of time the plaintiff ought not to be allowed to go on with the action . . ."

Romer, L.J., in agreeing with this opinion, said at p. 246:

> "There may be some cases where it would be right to allow an action to proceed even though there has been nothing done for twelve years, and where it would be right to make no order on a summons taken out by the defendant to dismiss the action for want of prosecution. There may be such cases, but I am abundantly clear in my mind that this is not one of them. This is a case where, apparently, the real cause of the plaintiff's not having proceeded with the action before is that he thought the defendant was not worth pursuing, and the action only came to life again when he discovered that the defendant's financial position had improved. I think this is a clear case where the action should be dismissed."

The circumstances of the case before me can be clearly distinguished from *Krakauer v. Katz* (3). In the first place the period that had elapsed from the filing of the plaint on October 8, 1958, to the date of the registrar's notice was nearly three and a half years. That period by itself may be sufficient to justify an order of dismissal, but it is nothing like as extreme as the period that had elapsed in *Krakauer v. Katz* (3). In the second place, no statement of claim had been delivered in that case and apparently no communication had been made between the parties subsequent to the service of the writ until the plaintiff's solicitors' letter of October, 1953, intimating that the claim was being revived: whereas in the case before me a plaint had been filed and served and there had

been an attempt at arbitration early in 1960. Thirdly, in *Krakauer v. Katz* (3), the matter came before the court as a consequence of an application by the defendant to dismiss the action for want of prosecution; whereas in the instant case the matter has come before this court, not as a consequence of any action by the defendant, but as a consequence of a notice issued by the registrar under a provision of local procedure which has no parallel in England.

The purpose of r. 6 in my view is to provide the court with administrative machinery whereby to disencumber itself of case records in which the parties appear to have lost interest. Indeed, I very much doubt whether notice to the parties of a proposal to make an order of dismissal is really necessary. Rule 6, unlike r. 2 of O. XVI, makes no provision for notices to the parties, but in order that a plaintiff may not be entirely shut out of his remedy against a defendant in the event of his suit being dismissed, specific provision is made in r. 6 allowing a plaintiff, subject to the law of limitation, to bring a fresh suit. However, where a court does adopt the benevolent procedure of giving a plaintiff an opportunity of showing cause against an order of dismissal, the decision thereon is one which is entirely within the discretion of the court, and, even where a plaintiff has taken no step of any kind, a court may still decide not to dismiss the action if, in its opinion, the interests of justice so dictate.

It is my opinion that the circumstances in this case do not justify an order of dismissal. However, it is ordered that the parties take steps within the next ten days to set the case down for hearing. I do not propose to make any order as to costs in connection with this matter.

Order accordingly.

For the plaintiff:
Kean & Kean, Nairobi
M. Kean

For the defendant:
D. N. & R. N. Kharna, Nairobi
D. N. Khanna

C Popat & Co v Hussein Brothers and Others
[1962] 1 EA 700 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	19 March 1962
Case Number:	300/1958
Before:	DJ Devine
Sourced by:	LawAfrica

[1] Costs – Taxation – Jurisdiction – Settlement of action – Order recording settlement – Each party to

bear his own costs – Earlier interlocutory order awarding party "costs in any event" – Jurisdiction after settlement to tax costs of interlocutory application.

Editor's Summary

The second defendant filed a summons for directions which was opposed and upon which an order was made against the second defendant awarding all other parties their "costs in any event". Subsequently the case was marked "Settled, each party to bear his own costs". The third defendant then filed a bill of costs for taxation in respect of the interlocutory application for directions.

[**Editorial Note:** This decision is published as a Practice Note.]

Judgment

The Taxing Officer (DJ Devine), held that the order marking the case as settled finally determined the rights, remedies and liabilities of the parties and, if there were any terms as to payment of costs previously

incurred, these should have been incorporated in the order recording the settlement. Accordingly, the court had no jurisdiction to tax the bill.

P. L. Maini For the second defendant.
R. N. Khanna For the third defendant.

For the second defendant:
Maini and Patel, Nairobi

For the third defendant:
Khanna & Co., Nairobi

R v Krpal Singh Rajan Singh
[1962] 1 EA 701 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	29 August 1962
Case Number:	25/1962
Before:	Pelly Murphy J
Sourced by:	LawAfrica

[1] Criminal law – Unwrought precious metal – Unlawful possession – Meaning of "unwrought precious metal" – Trading in Unwrought Precious Metals Ordinance (*Cap.* 172), *s.* 4 (1) (*K.*) *– Criminal Procedure Code, s.* 195 (*K.*).

Editor's Summary

The accused was convicted on a charge of being in "unlawful possession of one unwrought gold bar" contrary to s. 4 (1) of the Trading in Unwrought Precious Metals Ordinance. The report of the government analyst which was admitted in evidence under s. 195 of the Criminal Procedure Code stated that the gold bar was unwrought precious metal as defined in the Ordinance. At the close of the case for the Crown, counsel for the accused submitted that there was no case to answer on the ground that the gold bar was a manufactured piece of gold and that the evidence did not establish that it was unwrought precious metal. When this submission was overruled the defence called the government analyst whose evidence was that the gold bar "is manufactured gold as opposed to gold ore" and that he considered it "to be bullion". The trial magistrate held that on the evidence of the government analyst the gold bar was bullion and came within the definition of unwrought precious metal even though it had been changed from gold ore into bullion. At the hearing in revision, counsel for the accused submitted that the assertion in the report that the gold bar was unwrought precious metal as defined in the Ordinance did not establish

any fact upon which the court could find that the gold bar was unwrought precious metal, that, consequently, the Crown had failed to prove its case, and that the evidence given by the government analyst established that the gold bar was bullion but not that it was precious metal smelted into bullion, and, therefore, did not establish that it was unwrought precious metal.

Held –

(i) on the evidence of the government analyst, the magistrate should have dismissed the charge and held that the Crown had failed to prove that the gold bar was unwrought precious metal.

(ii) the words "in the unmanufactured state" must mean in the state in which it is found when it is removed from the earth before it is subjected to any process of refinement or reduction.

(iii) even if "smelted" means refined, and "bullion" means refined gold, in order to prove that an object is precious metal smelted into bullion and so bring it within the definition of the Ordinance, it must be proved that the bullion was produced directly from precious metal by smelting.

Conviction quashed and sentence set aside. Order that the fine be refunded and the gold bar be returned to the accused.

Cases referred to in judgment:

(1) *R. v. Mohanlal Dharamdas*, Kenya Supreme Court Criminal Appeal No. 3 of 1943 (unreported).

(2) *Ratilal Bhura v. R.*, Kenya Supreme Court Criminal Appeal No. 120 of 1958 (unreported).

Judgment

Pelly Murphy J: The proceedings in this case which was heard by one of the resident magistrates, Mombasa, were called for by the court in the exercise of its revisional jurisdiction. In those proceedings one Kirpal Singh Arjan Singh (hereinafter called the convicted person) was convicted of an offence against s. 4 (1) of the Unwrought Precious Metals Ordinance, the particulars of the offence alleging that the convicted person, on February 6, 1962, "was found in unlawful possession of one unwrought gold bar". The convicted person was fined Shs. 500/-, the "gold bar" being declared forfeited to the Government.

The evidence for the Crown was that, on the day in question, an inspector of police was on board the s.s. Amra at Mombasa. As a result of information he went to a certain bunk where, in his presence, the convicted person unlocked a wooden box. Concealed in one part of the box were some objects which are not relevant to the charge and in another part was "a bar of metal" which (in cross-examination) the witness said was "raw gold" and "manufactured into that condition". The bar of metal was sent to the government analyst and his report was admitted in evidence under the provisions of s. 195 of the Criminal Procedure Code. The substance of that report was as follows:

> "Exhibits received: One gold bar numbered 237729.
>
> "Report: The exhibit was a gold bar weighing 32.1 ozs. troy. The exhibit is unwrought precious metal as defined in the Trading in Unwrought Precious Metals Ordinance, Cap. 172."

The Crown also proved an extra-judicial statement made by the convicted person in which he said:

> "It is true that I was found in possession of the alleged piece of gold bar. I have no more to say."

At the conclusion of the Crown case, counsel for the convicted person submitted that there was no case to answer on the ground that the exhibit was a manufactured piece of gold and that the evidence did not establish that it was unwrought precious metal within the meaning of the Trading in Unwrought Precious Metals Ordinance (Cap. 172) (hereinafter called the Ordinance), and in support of that submission relied on two decisions of this court to which I shall refer at a later stage. The magistrate ruled that there was a case to answer "in view of the government chemist's report".

The defence called the government analyst who said that the exhibit "is manufactured gold as opposed to gold ore" and "is an unwrought precious metal within the definition of s. 1" and that he considered it "to be bullion". The convicted person in evidence said that he had bought the exhibit from a named person. That named person then gave evidence in which he said that he had never seen the exhibit and had not sold any gold to the convicted person.

The relevant passage of the magistrate's judgment reads:

> "The burden of proof is upon the prosecution to prove their case affirmatively; in this case it is a fact that the accused was in possession of

> the bar of gold, exhibit 2, and it is also a fact on the evidence of the government chemist that this gold bar is bullion and comes within the definition of unwrought precious metal even though it has been changed from gold ore into bullion."

As I understand Mr. Sharma, who appeared for the convicted person in this court, he contends that the conviction was wrong in that –

(1) the evidence which consisted of an assertion in the government analyst's report that the exhibit was unwrought precious metal as defined in the Ordinance did not establish any fact upon which the court could find that the exhibit was unwrought precious metal; that such an assertion was not one which could be relied on without amplification and was, in any event, a usurpation of the functions of the courts;

(2) if the government analyst's report did not establish a fact upon which the court could make a finding that the exhibit was unwrought precious metal, the Crown had failed to prove its case and the charge should have been dismissed without calling upon the defence;

(3) the evidence given by the government analyst (when he was called by the defence) established that the exhibit was bullion but not that it was precious metal smelted into the form of bullion and therefore did not establish that it was unwrought precious metal as defined in the Ordinance.

In my opinion the first of these contentions is correct. I think that, in order to establish that an article is unwrought precious metal within the meaning of the Ordinance, the first step is to show that the article is precious metal. "Precious metal" is defined in s. 2 of the Ordinance as

> "gold, silver or metal of the platinoid group in the unmanufactured state".

The evidence must therefore establish that the article is "in the unmanufactured state". On the evidence before the court in this case it was by no means certain from the report which was put in evidence that the government analyst's mind had been directed to that all-important question at all. Indeed, it is clear from the evidence later given by the government analyst that the exhibit was "manufactured gold as opposed to gold ore". I think that, when he read the report, the magistrate should have summoned the government analyst and examined him as to its subject matter. Not having done so, the magistrate should, in my opinion, have dismissed the charge and held that the Crown had failed to prove that the exhibit was unwrought precious metal.

For this reason alone, I am of opinion that the conviction cannot stand but, in view of the conclusion to which I have come on the third of Mr. Sharma's contentions, I make no finding based on the first and second of those contentions.

The important and difficult question in this case is whether or not on the evidence as a whole the conviction in this case can be sustained.

The expression "unwrought precious metal" is defined in s. 2 of the Ordinance in the following terms:

> " 'unwrought precious metal' means precious metal in any form whatever, which is not manufactured or made up into any article of industry or of the arts, and includes amalgam, slimes, slags, gold bearing concentrates, pots, battery chips, sweepings from reduction works and scrapings and by-products of unrefined precious metal and precious metal which has been smelted into the form of bullion but does not include ore in situ".

As I have said, I think it is clear that, before an article can be said to be unwrought precious metal, it must be shown to be one of the metals referred

to in the definition of precious metal and to be "in the unmanufactured state". The first question is, what is meant by "the unmanufactured state"?

In *R. v. Mohanlal Dharamdas* (1), Kenya Supreme Court Criminal Appeal No. 3 of 1943 (unreported) which is referred to in a circular to magistrates recorded in 20 K.L.R. Part 2 at p. 109, the court in its judgment said:

> "The definition of precious metal in the Ordinance is, 'gold, silver or metal of the platinoid group in the unmanufactured state', and, inter alia, 'unwrought precious metal' means precious metal which has been smelted into the form of bullion.
>
> "Now as it seems to us if there be any doubt as to the metal, exhibit P. 1 having had its origin in a manufactured article it cannot be regarded as precious metal, much less unwrought precious metal. Mr. Russell, who appeared for the accused in this appeal, made this submission, but it was rejected by the magistrate in the following passage in his judgment:
>
> "'Major Russell observes with some force that if the ingot were derived from the smelting of old ornaments, there must be an intermediate stage of unwrought formlessness before the reforming of the metal; and that that intermediate stage could not be an object of attack. He cites two Rangoon cases to give point to this argument. But I am, for reasons already given, utterly unconvinced that such was the origin of the ingot. It is quite true that both Mr. Surridge and Mr. Curwen express surprise at the high fineness of the gold in the ingot, but neither is prepared to say that it necessarily comes from the smelting of an ornament.'
>
> "On a review of the evidence as a whole, and particularly that of the two expert witnesses, Mr. Curwen and Mr. Surridge, our opinion is that there is at least a doubt on this critical point in the case. It is a fair inference from the expert evidence that the exhibit presents features which, if it came from a mine, surprised the experts. Neither was prepared to say that it had come from a mine as distinct from its being a manufactured article and the words of Mr. Surridge, 'I have never yet come across mine gold of such high purity as delivered to a bank', are very significant.
>
> "The magistrate would appear to have been very much influenced by certain calculations he made in connexion with the accused's explanation that he had purchased ornaments from one Mawji Jeram. We have duly considered this aspect of the case and still remain of the opinion that the super and weightier evidence is that of the experts pointing to the improbability of the exhibit having come from a mine rather than from an ornament. There are of course suspicious features in the case, but on the other hand, besides the expert evidence, there is the evidence of the finding of a rough anklet lying beside exhibit P.1 which not merely confirms the doubt we have expressed as to the guilt of the accused but points to the operation witnessed by the police constable having been one of smelting ornaments."

It would appear that the gold the subject of the charge in that case was in the form of an ingot, in other words, a gold bar. The essence of the judgment appears to be that if the article the subject matter of the charge was, in fact, derived from the melting of ornaments, it is not "precious metal" and that unless the article the subject matter of the charge "came from a mine" it is not precious metal and is therefore outside the scope of the Ordinance.

The Ordinance was enacted in 1933. It may well be that even as recently as 1943 it was not unusual in Kenya for gold in the form of ore in its unrefined state to be deposited in banks. But it is clear from the extract of the magistrate's judgment which is quoted in the judgment in *R. v. Mohanlal Dharamdas* (1),

that the court was there concerned with a bar of gold and certainly not with gold in a form in which gold is ever found when it is taken from a mine unless it has been put through a refining process at the mine. With respect, therefore, I think that references in the judgment to gold which "came from a mine" were unnecessary for the decision in that case.

In the instant case there has been no suggestion, although it may well be the fact, that the exhibit had been derived from the melting of ornaments. Therefore, the question here is whether the words "in the unmanufactured state" mean metal (in this case gold) in the state in which it is found when it is removed from the earth, for instance in the form of a nugget which is composed of gold and other substances, before it is subjected to any process of refinement or reduction; or whether those words mean refined gold which, although it has been refined so that all substances other than gold have been removed and although it has been shaped into the form of a bar or ingot, has not been manufactured or fashioned into an article of ordinary industrial or artistic use. That question was not, in my opinion, answered in the judgment in *R. v. Mohanlal Dharamdas* (1), nor was it touched upon in the judgment of the Supreme Court in *Ratilal Bhura v. R.* (2), Kenya Supreme Court Criminal Appeal No. 120 of 1958 (unreported), although the judgment of the magistrate who tried that case at first instance dealt with the question at some length.

It will be observed that the definition of "unwrought precious metal" first of all requires that it should be precious metal, that is, metal in the unmanufactured state, in any form whatever, which is not manufactured or made up into any article of industry or of the arts. Now it seems to me that the words "in the unmanufactured state" must have a meaning which is distinct from

> "not manufactured or made up into any article of industry or of the arts"

and therefore that in the context the meaning of "in the unmanufactured state" must be metal (in this case gold) in the state in which it is found when it is removed from the earth before it is subjected to any process of refinement or reduction. I think that this is made clear by a consideration of the remaining part of the definition of "unwrought precious metal" where that expression is stated to include amalgam, slimes, slags, gold bearing concentrates (and so forth) which are all substances resulting from a process of refinement or reduction. The exclusion in the definition from the meaning of the expression "unwrought precious metal" of ore in situ seems to me also to confirm the meaning which I think should be given to the words "in the unmanufactured state" in the definition of "precious metal".

Was then the exhibit in this case proved to be unwrought precious metal?

In the first place I am of opinion that, because the evidence shows that it is a gold bar, it is not precious metal because, for the reasons I have given, it is not in the unmanufactured state. It is not, therefore, "precious metal in any form whatsoever". It may be that it is precious metal which has been smelted into the form of bullion. But I do not think that the evidence proved this. The verb "to smelt" in relation to metal means (according to Webster's New International Dictionary, 1909 Edn.) "to melt or fuse, as ore, to separate and refine the metal; hence to reduce; to refine". The Concise Oxford Dictionary (3rd Edn.), defines the verb to smelt as "extract metal from (ore) by melting; extract (metal) from ore by melting". It seems to me that the latter definition is the more correct one and that, particularly in the context of the expression "precious metal which has been smelted into the form of bullion", "smelted" means melted but does not involve refinement. In other words, I think that to bring an object within the meaning of the expression, the ore must have been melted but not been subjected to any other process of refinement which would

extract other metals or pyrites. On the other hand “bullion” is defined in the Concise Oxford Dictionary (3rd Edn.), as “gold or silver before coining or manufacture; solid or real gold or silver”. The second part of this definition in using the word “solid” may imply refinement to the state of pure gold; but I doubt whether this is in fact intended. But even if “smelted” means refined and “bullion” means refined gold, in my opinion in order to prove that an object is “precious metal smelted into bullion” and so bring it within the definition, it must be proved that the bullion was produced directly from precious metal by smelting. In my opinion the prosecution in this case did not prove this and therefore did not prove that the object is “unwrought precious metal”.

For these reasons the conviction is quashed and the sentence set aside. The fine will be refunded and the exhibit returned to the convicted person.

It may be that it would be very difficult to prove what I think it is incumbent on the prosecution to prove and obtain a conviction. But it seems to me that the Ordinance is intended to control the trading in and possession of gold, silver and platinum before it has been refined, derivatives of the refining process and unrefined gold and silver which has been melted into the form of bullion and is not intended to control the trading in or possession of any such metal in any other shape or form.

I have reached the conclusion to which I have come after considerable doubt. It is a matter of regret that an order made in revision is not subject to appeal. I suggest that the question of the meaning of the definitions is one of importance and that, when a suitable opportunity occurs, the Crown may wish to have the matter settled by a more authoritative decision than that which I have attempted to give.

Conviction quashed and sentence set aside. Order that the fine be refunded and the gold bar be returned to the accused.

For the Crown:
The Attorney-General, Kenya
D. S. Davies (Senior Crown Counsel, Kenya)

For the accused:
Sharma & Shah, Mombasa
B. R. Sharma

Chandubhai Hathibhai Patel v R
[1962] 1 EA 706 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 September 1962
Case Number:	619/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Criminal law – Theft – Vehicle on hire – purchase – Vehicle insured in hirer's name – Accident to vehicle – Claim on insurers – Hirer paid by insurers – Wreck sold by hirer – Evidence that hirer believed he was owner of vehicle – Instalments paid under agreement after accident – Whether accused guilty of theft – Penal Code, s. 276 (*K.*).

Editor's Summary

The appellant was convicted of theft of a motor vehicle and a sum of Shs. 10,000/-, both alleged to be the property of the Credit Finance Corporation Limited. The appellant had obtained a motor vehicle from the corporation under a hire-purchase agreement, and while the agreement was still current and some instalments of hire unpaid, the vehicle was damaged in an accident. As the car was insured by the appellant in his own name, the insurance company

paid him Shs. 10,000/- in respect of the damage. The appellant later sold the wreck without the knowledge or consent of the corporation. Under the agreement the appellant undertook to insure the car and to hold any money received under the insurance as trustee for the corporation and for making good any necessary repairs. The appellant's defence was that he understood the corporation had financed his purchase of the car, that he was thus the owner and entitled to sell the damaged vehicle provided he continued to pay the instalments under the agreement, that he intended to pay and in fact had paid a few instalments after the accident. There was evidence that the final details of the transaction were hurriedly arranged and that the appellant had signed the documents without reading them, and there was no proof that he ever received a copy of the agreement. The magistrate found, inter alia, that although the appellant did not read the documents before signature, he knew he was entering into a hire purchase agreement and that the appellant did not believe that he had an honest claim of right to the car. On appeal,

Held –

(i) the appellant was the owner of the sum paid by the insurance company and although he was contractually bound to pay or account for it to the corporation, that did not make the corporation the owner of the sum.

(ii) there was sufficient doubt whether the appellant knew the limitations of his rights in relation to the damaged car to require an acquittal on the charge of theft of the vehicle.

Appeal allowed. Convictions and sentences set aside.

Judgment

Rudd Ag CJ: read the following judgment of the Court:

The appellant appeals from convictions of theft contrary to s. 276 of the Penal Code on two counts which read as follows:

> "COUNT 1. Stealing, contrary to s. 276 of the Penal Code.
>
> "Particulars of Offence: Chandubhai Hathibhai Patel, on or about August 30, 1960, at Kisumu in the Central Nyanza District of the Nyanza Province, stole one Pontiac motor-car, registration number KGF 333, the property of the Credit Finance Corporation Ltd., Nairobi.
>
> "Count 3. Stealing contrary to s. 276 of the Penal Code.
>
> "Particulars of Offence, Chandubhai Hathibhai Patel, on or about July 14, 1960, at Nairobi in the Nairobi Extra-Provincial District stole Shs. 10,000/-, the property of Credit Finance Corporation Ltd., Nairobi."

In brief the gravamen of the charges was that the appellant, a farmer who had previously been a law clerk, had obtained the motor-car KGF 333 under a hire-purchase agreement. While that agreement was still current and some of the instalments of hire were unpaid, the car was damaged in an accident. It had been insured by the appellant in his own name. The insurance company ultimately paid the appellant Shs. 10,000/-, in respect of the damage to the car and, as far as the insurance company was concerned, the owner of the car was entitled to dispose of the wreck. The appellant sold it without the knowledge or consent of the Credit Finance Corporation Ltd., a finance company with whom he had contracted the hire-purchase agreement.

The first count relates to the conversion by sale of the damaged car and the other count relates to the

money which the appellant received from the insurance company.

The accident to the car occurred in February, 1960. The insurance money was received by the appellant in July, 1960, and the sale of the damaged car by the appellant took place in August, 1960. The appellant continued to pay the monthly hire up to February, 1961, when there was still Shs. 6,830/- to be paid to complete the hire and purchase of the car by the appellant under the agreement which he signed with the finance company.

The appellant's defence was that he understood the finance company had financed him in the purchase of the car, that he was thus the owner and that he was entitled to sell the damaged car; that he thought that he could sell it provided he continued to pay the instalments under the agreement, that he intended to pay those instalments but found some months later that he could not do so due to financial difficulty. Ultimately he became bankrupt.

The final arrangements of the terms on which the appellant obtained the car appear to have been rather hurried. The car was delivered to him and he was presented with three documents which he signed immediately they were presented to him without reading them. These documents were (1) a receipt for the delivery of the car from the finance company; (2) a request to the finance company to buy the car from its previous owners the Motor Mart and Exchange Ltd., Kisumu and to enter into a hire-purchase agreement with the appellant on the basis of information contained in a schedule on the back of the proposal; and (3) a hire-purchase agreement between the appellant and the finance company.

There was no proof that the appellant had ever received a copy of the hire- purchase agreement. The agreement contained a schedule of prices and hire similar to the schedule on the back of the proposal form. It showed the cash price of the vehicle as Shs. 26,500/-, a deposit of Shs. 8,500/- leaving a balance of cash purchase price of Shs. 18,000/- to which hire charges were added amounting to Shs. 2,430/- showing, therefore, a balance of hire of Shs. 20,430/- to which was added Shs. 20/- in respect of the option to purchase making Shs. 20,450/- in all payable by 16 monthly hire rentals of Shs. 1,135/- and one monthly hire rental of Shs. 1,155/- commencing January 15, 1960.

The hire-purchase agreement was in a fairly common form containing a number of clauses and conditions which the appellant did not read. It was an agreement for hire with an option to purchase exercisable only when all the hire rentals had been paid. Up to that time property in the motor-car remained with the finance company and according to the agreement the appellant had no right to sell or dispose of it. The contract also required the appellant to insure the car and to do necessary repairs. The appellant was to hold any money which he received under the insurance as trustee for the finance company and it was to be used in the first place to make good any necessary repairs. On due payment of the 16 hire rentals the appellant could exercise his option to purchase on payment of Shs. 20/- which, in point of fact, was included in the total amount of the 16 hire rentals.

As regards the sum of Shs. 10,000/- which the appellant received from the insurance company we do not see how this could amount to theft. The vehicle was insured in the appellant's own name alone. He was the only person who was entitled to receive the money from the insurance company. It was not paid by the insurance company on the basis that the appellant was to pay it to anyone else. In law the appellant was the owner of this money and though he was contractually bound to pay or account for it to the finance company that fact did not make the finance company the owner of that money. The finance company might have a right of civil action under the contract but that did not constitute it the owner of the money which the appellant received from the insurance company. The conviction on this ground must, therefore, be set aside and the appellant acquitted thereon.

As regards the first count there was undoubtedly in fact a wrongful conversion of the damaged car which took place when the appellant sold it back to the Motor Mart and Exchange Ltd., Kisumu. If, at that time, the appellant knew that the finance company was the sole owner of the car and that his rights in respect of it were only those of possession as a hirer until all the instalments were paid, then the conversion would in law be a fraudulent conversion and would amount to theft under the definition in the Penal Code for, in such case, he would be converting it with intent permanently to deprive the finance company of its property in the car. This would be the case even if the appellant intended to pay all the outstanding instalments as and when they became due.

But if the appellant did not know that the finance company was in fact the owner of the car at the time in question and did not know that he had no right to dispose of it and if he acted in good faith with the intention of paying the balance of the hire and believing that he was entitled to dispose of it on that basis then he would be entitled to be acquitted.

In our opinion the evidence in this case indicated that at the time the appellant sold the damaged car he genuinely intended to complete the purchase of it by paying the balance of the instalments as they became due and, accordingly, this was not a case in which the appellant intended to defraud by selling the car without intending to pay the balance of the instalments. In support of this view it is to be noted that when the appellant sold the damaged car back to the Motor Mart and Exchange Ltd., Kisumu, he negotiated the matter with an official of that company who was concerned in the original transaction and who knew that the car had been originally obtained by the appellant under the hire-purchase agreement with the finance company. This official said that he had forgotten that this was the case but the appellant would not know that he had forgotten.

The trial magistrate found that the appellant did not read the contract when it was presented to him for signature. It does not appear that the appellant ever received a copy of the hire-purchase agreement. The magistrate, however, found that the appellant knew the nature of the documents which he signed, knew that he was entering into a hire-purchase agreement with the finance company, that his rights were those of a hirer and that the finance company were the owners of the car. The magistrate held further that the appellant did not believe that he had an honest claim of right to the vehicle.

The difficulty we have in the matter is that although technically a hire-purchase agreement has the effect which the magistrate had in mind the term is sometimes used in colloquial language as including an agreement to purchase by instalments and in such a case the purchaser may have a right of ownership and can sell the car. In order to discover the full meaning and effect of such an agreement it is necessary to consider the terms of the contract and when the contract is signed perfunctorily in the presence of the agent of the owner of the car without being read by the other party and where no copy of the contract is supplied to the other party, clearly a doubt can arise as to whether that other party was fully aware of all the effects in law of the contract. Although the appellant speaks of his agreement with the finance company as being a hire-purchase agreement, it appears to be his defence and contention that the actual nature of the agreement was one of loan – that the finance company had financed him in the purchase of the vehicle, the result of which made him the owner of the vehicle but the company’s debtor.

In our opinion in view of the fact that several different kinds of agreements are colloquially called hire-purchase agreements and that such agreements can have different effects regarding the right of disposal of the subject of the agreement and in view of the fact that the terms and effect of the agreement in this case were never proved to have been explained to the appellant who did not read

the documents which he signed and did not have a copy of these documents, there is just sufficient doubt that the appellant did not know the limitations of his rights to require his acquittal on this count.

The convictions and sentences are accordingly set aside and the appellant is acquitted.

Appeal allowed. Convictions and sentences set aside.

For the appellant:
Bryan O' Donovan, Q.C. and *V. V. Patel*, Nairobi

For the respondent:
The Attorney-General, Kenya
G. A. Twelftree (*Ag. Senior Crown Counsel, Kenya*)

M N Tejani and others v The Official Receiver
[1962] 1 EA 710 (PC)

Division:	Privy Council
Date of judgment:	3 December 1962
Case Number:	15/1961
Before:	Lord Jenkins, Lord Guest and Lord Pearce
Sourced by:	LawAfrica
Appeal from	E.A.C.A. Civil Appeal No. 36 of 1960 on appeal from H.M. High Court of Uganda – Sheridan, J.

[1] Company – Winding-up – Public examination of officers – Report of official Receiver – Allegation therein of possible fraud by directors – Whether report must establish fraud prima facie and attribute to each director some particular fraud – Companies Ordinance (*Cap*. 212), *s*. 182 *and s*. 214 (*U*.).

Editor's Summary

The court made an order for the compulsory winding-up of a company of which the appellants were directors. Pursuant to s. 182 of the Companies Ordinance the Official Receiver reported to the court that in her opinion fraud had been committed by the four directors (including the appellants) since the formation of the company and the court ordered the appellants to attend for public examination as to the conduct of the business of the company and as to their conduct and dealings as directors. The appellants then moved for discharge of this order which the court refused and, on appeal to the Court of Appeal, their appeal was dismissed. On further appeal to the Privy Council it was submitted that the report should establish a prima facie case of fraud before any public examination of the directors could be properly held and that the Official Receiver in his report had failed to attribute to each appellant some particular

fraud.

Held – it is not necessary that the Official Receiver's report should establish a prima facie case of fraud before any public examination of the directors could properly be held nor is it necessary for the Official Receiver to attribute to each director some particular fraud in his report.

Appeal dismissed.

Case referred to in judgment:

(1) *In re Civil, Naval and Military Outfitters, Ltd*. [1899] 1 Ch. 215.

Judgment

Lord Jenkins: This litigation arise in the winding-up by the court of a company incorporated in Uganda on July 28, 1951, under the name of "Industrial Oil Products Corporation Limited" (hereinafter called "the company").

The winding-up order was compulsorily made on April 3, 1959. On October 22, 1959, the Official Receiver made a further report, as she was empowered to do under s. 182 of the Companies Ordinance (Cap. 212 of the Laws of Uganda) stating that in her opinion a fraud had been committed by four directors (including the appellants) since the formation of the company.

By s. 214 (1) of the Companies Ordinance:

> "Where an order has been made for winding-up a company by the court, and the Official Receiver has made a further report under this Ordinance stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since its formation, the court may, after consideration of the report, direct that that person, director, or officer shall attend before the court on a day appointed by the court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof."

On January 25, 1960, the High Court of Uganda (Bennett, J.), ordered the appellants to attend for public examination as to the conduct of the business of the company and as to their conduct and dealings as directors.

By an order of the High Court dated March 9, 1960 (Sheridan, J.), a motion by the appellants for the discharge of the order (apparently made ex parte) for the public examination of the appellants was dismissed, and leave was given to appeal to the Court of Appeal for Eastern Africa against the said order of dismissal.

The appellants duly availed themselves of such leave and their appeal was heard on July 27, 1960, before Sir Kenneth O'Connor, P., T. J. Gould, Ag. V.-P., and R. Windham, J.A., when the appeals of the two Tejanis and of Allibhai S. Kaba were dismissed, and the appeal of H. J. Ismail was allowed, the latter having, as it had turned out, no interest of any substance in any of the matters in question.

Final leave to bring the present appeal was granted by order of the court of Appeal for Eastern Africa dated May 4, 1961.

The main judgment in the Court of Appeal for Eastern Africa was delivered by the Acting Vice-President Mr. Justice Gould, and contains the following passages from which their lordships have derived much assistance in their consideration of the case:

> "I am, with respect, unable to accept what was said in *Re Medical Battery Co. Ltd*., as a full exposition of the meaning of the section under consideration then and here, and I think that the further report alleges fraud of a type covered by the section and that this ground of appeal must consequently fail.
>
> "The last ground is that the further report does not contain a prima facie case of fraud against each of the appellants. Sheridan, J., took the view that he could not discharge the order of Bennett, J., who was satisfied that the report warranted the public examination of the appellants. He did not think that the matter could be argued as a question of jurisdiction. With respect, I do not think this is quite the right approach. In *In re Great Kruger Gold Mining Co*. (supra) at p. 314, Vaughan Williams, J., pointed out that the order for examination would be discharged if it was made

without jurisdiction, or if it was oppressive or an abuse of the court's powers. It would, I think, be clearly oppressive if the order were made upon a report which did not, as required by *In re Barnes*, [1896] A.C. 146, contain allegations which would amount to a prima facie case against the individual to be examined. The order for examination is normally made ex parte and, in my opinion, upon an application for its discharge the judge hearing the application must be satisfied upon this question. In the case of *In re Civil, Naval and Military Outfitters, Ltd*. [1899] 1 Ch. 215, Wright, J., was the judge who heard the application for discharge. On appeal from his order Lindley, M.R., at pp. 232-3, said:

> 'Now, putting these facts together, is there not some basis for the opinion of the opinion of the Official Receiver "that fraud has been committed by Mr. Long in the promotion or formation of this company"? I do not say that this charge is proved in such a way as would authorise a court of civil jurisdiction to compel Mr. Long to make good the profits which he has made; still less do I say that there is such a charge as Mr. Long should be called upon to meet in a court of criminal jurisdiction. The question we have to consider is whether this report is so flimsy, so sketchy, so unfair that Wright, J., exceeded his jurisdiction, or exercised his discretion wrongly, in saying that Mr. Long ought to be publicly examined under the provisions of the Act. In my judgment, although the report might have been plainer (and I hope that on any future similar occasion the report will be plainer, so that we shall not have to waste a day in discussing the matter), this report gave Wright, J., ample jurisdiction to make the order, and that he exercised his discretion in the way in which I myself should have exercised it.'

In that case both Wright, J., and on appeal from him, the Court of Appeal, considered whether the further report sufficiently supported the opinion of the Official Receiver. That would appear to be the approach which ought to have been adopted in the present case in the Supreme Court.

"I have considered the further report in the present case and, without going into detail, am of the opinion that it clearly supports the opinion of the Official Receiver, in the cases of the appellants Musabhai Noormohamed Tejani, Ebrehim Noormohamed Tejani and Allibhai S. Kaba."

On the appellants' side points were sought to be made (inter alia) in regard to the need for a prima facie case to have been made out before any public examination could properly be held, and in regard to the failure of the Official Receiver to attribute to each appellant some particular piece of alleged fraud. Their lordships cannot accept these arguments. The need for a prima facie case must surely be satisfied by a prima facie case of the highly qualified kind which was regarded as sufficient by Lindley, M.R. in the *Civil, Naval and Military Outfitters, Ltd.'s* case (1), [1899] 1 Ch. 215, at pp. 232-3 (present record p. 53). As to the attribution of particular pieces of alleged fraud to particular individuals, this appears to their lordships to compel the conclusion that if a company with say three directors was carrying on some business in a fraudulent manner, none of the directors could be brought to book unless he or they chose to tell the Official Receiver which of the three directors had been the actual perpetrator or perpetrators of any of the fraudulent acts in question. This would be a reductio ad absurdum which their lordships find impossible of acceptance.

In conclusion, their lordships would only say that nothing they have heard in the course of the full argument presented to them has sufficed to satisfy their lordships that the order of Her Majesty's Court of Appeal for Eastern Africa dated July 17, 1960, was in any respect erroneous.

Their lordships will accordingly humbly advise Her Majesty that the appeal ought to be dismissed. The appellants must pay the costs of this appeal.

Appeal dismissed.

For the appellants:
Kingsford, Dorman & Co., London
Dingle Foot, Q.C. and *Peter Curry* (both of the English Bar)

For the respondent:
Charles Russell & Co., London
Nigel Warren, Q.C. and *Raymond Walton* (both of the English Bar)

The Commissioner of Income Tax v The Trustees of the Late B C Garland
[1962] 1 EA 713 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	27 October 1962
Case Number:	13/1962
Before:	Sir Ronald Sinclair P, Sir Trevor Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Kenya – MacDuff, J

[1] Appeal – Right of appeal – Income tax – Sale of estate – Apportionment of consideration in agreement for sale – Subsequent apportionment by Commissioner – Appeal to local committee – Further appeal to court – East African Income Tax (*Management*) *Act, 1952, s. 14 and the Second Schedule thereto, para.* 42 *– Income Tax Act*, 1952, *s.* 329.

[2] Income tax – Deductions and balancing charges – Capital expenditure on agricultural land – Sale of sisal estate – Purchase price apportioned in agreement for sale – Apportionment between movables and immovables – Subsequent apportionment between land and improvements by Commissioner – Whether Commissioner empowered to do so – Whether court can amend apportionement made – East African Income Tax (*Management*) *Act*, 1952, *s.* 14' *s.* 23, *s.* 25, *s.* 26, *s.* 46, *s.* 63, *s.* 77, *s. 78, s.* 87 *and Second Schedule, para.* 29, *para.* 31, *para.* 32, *para.* 33, *para.* 39 (1) *and para.* 42 *– East African Income Tax* (*Management*) *Act*, 1958, *Fifth Schedule – Income Tax Act*, 1952, *s.* 313, *s.* 314, *s.* 315, *s.* 326 *and s.* 329 *– Civil Procedure Ordinance* (*Cap*. 5), (*K*.).

Editor's Summary

The respondents in 1954 sold a sisal estate with growing sisal on it to D.H. Limited at a price of Shs.

1,700,000/-. The purchase price was apportioned in the sale agreement as to Shs. 300,000/- for movables and Shs. 1,400,000/- for immovables. In 1958 the Commissioner of Income Tax purported to apportion the purchase price between land, development, machinery, buildings, tractors, motor vehicles and agricultural implements and the respondents appealed against this apportionment to a local committee which upheld the apportionment. The respondents then appealed to the Supreme Court. In both appeals D.H. Limited participated as a party affected. The court held that the apportionment was not within the scope of para. 39 (1) of the Second Schedule to the East African Income Tax (Management) Act, 1952, and therefore was beyond the powers of the Commissioner, and in case that finding was held to be incorrect the judge, having heard evidence, made an order amending the apportionment. The judge also held that an appeal lay against an apportionment. On cross-appeals to the Court of Appeal the issues argued were whether an appeal lay, whether the Commissioner had power to make the apportionment and, if so, whether the judge was correct in amending the apportionment or amending it in the way or to the extent that he did.

Held –

(i) a right of appeal against the apportionment made by the Commissioner of Income Tax lay by virtue of para. 42 of the Second Schedule to the East African Income Tax (Management) Act, 1952.

(ii) under para. 39 (1) of the Second Schedule to the East African Income Tax (Management) Act, 1952, the Commissioner of Income Tax had power to make the apportionment between land and developments.

(iii) subject to a slight re-apportionment of the sum allocated by the judge to the value of developments, his amendments to the apportionment should not be disturbed.

Appeal of the Commissioner allowed. Cross-appeal of the trustees allowed in part.

Case referred to in judgment:

(1) *Furtado v. City of London Brewery Co. Ltd*., 6 T.C. 382.

(2) *Queensbury Industrial Society Ltd. v. William Pickles* (1865), L.R. 1 Ex. 1.

(3) *Whitney v. Inland Revenue Commissioners,* [1926] A.C. 37.

(4) *Inland Revenue Commissioners v. Pilcher,* [1949] 2 All E.R. 1097; 31 T.C. 314.

(5) *Ralli Estates Ltd. v. Commissioner of Income Tax*, [1958] E.A. 165 (C.A.).

(6) *B.A. Sisal Estates Ltd. v. Commissioner of Income Tax* (1959), 3 E.A.T.C. 27.

(7) *Fitton v. Gilders & Heaton*, 36 T.C. 233.

The following judgments were read:

Judgment

Sir Trevor Gould JA: In the year 1954 the trustees of B. C. Garland deceased (hereinafter referred to as "the trustees") pursuant to an agreement entered into earlier that year with one John Yakas, assigned to Dorchester Hotel Ltd. (hereinafter referred to as "Dorchester Hotel") as nominee of Yakas, a sisal estate, with growing crops of sisal upon it. The total price of Shs. 1,700,000/- was apportioned in the agreement as to Shs. 300,000/- for movables and Shs. 1,400,000/- for immovables. By a notice dated December 19, 1958, the Commissioner of Income Tax (hereinafter referred to as "the Commissioner") purported to apportion the consideration as follows:

"Land	Shs. 324,000
Developments	840,000
Machinery	218,500
Buildings	141,000
Tractors & Trailers	129,000
Motor Vehicles	46,000
Agricultural Implements	1,500
	Shs. 1,700,000"

The trustees appealed against this apportionment to a local committee which upheld the apportionment. The trustees then appealed to the Supreme Court of Kenya – in each appeal Dorchester Hotel participated as an affected party. In the Supreme Court the learned judge held that the apportionment in question did not come within the scope of para. 39 (1) of the Second Schedule to the

East African Income Tax (Management) Act, 1952 (hereinafter referred to as "the 1952 Act") and therefore was beyond the powers of the Commissioner. In case that finding was held to be incorrect the judge, having heard evidence, made an order amending the apportionment. It was also in issue in the Supreme Court whether an appeal lay against an apportionment, and the learned judge held that it did.

The appeal to this court is by the Commissioner, who challenges the finding of the learned judge that he had no power to make the apportionment. There are, however, cross-appeals by both the trustees and Dorchester Hotel. The trustees claim in the first place that there was no right of appeal conferred by the 1952 Act, against an apportionment. This, at first sight, is confusing, as the trustees were the appellants before the local committee and the Supreme Court, but it appears that it is an attitude they have adopted throughout the proceedings, which were brought with the purpose, inter alia, of testing that question. Alternatively the trustees in their cross-appeal challenge the apportionment as amended by the learned judge and contend that it should be varied further in their favour. On the other hand Dorchester Hotel, in its cross-appeal contends that the apportionment should not have been varied at all.

There were thus three issues argued before this court; first, whether an appeal lay, secondly, whether the Commissioner had power to make the apportionment and (if so) thirdly, whether the learned judge was correct in amending the apportionment or amending it in the way or to the extent that he did. I will take first the question of the right of appeal.

Though the 1952 Act, has long since been replaced by the East African Income Tax (Management) Act, 1958, and the notice of apportionment was given in that year, it has not been contended by counsel for any party, that by virtue of the transitional provisions contained in the Fifth Schedule to the 1958 Act, any of the provisions of that Act are relevant to the present question. I therefore accept that as the position.

In the 1952 Act, the general provisions as to appeal are contained in s. 77 and s. 78. By the former a right of appeal is given to any person aggrieved by an assessment made upon him against such assessment, to a local committee appointed for the area in which the person assessed resides. Section 78 confers a right of appeal to the Supreme Court upon any person so aggrieved (and if he has appealed to a committee provided that he is aggrieved by its decision) and the appeal in this case also is "against the assessment". The Commissioner may also appeal if he is dissatisfied with the decision of the committee, in this case against "the decision". By the same section any further appeal is limited to questions of law or mixed law and fact. There are a number of instances in which a particular right of appeal has been conferred. Section 23 empowers the Commissioner to give directions in transactions designed to avoid liability to tax and by sub-s. (3) there of a person aggrieved by the direction "may appeal as if an assessment to tax had been made upon him". Similar wording is used in s. 46 (6) dealing with double taxation relief. There is a variation from the general system in s. 63 which empowers a person aggrieved by a notice requiring him to keep books etc., to appeal to a judge for its withdrawal or amendment. Under s. 87 a person aggrieved by a decision in relation to refund of tax, may appeal "as if he were aggrieved by an assessment made upon him".

Among the deductions from income permitted by s. 14 of the 1952 Act, are those due under the provisions of the Second Schedule, which in Parts 1 – V enumerates deductions which may be made in relation to various types of expenditure in relation to various types of enterprises. Paragraph 39 (1) and para. 42 of the Schedule occur in Part VI "Miscellaneous Provisions", and are as follows:

"39(1) Any reference in this Schedule to the sale of any property includes a reference to the sale of that property together with any other property and, where property is sold together with other property, so much of the net proceeds of the sale of the whole property as, on a just apportionment, is properly attributable to the first-mentioned property shall, for the purposes of this Schedule, be deemed to be the net proceeds of the sale of the first-mentioned property, and references to expenditure incurred on the provision or the purchase of property shall be construed accordingly."

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"42(1) Where under any provisions of this Schedule, any sum falls to be apportioned and, at the time of the apportionment, it appears that it is material as respects the liability for tax (for whatever year of income) of two or more persons, any appeal from the decision of the Commissioner under the provisions of this Act as to the manner in which the sum is to be apportioned shall be determined for the purposes of the tax of all those persons–

(*a*) in a case where the same local committee has jurisdiction with respect to all those persons, by that committee, unless all those persons agree that it shall be determined by a judge;

(*b*) in a case where different local committees have jurisdiction with respect to those persons, by such of those bodies as the Commissioner may direct unless all those persons agree that it shall be determined by a judge and any such local committee or judge shall determine the question in like manner as if it were an appeal against an assessment to tax, and the provisions of this Act relating to such an appeal shall apply accordingly with any necessary modifications:

Provided that all the said persons shall be entitled to appear and be heard by the local committee, or a judge which is to make the determination, or to make representations to them in writing.

"(2) This paragraph applies in relation to any determination, under either of the two last preceding paragraphs, of the price which property would have fetched if sold in the open market as it applies in relation to apportionments."

The power of apportionment conferred by para. 39 is one, the exercise of which may be deemed necessary by the Commissioner in relation to a number of provisions in the earlier parts of the Schedule. An apportionment, however, is not an assessment and therefore no appeal lies against it under the general appeal provisions contained in the 1952 Act, to which I have referred above. The right there conferred upon a person aggrieved by an assessment is to appeal against that assessment. None of what I have called the "particular" rights of appeal are applicable. In the absence of what is enacted in para. 42 I would have no doubt that an appeal against an assessment would entitle the appellant to attack an apportionment which was reflected in the assessment, but that, though it is an associated matter, is not what is in question here.

There being no provision for an appeal against an apportionment as such elsewhere in the 1952 Act, the right to bring such an appeal (if it arises at all) must be drawn from the provisions of para. 42 of the Second Schedule. In the Supreme Court the learned judge, having compared para. 42 with the corresponding section in the English legislation (s. 329 of the Income Tax Act, 1952), reached the following conclusion:

"In so far as it does not say, in so many words, in para. 42(1) that one of the persons affected by the apportionment may appeal, the paragraph is defective. If the paragraph is to be given any meaning or any effect it

> requires that the right to appeal must be read into its meaning. This, I think, is the proper interpretation to be placed on the paragraph, that implicit in its terms is the fact that an appeal lies."

It is common ground that there is a printing error in para. 42 (1) of a kind which appears elsewhere in the Second Schedule. It is agreed that all the words of the sub-paragraph which follow the phrase "determined by a judge" in para. 42(1)(*b*) have relation to both (*a*) and (*b*) and not to (*b*) exclusively.

Counsel for the trustees submitted that the paragraph was purely procedural; its necessity arose from the fact that the interests of more than two parties (the Commissioner and the potential taxpayer under an assessment) were involved. Where there is a sale of property there is a vendor and a purchaser and both are concerned, from the point of view of taxation, with the apportionment of purchase moneys between deductible and non-deductible items under the provisions of the Schedule. The paragraph was necessary to enable all parties interested to have the question determined as between all of them, whereas without it (say) a vendor, having been assessed and being aggrieved, might contest the matter on appeal while his purchaser, as yet unassessed, would have to stand by, and would not be bound by the result.

This I agree, is at least one of the objects of the paragraph, but whether it is the sole object is quite another question the answer to which depends upon the wording employed. Counsel for the Commissioner relied upon the use of the words

> "any appeal from the decision of the Commissioner under the provisions of this Act as to the manner in which the sum is to be apportioned".

He pointed out that it was the "decision" which was referred to as appealable, and submitted that the creation of a right to appeal must have been intended.

Paragraph 42 is modelled upon s. 329 of the Income Tax Act, 1952 (England) which counsel for the trustees concedes creates a right of appeal. He relied, however, upon a difference in wording in the early part of the section, which provides that, "any question which arises as to the manner in which the sum is to be apportioned shall be determined . . ." by certain persons. The local paragraph at the like stage refers to "any appeal . . . under the provisions of this Act". That was a reference to the provisions of the Act other than para. 42, and in the result the appeal against the "decision" was the right to attack the decision in an appeal against assessment.

A right of appeal must be specifically given – "expressly" is the word used in the judgment in *Furtado v. City of London Brewery Co. Ltd.* (1), 6 T.C. 382 at p. 390. I do not think that this means that the legislature must adopt any particular form of words but that it is sufficient if, upon ordinary principles of construction, the intention can be seen. In the present case it is of no moment that the particular provision falls within a Schedule to the Act, that is just as much a part of the Act as any other and, as has been seen, particular provisions as to appeal are scattered throughout the enactment. I think the intention to create a right of appeal is evident. Manifestly what is in the mind of the legislators is an attack upon a decision of the Commissioner as to apportionment. The question involved in the attack is to be determined "in like manner as if it were an appeal against an assessment of tax". To my mind that is a clear indication that something other than an appeal against an assessment to tax is meant; another proceeding, in the nature of an appeal, but against a decision, not an assessment. The determination of the question *as if* it were an appeal against assessment rules out its being itself an appeal against assessment or part of one. That construction is in accord with the inclusion in the paragraph of the words ". . . at the time of the apportionment, it appears . . .". That imports

a notion of something which may be done at that time, without the necessity of waiting until an assessment is made so that an appeal can be brought in the ordinary way; I think that one of the objects of the paragraph is to avoid such unnecessary circuity. I would therefore resolve this issue by saying that in my opinion the trustees had a right of appeal against the apportionment. I do not think that the question of duplicity of appeals is important for anything decided in the appeal against apportionment would be res judicata in an appeal against assessment.

Counsel have taken no point that, if para. 42 is to be construed as conferring a right of appeal against an apportionment, it is an appeal limited to the committee or judge, as the case may be, mentioned in (*a*) and (*b*) of sub-para. (1). I think they are correct in this. The words preceding the proviso in that sub-paragraph are not in terms limited to procedural provisions and embrace all provisions relating to appeals against assessment. That, in my view, means that an appeal against apportionment is to be treated in exactly the same way as if it were an appeal against assessment, subject only to the limitation contained in para. 42, that the parties may not go to a judge in the first instance unless they all agree. If that were not so it would follow that if the parties went to a local committee (as they must in the absence of agreement) the decision would be final, whereas, if by agreement they went to a judge, there would be a further appeal to this court except on questions of pure fact, by virtue of the provisions of the Civil Procedure Ordinance (Cap. 5), of the Laws of Kenya, 1948, and s. 78 (10) of the 1952 Act. In my opinion therefore the appeal to the Supreme Court in this case was rightly entertained.

I pass now to the question whether the Commissioner had the power to make the apportionment under appeal. It is common ground that the Commissioner purported to act under power derived from para. 39 (1) of the Second Schedule which is set out above. It is not of course argued that the paragraph does not confer a power of apportionment but the bone of contention is whether the power is wide enough to enable the Commissioner to sever real property into component parts and to assign a value to each. In particular the issue here is whether there can be an apportionment between the land itself and the value of its development as a sisal bearing estate. In the apportionment made by the Commissioner, which is set out above, he attached a value of Shs. 840,000/- to “Developments” and it is contended that he had no power to do this – the learned judge in the court below upheld that contention.

Paragraph 39 is in Part VI of the Second Schedule and applies to the whole of the Schedule. To ascertain the meaning of the word “property” as used in the paragraph, it is therefore necessary to consider the function of the paragraph as part of the machinery of the Schedule as a whole. The Schedule itself may be described in general terms as embodying a scheme whereby certain expenditure which is in its nature capital expenditure may be deducted from income for taxation purposes. In certain circumstances, such as sale of income producing property, a system of balancing charges or deductions becomes applicable in order (for example) that a taxpayer may not retain the benefit of deductions for expenditure for which he has been reimbursed, but will receive or retain deductions equal to his net expenditure.

Part I of the Schedule deals with expenditure on industrial buildings or structures; there is provision for an initial deduction of a proportion of the cost and for annual deductions. On sale, or if the interest of the taxpayer otherwise terminates, there may be a balancing charge or deduction. Part II makes similar provisions in relation to the cost of machinery or plant. Part III deals with mining enterprises and provides for deductions in respect of specific types of capital expenditure, excluding others. There is provision for balancing charges and deductions and for deductions by purchasers. Part IV of the

Schedule is the one providing for deductions in respect of capital expenditure on agricultural land and consequently the one with which the court is particularly concerned on this appeal. Paragraph 29 provides, inter alia, that a person who incurs capital expenditure on the clearing and planting of agricultural land (in crops such as sisal) is entitled to a deduction, in the computation of his total income for the year in which the expenditure was incurred, equal to the amount of that expenditure. He has an option to take instead, annual deductions spread over a period, but it is common ground that the option was not exercised in the present case; the expenditure was deducted in the years it was incurred which is known as the "as and when" basis, and it follows that the trustees had received the benefit of the total deductions prior to the sale.

Paragraph 31 provides for balancing charges and deductions. The relevant portions are as follows:

"31(1) Where any capital expenditure to which this Part of this Schedule applies has been incurred (whether before or after January 1, 1951), on any land and any of the following events happen –

(*a*) the relevant interest in the asset upon which the expenditure was incurred is sold; or

(*b*) such interest, being an interest depending on the duration of a concession, comes to an end on the coming to an end of a concession; or

(*c*) such interest, being a leasehold interest, comes to an end otherwise than on the person entitled thereto acquiring the interest which is reversionary; or

(*d*) the permanent or semi-permanent crops are destroyed or ceased permanently to be productive, a deduction or charge (in this Part of this Schedule referred to as 'a balancing deduction' or 'a balancing charge') shall, in the circumstances mentioned in this paragraph, be made to, or as the case may be, on, the person entitled to the relevant interest immediately before that event occurs in computing his total income for the year in which that event occurs:

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"(2) Where there are no sale, insurance, salvage or compensation moneys, or where the residue of the expenditure as at the time of the event exceeds those moneys, a balancing deduction shall be made and the amount thereof shall be the amount of the residue or, as the case may be, the excess thereof over the said moneys.

"(3) If the sale, insurance, salvage or compensation moneys exceed the residue, if any, of the expenditure as at the time of the event, a balancing charge shall be made and the amount on which it is made shall be the amount equal to the excess, or, where the residue is nil, to the said moneys.

"(4) Notwithstanding anything in the preceding provisions of this paragraph contained, in no case shall the amount on which a balancing charge is made on a person in respect of any expenditure to which this Part of this Schedule applies exceed the aggregate of the following amounts allowed in respect of that expenditure, that is to say –

(*a*) any deductions allowed under the provisions of the repealed enactments in computing the total income of that person for any year; and

(*b*) any deductions allowed under the provisions of this Part of this Schedule in computing the total income of that person for any year."

Paragraph 32(*a*) is relevant:

> "32. For the purposes of this Part of this Schedule the residue of the expenditure shall –
>
> (*a*) where the expenditure is deducted in computing the total income of the person who incurred it for the year in which it was incurred, be nil;"

The position of the purchaser is regulated by para. 33:

> "33. Where a person sells any asset representing expenditure to which this Part of this Schedule applies and the buyer of that asset buys it for the purposes of permanent cultivation, the buyer shall be deemed to have incurred on the asset at the time of the sale, expenditure to which this Part of this Schedule applies equal to the price paid for the asset or the expenditure to which this Part of this Schedule applies which the seller incurred on that asset, whichever is the less."

It was the submission of counsel for the Commissioner that in order to render para. 31 (3) and para. 33 workable, it was essential that the element representing the development expenditure in the total sale price must be known. He submitted that the word property, in para. 39, was not used in any technical sense; it was a word used in many statutes and was defined according to the requirements of the particular enactment. He referred to the words of Pollock, C.B., in *Queensbury Industrial Society Ltd. v. William Pickles* (2) (1865), L.R. 1 Ex. 1 at pp. 4-5:

> "Now, *property* is not a term of art, but a common English word, which must be taken in an ordinary sense, and any ordinary person would certainly think it strange, if he were told that a debt due to him was not part of his property. And this meaning is evidently required by the Act, since the contrary construction would be followed by the absurd consequence, that this society, although it could continue actions already pending, yet has no power to initiate proceedings for a similar cause of action."

Counsel contended that the asset of sisal development may be termed property and can therefore be the subject of apportionment. If not, the sections relating to balancing charges were largely ineffective. He referred also to the words of Lord Dunedin, in *Whitney v. Inland Revenue Commissioners* (3), [1926] A.C. 37 at p. 52:

> "A statue is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

Counsel sought to distinguish the case of *Inland Revenue Commissioners v. Pilcher* (4), 31 T.C. 314, which was mentioned by the learned judge in the Supreme Court, though it is difficult to ascertain the weight he attributed to it. In counsel's submission this case (and others following it in East Africa) held only that the purchase price of a capital asset could not be split up so as to treat part of it as a revenue deduction. In the present case there was no question of a capital payment between the component parts.

On the other hand it was submitted by counsel for the trustees that the normal meaning of the word "property" used in para. 39 was such as to exclude the distinction contended for by the Commissioner. The phraseology used was more referable to two properties such as Whiteacre and Blackacre and the meaning to be ascribed to the word in para. 39 was "property capable of severance". He referred to the origin of the paragraph in s. 326 of the Income Tax Act, 1952 (England), and pointed out that s. 313, s. 314 and s. 315 of that

Act are totally different from para. 29, para. 30, para. 31, para. 32 and para. 33 of the Second Schedule – nowhere is there any provision for allowance for capital expenditure relating to permanent or semi-permanent crops. It would be strange if the words of s. 326, transferred to para. 39 should cover something not contemplated by the English Act. I pause here to say I am unable to agree with this argument. The task of this court is to construe para. 39 as it stands in relation to the whole Schedule. Part IV of the Second Schedule is consistent in pattern with the parts dealing with other forms of capital expenditure and the fact that its provisions relating to crops go beyond those of the corresponding English enactment, does not appear to me in any way relevant.

Counsel relied upon the case of *Inland Revenue Commissioners v. Pilcher* (4), which, he claimed, decided that what was on the land was part of the land. That case was followed with regard to sisal in *Ralli Estates Ltd. v. Commissioner of Income Tax* (5), [1958] E.A. 165 (C.A.) and in *B.A. Sisal Estates Ltd. v. Commissioner of Income Tax* (6) (1959), 3 E.A.T.C. 27. Counsel pointed to *Fitton v. Gilders & Heaton* (7), 36 T.C. 233, in which an apportionment was made between a lease of business premises and the dental equipment appertaining thereto, as an example of the categories of property to which the apportionment section aptly applies. He submitted these were properly treated as separate items of property. Counsel's answer to the contention that para. 31 (3) could not work without a valuation of the development asset was that para. 31 (4) had been overlooked, in relation to the reference to "where the residue is nil" in para. 31 (3).

I will deal with this last point at once, and must say, with respect, that I am unable to follow it as an argument. Where the full deductions have been made, the residue of the expenditure is nil; if the taxpayer then sells the estate and recovers (in respect of development) as much as or more than the total expenditure, then by sub-para. (4) the balancing charge cannot exceed the total of the deductions which he has received. In that one case it might be said that apportionment of the sale price would be unnecessary as the balancing charge is fixed. But even in that case would not the Commissioner require to ascertain the proportion of the price attributable to development in case it was less than the total of the deductions? If it were, the balancing charge imposed by the Commissioner would be limited to "the said moneys" i.e. the price, under sub-para. (3). In all cases of sale where there is a residue of expenditure at the time of sale it is essential that the Commissioner should know the sale price of the asset. If the latter falls short of the residue, then the taxpayer is entitled to a balancing deduction equal to the difference. If the sale price is exactly equal to the residue there is no adjustment needed. If the sale price exceeds the residue there will be a balancing charge equal to the difference, subject to the limitation in sub-para. (4). In virtually every instance, therefore, it would be necessary for the Commissioner to know or ascertain the amount of the sale price of the estate attributable to the development asset.

I come now to the consideration of the other questions debated by counsel. The quotation of judicial authority has been limited (except upon general principles of construction) to the case of *Inland Revenue Commissioners v. Pilcher* (4), and the East African cases in which that decision was followed. The question in *Pilcher's* case, was simply whether the purchaser of a freehold estate upon which was a cherry orchard with a ripening crop, could treat the value of the ripening cherries (paid as part of the total purchase price) as a revenue expense to set-off against the selling price of the picked cherries. It was held that the cherries had not been the subject of a separate sale and were part of the land, with which they formed a single capital asset. The case is quoted in Halsbury's Statutes of England (2nd Edn.), Vol. 31 at p. 136, as an example of the general principle that capital expenditure cannot be attributed to revenue. There can be no quarrel with the principle there accepted, but it appears to me

to have no significance in relation to the problem before this court. That has no connection with the basic distinction between capital and revenue, for the expenditure with which Part IV of the Second Schedule is concerned is therein described as capital expenditure, and the Commissioner is only concerned to conform to the provisions of the Schedule, which indicate the extent to which and the manner in which that capital expenditure may be set-off against income. It is a question entirely distinct from whether fruit or crops form part of the land – the Commissioner is not in fact dealing with the crops but with the asset (not a fictitious one) represented by the expenditure involved in clearing the land and planting the crops. The value attributed to that asset upon sale is something which he must know, if he is to make a proper assessment, and I am unable to see, in the fact that, in quite another context, land and crops are regarded as one, any impediment to the use of the machinery provided in the Second Schedule for the acquisition of that necessary information, or any reason for placing a limit upon its applicability.

It is necessary therefore to attempt to ascertain the meaning intended by the legislature to be attached to the word "property" in para. 39 by construing it in the context of the Schedule. I accept the submission of counsel for the Commissioner that it is not a term of art and that it can have a wide meaning according to the requirements of the context. "Property" must be capable of including an asset, and the development of land by clearing and planting is an asset – a visible asset. It can be said that it is only part of a larger asset, the land itself; it could hardly be sold separately. That may be so, and it is not I think, an argument based upon the same principle as that in *Inland Revenue Commissioners v. Pilcher* (4). Paragraph 39, however, speaks of property being sold "together with other property" and has no application where that is not the case. The fact that the land and the development must be disposed of together (if that is so) does not therefore present an insuperable objection to the meaning contended for by the Commissioner if the Schedule requires it. Whether it does, depends, in my opinion, upon whether the Schedule tends to treat the development as a separate asset and whether the relevant provisions of the Schedule would prove unworkable upon another construction.

I have already dealt with para. 31 and pointed out that sub-paras. (2) and (3) cannot function (unless perhaps in exceptional cases) unless the Commissioner has the means of ascertaining the sale price of the development asset. Counsel for the trustees contended that if the parties themselves made the apportionment the Commissioner could act upon it – otherwise he was powerless. Why should this be? Incidentally, if the parties make the apportionment they are dividing the total price between two assets, and I see nothing incongruous in describing those assets as property. In sub-paras. (2) and (3) the development is treated as a separate asset – the reference to "sale . . . moneys" is to the price to be received on sale of that asset only. Similarly in para. 33 the reference is to "any asset representing expenditure". In order that this paragraph also may be made to function, the Commissioner must know the price attached to that asset: otherwise how could he decide which was the less, the price paid or the expenditure?

In Part I of the Schedule, which deals with industrial buildings, paras. 4 (2) and (3) are identical with paras. 31 (2) and (3). If land and buildings were sold together a similar apportionment would be required (and one which would not, I think, fall within the provisions of para. 11 (4)). It is conceivable that an industrial building might be capable of severance and separate sale but in the majority of cases it would not; it would be as much a part of the soil as planted crops. Nevertheless the amount of the total purchase price attributable to it would have to be ascertained for the purpose of the Schedule. There would be a similar requirement under para. 5 (5) to ascertain an amount to be written off.

The same arguments apply with less force to the case of machinery and plant, which is of its nature more likely to be detachable or detached from the soil.

In Part III, which relates to mining enterprises, the deductible capital expenditure can include expenses in respect of matters as intangible as searching for mineral deposits. Yet the expenditure is referred to throughout as an "asset". In para. 25 (6) and para. 26 (2) which relate to the position of the buyer of those assets, it is clearly essential that the Commissioner should be in a position to ascertain the price paid for them. Most of such sales would be effected in conjunction with other property, and unless the Commissioner can apportion the price under para. 39 I can see no other method whereby he can obtain the required information.

On my reading of the Second Schedule as a whole, I consider that a clear pattern emerges of treating the result of the capital expenditure of various classes as assets, quite distinct from the other assets (or property) to which they may be attached or of which they form part. There are many instances in which the sale price of the assets representing such expenditure is required to be known, and in which, if the parties make no apportionment, the Commissioner may do so only if he is so empowered by para. 39. The word "property" can sustain a meaning wide enough to include any form of commercial asset and, in my judgment, the Schedule as a whole indicates an intention that it shall here be construed so as to include the assets representing capital expenditure referred to therein. For these reasons I consider that the Commissioner had power to make the apportionment.

In discussion of the two questions of law so far dealth with I have referred to the argument of counsel for the Commissioner, and, in so doing, intended no disrespect to the argument of counsel for Dorchester Hotel, which supported that of the Commissioner on both points. On the third issue the contest is between the trustees, on the one hand and Dorchester Hotel, on the other; the Commissioner has made no submission on this question, which is whether the apportionment made by the Commissioner, as varied in the Supreme Court, is a just apportionment.

For the purposes of this part of the case it is necessary to approach the facts more closely. Some of them are not in dispute. On July 1, 1954, the trustees gave John Yakas, who was acting for Dorchester Hotel, an option to purchase the sisal estate in question for Shs. 1,700,000/-, apportioned as to Shs. 300,000/- for movables and as to Shs. 1,400,000/- for immovable property including buildings and permanent improvements. All growing crops were included in the sale and, of course, in the allocation of Shs. 1,400,000/- to immovables. By an assignment dated December 31, 1954, the immovable property was assigned by the trustees to the Dorchester Hotel for a consideration of Shs. 1,400,000/-. The sale was made subject to an agreement to exchange part of the land (1,800 acres) for neighbouring land (2,000 acres) belonging to Lomolo Ltd. The important aspect of that matter is that upon the land acquired from Lomolo Ltd. there was no sisal, whereas sisal was growing upon a portion of the 1,800 acres parted with. There appears to be no dispute that the result of the transaction was that Dorchester Hotel acquired 5,669 acres, but apart from that fact, the assertions of fact contained in para. 4(*a*), (*b*) and (*c*) of the trustees' statement of facts were in issue. That portion of the paragraph reads:

> 4. At the date of the transaction the acreage of Land Reference No. 478 was approximately 5,348 acres and carried sisal as follows:
>
> (*a*) approximately 3,000 acres planted in 1927/33, of which approximately half was destroyed by fire in 1949;
>
> (*b*) approximately 1,500 acres replanted over the period 1951-1954 inclusive at a computed cost of £6 10s. 0*d*. per acre;

(*c*) as a result of the exchange transaction referred to in para. 3 hereof the total area of land acquired by Dorchester Hotel Limited was 5,669 acres and approximately 750 acres of sub-para. (*a*) sisal and approximately 150 acres of sub-para. (*b*) sisal were transferred to Lomolo Limited leaving –

(i) 750 acres of sisal planted in 1927/33;

(ii) 1,350 acres of sisal planted in 1951/54;"

The apportionment made by the Commissioner of the total price (Shs. 1,700,000/-) has already been set out, and there has not been any attack upon the figures allocated to machinery, buildings, tractors and trailers, motor vehicles or agricultural implements. The two controversial items are Shs. 324,000/- for land and Shs. 840,000/- for developments. Sub-paras. (*c*) and (*d*) of para. 6 of the trustees' statement of facts contain matter in the nature of pleading or argument and it may be necessary to refer to them. They read:

"(*c*) The foregoing apportionment results in a value of less than £3 per acre being placed on land whereas the appellants will contend that the just and reasonable value is £5 per acre.

"(*d*) The foregoing apportionment results in a value of approximately £20 per acre being placed on Development when the appellants will contend –

(i) that the acreage planted in 1927/33 before the inception of income tax must be ignored for apportionment purposes; and

(ii) that the just and reasonable value of the sisal planted in 1951/54 is £6 10s. 0*d*. per acre."

The passage of the judgment in the Supreme Court which deals with this aspect of the matter is as follows:

"The third ground of appeal is that 'the said apportionment, if valid has not been made on a just and reasonable basis'. In the event that the respondent has power to apportion the value of 'land' or 'real property' or 'immovables' into land, improvements and buildings the appellant contends that the value assessed against the land itself is too low and that assessed against the improvements is too high. There was a great deal of conflicting evidence called by the appellant and Dorchester Ltd. as to the cost of clearing and planting land to sisal and how much land was under permanent cultivation to sisal at the time of the sale. I would accept the expert evidence of Mr. Mortlock as to the value of unimproved land on this area as at 1954, when he places it at Shs. 100/- per acre. I would also accept with slight reservation Mr. Yakas' admission that prior to the date of sale he would accept Mr. Koen's figures for clearing and planting at Shs. 93/90 per acre. This I think, in view of other evidence to be something on the low side bearing in mind the quotation of the construction company in 1946 at Shs. 120/- per acre, the estimates, somewhat exaggerated, of Mr. Smith and the cost given by Mr. Yakas. It is for comment that no witness, whether for appellant or Dorchester Ltd. produced to the court from their books accurate figures of actual cost. There is some conflict in the acreage of sisal at the time of sale. Here I think Mr. Yakas' final admission of 2,350 acres was the more acceptable. Taking all the evidence into consideration Mr. Bechgaard's submission that the land, without improvements, should have been valued at Shs. 100/- per acre is, I think, better supported by the evidence. This then will have the effect of reducing the figure for improvements more in accord with the average evidence of cost of clearing, planting and cultivation. I would therefore allow the appeal on this ground to the extent of amending the apportionment

in respect of land to Shs. 566,900/- and in respect of improvements to Shs. 597,100/-."

In that passage the references to "the appellant" are references to the trustees. In their notice of cross-appeal in this court the trustees, on this third issue, relied upon two grounds, the first of which (as corrected at the hearing) is as follows:

". . . the learned judge erred:

(*a*) In interpreting the evidence of Mr. Yakas to constitute admissions as to an acreage of 2,350, instead of 1,800 or 2,100, and thereafter valuing the improvements on his alternative finding at Shs. 597,100/- giving an average figure of over Shs. 254/- per acre on 2,350 acres, whereas, the agreed acreage was 2,100 acres, including 750 acres planted in 1927/33 and the admitted development figure was Shs. 93/90 per acre yielding, subject to para. (*b*) hereof, a correct development expenditure total of Shs. 197,190/- as against Shs. 597,100/-."

How much of this can be said to involve questions of mixed law and fact, and how much is pure fact, and therefore not the subject of appeal to this court, is debatable. The challenge to the finding of the judge upon the question of the acreage under sisal seems essentially one dependent upon the evidence, but it is said that he misdirected himself when he said that 2,350 acres was Mr. Yakas' "final" admission. Mr. Yakas in evidence had stated that there were 2,800 acres in sisal. Under cross-examination he would not agree that there were only 2,100 acres in sisal. Then he said that he had not taken the Lomolo exchange into account, but had included 450 acres over which cutting rights had been retained. The learned judge's note of his evidence continues:

"Hence 2,800 acres overstated by that amount. Possible that Mr. Kocher included both new and old. Exchange to Lomolo effected in 1956. Agree now sisal on farm we got 1,400 new sisal, 400 acres of polled sisal (it polls at the earliest at 7 years). I would describe this as old sisal. This 450 was on land transferred to Stanning 750 acres old sisal near mill."

Counsel contends that this is an admission that the total acreage in sisal was only 1,800. In my opinion I am not in as good a position as the learned judge to decide what the witness meant. It is by no means clear. The passage does not show whether the witness meant that the polled sisal comprised all of the old sisal. The figure of 1,800 was less than that given by the trustees in their statement of facts (2,100 acres) and no reason was given by Mr. Yakas for this second reduction in his figures, if it was intended to be one. I do not accept this argument.

The second part of the ground of appeal appears to raise a question more nearly approaching one of principle. The learned judge acceded to the case of the trustees in the Supreme Court that the improved value of the land was £5 per acre. He then deducted the value of the land on that basis from the total apportionment made by the Commissioner for land and development, in order to ascertain the amount to be apportioned to development. Counsel now says that this was wrong, though, as far as I can see from the notes of the argument in the court below, counsel then made no clear submission upon the principles applicable if the apportionment was to be varied. Having succeeded on the question of land valuation, the trustees now direct the attack to the cost of sisal development and say that it was only Shs. 93/90 per acre. The learned judge did not in fact accept that: he found that it was on the low side and there was ample evidence to justify that opinion. Nevertheless, even if the figure of Shs. 120/- (mentioned by the judge) is taken, it is obvious that there is a gap. Of the total of Shs. 1,164,000/- allocated by the Commissioner to land and development, Shs. 566,900/- goes to the land, Shs. 282,000/- (2,350 x 120/-) is the cost of

development, leaving Shs. 315,000/- unaccounted for. My note of the argument by counsel for the trustees as to this amount is, "It does not follow that the balance is attributable to development. It could be attributable to goodwill or anything."

This is a fallacy of course. The total sum allocated by the Commissioner to land and development has never been challenged on the ground that the apportionments to the other specified assets were erroneous, or that there were assets which the Commissioner had neglected or overlooked in making the apportionment of the total price. Had there been any question of goodwill the claim would long ago have been made and it would have been incumbent upon the party relying upon the assertion, to prove it. The task of the Supreme Court on appeal must not be lost sight of. It was not to ascertain the actual cost of the sisal development but to ascertain what it was sold for. The "just apportionment" is for that purpose only. The Commissioner may well have to ascertain the actual cost for other purposes. This court has not been taken behind the scenes so as to enable it to see the factual result of its decision upon any question of assessment or otherwise. It is concerned only with the splitting up of a total sale price between various assets, and the sale price may of course yield a profit or involve a loss.

If there is what counsel has referred to as a "balance" it cannot be attributed to goodwill or to anything save the two assets with which the courts have been concerned. Can any part of it be attributed to the land? I think it is too late for any such suggestion to be made (and in fact counsel did not make it). In the Supreme Court the evidence brought by the trustees that the unimproved value of the land was £5 per acre was accepted. That was a valuation, and not an estimate of cost, which is all we have in the case of the sisal development. If £5 per acre is a fair value for the land it may well contain an element of profit over the cost price, which is not known. However that may be, it must be just and reasonable to regard the remainder of the total allocation (which, as I have said, has not been attacked) as the fair value of the sisal development. I emphasize that the total sum of Shs. 1,164,000/- must be divided between the two assets, that there was evidence of the actual value of the land, and only an estimate of the cost of the sisal development as distinct from its value. I think that the learned judge has not been shown to be wrong in adopting the course he did.

The second of the trustees' grounds of appeal on this aspect of the case reads:

> ". . . the learned judge erred:
>
> (*b*) In failing to consider that in any event out of the admitted area of 2,100 acres sisal transferred at the material date 750 acres had been planted in 1927/33 long before the inception of Income Tax in Kenya and was therefore outside the scope of the Second Schedule to the East African Income Tax (Management) Act, 1952, or the repealed enactments vide para. 43(1)(*a*) of the Second Schedule. The correct figure for development expenditure for the purposes of the Second Schedule should therefore, if material, be 1,350 acres at Shs. 93/90 per acre, i.e. Shs. 126,765/-."

It would appear that some distinction should be drawn with regard to the sisal planted in 1927/33 which is stated to be outside the scope of the Second Schedule. Counsel for Dorchester Hotel did not argue to the contrary. The distinction cannot however be drawn in the way suggested in the ground of appeal. It is a question of further apportionment of the sum allocated to sisal development between the two areas concerned. There is, however, only the most meagre evidence as to the acreage and no finding of fact on that question. Mr. Simpson said 3,000 acres were planted but 2,000 acres were burned. Of the old sisal 700 acres were transferred to Lomolo Ltd. That would appear to leave

300 acres as compared with the 750 acres claimed in the statement of facts. The evidence of Mr. Yakas might be construed as indication that there were more than 300 acres, but it is not clear. If the acreage was known and if the valuation of the old sisal development should be the same as the new it would be a mere matter of arithmetic to divide Shs. 597,100/- in the correct proportions. This court cannot be sure however, of either the acreage or the correct valuation basis and I think that the only possible course is to direct the Commissioner to amend the apportionment by reapportioning the relevant sum between the old (that is the 1927/33) sisal and the remainder.

I come now to the cross-appeal of the Dorchester Hotel, the notice of which reads:

> "1. The learned judge erred in failing to direct himself that the burden of proving that the Commissioner's assessment or apportionment was excessive or unreasonable lay on the appellant, i.e. trustees.
>
> "2. The learned judge erred in failing to direct himself that there was no or insufficient evidence on record to justify variation of the Commissioner's assessment or apportionment.
>
> "3. The learned judge's order for payment of all costs by the second respondent was unreasonable in the circumstances."

Counsel's argument on the first ground was that there was evidence that the trustees had failed or neglected to give proper information to the Commissioner and that it therefore lay upon the trustees to show that the apportionment was wrong. Secondly, he said that the onus lay upon the trustees under s. 78 (5) of the 1952 Act. As to the first submission, the circumstances referred to might create some slight presumption (hardly in the nature of an onus) against the case of the trustees but in the final result everything would depend upon the evidence tendered. Whether s. 78 (5), which relates to proof that an assessment is excessive, applies in this appeal depends upon the effect of the words in para. 42 (1) of the Second Schedule applying the provisions of the Act relating to assessment appeals with necessary modifications. I do not need to decide this question because the learned judge arrived at his decision upon the evidence tendered by all parties. He had to make up his mind as to the weight to be attached to the evidence of particular witnesses and was not called upon or obliged to apply considerations of onus.

Ground 2, is, I think, an attempt to phrase as a question of law what was developed in argument as merely an attack upon a decision upon fact. The only variation made by the learned judge in the apportionment was consequential upon his finding that the land should be valued at £5 per acre. I content myself with saying that there was substantial evidence to support that finding.

The third ground brings me to the question of costs and before dealing with it I will summarize my findings:

(*a*) I would allow the appeal of the Commissioner on the question of his power to make the apportionment in question. This appeal was opposed for the trustees and supported by Dorchester Hotel.

(*b*) I would dismiss the cross-appeal of the trustees as to the existence of a right of appeal against an apportionment. This appeal was contested by both the Commissioner and Dorchester Hotel.

(*c*) I would dismiss the appeal of the trustees on the matters set out in para. 2(*a*) of their notice of cross-appeal in which a further variation of the apportionment was claimed. The Commissioner took no part in this appeal, which was opposed by Dorchester Hotel in furtherance of its own cross-appeal.

(*d*) I would allow the appeal by the trustees on the matter set out in para. 2(*b*) of their notice of cross-appeal but only to the extent of ordering that the Commissioner further amend the apportionment (the amendment ordered by the learned judge in the Supreme Court, which I would confirm, now becomes operative) by reapportioning as he may see fit the sum of Shs. 597,100/- allocated to development, between the old (1927/33) and the new planting.

(*e*) I would dismiss the cross-appeal of Dorchester Hotel subject to the variation in the order for costs in the Supreme Court which I will propose.

The position in the court below must now be regarded as that the trustees succeed to some extent on the main factual issue (in which they were opposed mainly but not exclusively by Dorchester Hotel) but lost upon two issues of law, which occupied less time than the factual question. I would order that the trustees be paid one half of their costs in the Supreme Court, in the proportions of two-thirds thereof by Dorchester Hotel and one third by the Commissioner. I would sustain the order for costs of Queen's Counsel and junior. In this court the Commissioner has succeeded in his appeal. I would order his costs of the appeal and the trustees' cross-appeal to be paid by the trustees. Of the matters which lay between the trustees and Dorchester Hotel on their respective cross-appeals the trustees had a small measure of success upon one aspect of the factual issues but lost on the others and on the questions of law. I think that so far as these parties are concerned there should be no order for costs on either cross-appeal.

Sir Ronald Sinclair P: I agree and have nothing to add. The appeal by the Commissioner is allowed; the cross-appeal by the trustees of the late B. C. Garland is dismissed except to the extent indicated in the judgment of Gould, J.A.; the cross-appeal by Dorchester Hotel Ltd. is dismissed. There will be orders for costs in this court and in the Supreme Court as proposed by the learned Justice of Appeal.

Crawshaw JA: I have had the advantage of reading the proposed judgment of Gould, J.A., and agree therewith, but would make the following observations.

The appeal concerns an apportionment by the Commissioner of Income Tax of part of the sale price of certain agricultural property between the land and the development thereof. Paragraph 42 (1) of the Second Schedule to the East African Income Tax (Management) Act, 1952, provides that an appeal from a decision of the Commissioner as to the manner of apportionment shall be determined by a local committee, unless all taxpayers concerned in the transaction agree that it shall be determined by a judge of the Supreme Court. The paragraph then goes on to say,

> "and any such local committee or judge shall determine the question in like manner as if it were an appeal against an assessment of income tax, and the provisions of this Act relating to such an appeal shall apply accordingly with any necessary modifications: –"

The vendors, the trustees of the estate of B. C. Garland, deceased, appealed to the Supreme Court from the decision of the Committee which had upheld the Commissioner's apportionment. The first part of the first ground of appeal to the Supreme Court being:

> "1. The said notice of apportionment purports to be issued under the provisions of the E.A. Income Tax (Management) Act, 1952, which, in the absence of any assessment giving effect to a notice of apportionment conferred no specific right of appeal against a notice of apportionment;"

The learned judge found that this ground of appeal failed, and that there was a right of appeal given in para. 42 (1); he said "the right to and procedure in respect of appeals against apportionments are matters rightly contained in the Second Schedule".

The Commissioner appealed against the judge's decision on a ground unconnected with the right of appeal, and the trustees cross-appealed, ground I thereof being:

> "1. The learned judge erred in holding that para. 42 (1) of the Second Schedule to the East African Income Tax (Management) Act, 1952, implicitly conferred a right of appeal against the notice of apportionment dated December 19, 1958."

It will be seen therefore, that in both their appeal to the Supreme Court and in their cross-appeal to this court the trustees raised the question of appeal rights under para. 42 (1) although in neither did they specifically question the right of a further appeal from a committee should it be held that there was a right of appeal to a committee.

I agree with Gould, J.A., that the judge was correct in holding that para. 42 (1) gave a right of appeal to a committee; the only question in my mind has been whether it gave a further right of appeal from a committee to a judge. The learned judge did not consider this, and it does not appear that the point was specifically taken by counsel. Being a matter of jurisdiction it is however one for consideration by the court, and according to my notes I understood Mr. Bechgaard, who appeared for the trustees, to submit on a question from the bench (I think from myself) that if there was an appeal to a committee, there was no provision for a further appeal to a judge.

Section 77 of the Act enables a taxpayer to appeal to a local committee from an "assessment" made by the Commissioner, and s. 78 (1) gives him a right to appeal from the decision of the committee to a judge. Section 78 (2) gives the Commissioner a right of appeal from "the decision" of the committee to a judge, and in its context I have little doubt (and it has not been argued otherwise) that by "the decision" is meant the decision of an appeal against an assessment. Section 77 and s. 78 have no direct relevance to apportionments; an apportionment may affect an assessment, but in view of the appeal provision in para. 42 of the Second Schedule it would be a matter for argument, and one which need not be decided here, whether the apportionment could again be raised on an appeal against an assessment.

For an appeal against apportionment one has to look therefore to para. 42, which is contained in Part VI of the Second Schedule headed "Miscellaneous Provisions". Unless that paragraph gives a right of appeal to a judge from the decision of a committee, there is no such right. I can see nothing illogical in the legislature deciding that in an interim matter, such as an apportionment, concerning only one ingredient in the ultimate assessment, the final appeal tribunal should be to a committee unless all the relevant parties agree that the appeal should be to a judge with the knowledge that thereby a further right of appeal would be available to them.

The paragraph says that the committee shall determine the appeal "in like manner" as if it were an appeal against assessment. These words are very different in my opinion to "may appeal as if an assessment to tax had been made upon him" which appear in certain sections of the Act itself. I read the former as having reference to s. 77 (4) and s. 78 (6) respectively, which prescribe the type of orders which can be made. The words in para. 42 which follow are, "and the provisions of this Act relating to such an appeal shall apply accordingly with any necessary modifications". The words "and the provisions of this Act relating

to such an apportionment" must refer to an appeal against assessment, for there are no other provisions in the Act relating to an appeal against apportionment. It seems to me further that the words "such an appeal" refer to an appeal to a committee or to a judge as the first appeal tribunal. What then is the meaning of "the provisions of this Act"? There can be little doubt, I think, that they relate to procedural matters as the words "with any necessary modifications" would seem to indicate. Can it be said, however, that they relate also to the right of further appeal given in s. 78? It is of this that I hold considerable doubt. In the absence, however, of argument from counsel on this point and in view of the opinions of my brother judges, I do not feel sufficiently confident to say that the words could not have that meaning, and I accordingly support in general the conclusions of Gould, J.A., and agree with the order he proposes.

Appeal of the Commissioner allowed. Cross-appeal of the trustees allowed in part.

For the appellant:
The Legal Secretary, E.A. Common Services Organisation
G. C. Thornton (Deputy Legal Secretary, E.A. Common Services Organisation)

For the first respondent:
Cresswell, Mann & Dod, Nakuru
K. Bechgaard Q.C. and *J. S. Dodd*

For Dorchester Hotel Ltd.:
Reid & Edmonds, Arusha
A. Reid

G R Mandavia v Rattan Singh s/o Nagina Singh
[1962] 1 EA 730 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	26 October 1962
Case Number:	33/1961
Before:	Sir Trevor Gould, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Pelly Murphy, J.

[1] Contempt of court – Committal order – Whether such an order is a decree – Whether appeal from committal order lies as of right – Civil Procedure Ordinance (*Cap.* 5), *s.* 2, *s.* 33, *s.* 35 *and s.* 75 (*K.*) – *Civil Procedure* (*Revised*) *Rules*, 1948, *O. XXI*, *O. XLI*, *r. i O. XLII*, *r.* 1 (1) *and O. L* (*K.*).

[2] Jurisdiction – Contempt of court – Committal order – Leave to appeal refused – Appeal – No leave

obtained from appellate court – Jurisdiction to hear appeal – Civil Procedure Ordinance (*Cap.* 5), *s.* 2, *s.* 33, *s.* 35 *and s.* 75 (*K.*) – *Civil Procedure* (*Revised*) *Rules*, 1948, *O. XXI*, *O. XLI*, *r.* 5, *O. XLII*, *r.* 1 (1) *and O. L* (*K.*).

Editor's Summary

The respondent had by originating motion obtained an order in the Supreme Court that the appellant should deliver up certain deeds, documents and papers. Subsequently by notice of motion the respondent asked that the appellant be committed for contempt of court as he had failed fully to comply with the court order. When, after two adjournments, the motion for a committal order came on for hearing one morning, the appellant did not appear and he was committed for contempt of court but in the afternoon this order was discharged, the appellant having purged his contempt. The court refused an application by the appellant for leave to appeal against the committal order from which the appellant sought to appeal. At the hearing a preliminary objection was taken that the appeal did not lie on the grounds, firstly, that the committal order was a decision given in a criminal cause or matter from which no appeal lay; secondly, that there was no jurisdiction to hear the appeal from the committal order as it was an interim order which was no longer in force and had

become merged with the order made in the afternoon and that the afternoon order had not been extracted, and thirdly, that the committal order was not a decree and that without leave of the court, which had not been obtained, no appeal lay.

Held –

(i) the committal order was not made in a criminal cause or matter but was made in a civil case and was appealable in accordance with the law relating to civil appeals.

(ii) the fact that the sanction imposed by the committal order had been remitted did not make it an interim order, but merely made it an order which had no longer any effect and accordingly the committal order did not merge with the afternoon order.

(iii) there was no ground for holding that the court had no jurisdiction to hear the appeal because the committal order had merged in the afternoon order and the afternoon order had not been extracted.

(iv) the committal order was an order within the definition of that word in s. 2 of the Civil Procedure Ordinance and was appealable only with the leave of the court under s. 75 (1) of the Civil Procedure Ordinance, and, as no leave had been obtained, the court had no jurisdiction to hear the appeal.

Appeal dismissed.

Cases referred to in judgment:

(1) *Gordon v. Gordon*, [1946] 1 All E.R. 247.

(2) *Scott v. Scott*, [1913] A.C. 417.

(3) *Wiltshire v. Fell*, [1959] 3 All E.R. 862.

(4) *Mansion House Ltd. v. Wilkinson* (1954), 21 E.A.C.A. 98.

(5) *Saint Benoist Plantations Ltd. v. Felix* (1954), 21 E.A.C.A. 105.

The following judgments were read:

Judgment

Newbold JA: One November 28, 1959, the respondent took out an originating notice of motion numbered as Miscellaneous Civil Application NO. 106 of 1959 which, after setting out the parties, was headed as follows:

"Originating Notice of Motion.

"(Sections 65, 67 and 69 of the Advocates' Ordinance, 1949, and section 13 of the Remuneration of Advocates' Order, 1955, and the inherent jurisdiction of the court)."

This notice of motion asked, inter alia, that the appellant (the respondent in the motion) "do deliver all deeds, documents or papers" to the persons specified in the notice. On December 15, 1959, the Supreme Court adjudicated upon the motion and that adjudication was embodied in a formal document (hereinafter referred to as the December order) the material parts of which are as follows:

"Order.

"Upon reading the application presented to this court on the 28th day of November, 1959, by counsel for the applicant under sections 65, 67 and 69 of the Advocates' Ordinance, 1949, and section 13 of the Remuneration of Advocates' Order, 1955, and the inherent jurisdiction of the court,

and upon . . . it is ordered

"1

"2. That the respondent do deliver all deeds, documents and papers to . . ."

The respondent alleged that the appellant had not complied completely with the terms of the December order and on June 3, 1960, he took out a notice of motion in Miscellaneous Civil Application No. 106 of 1959 seeking, inter alia, an order that the appellant

> "do stand committed to H.M. Prison, Nairobi, for his contempt of this honourable court in failing to deliver . . . one cash book . . . within two days from the date of the order made by this honourable court on the 15th day of December, 1959, in Miscellaneous Civil Application No. 106 of 1959"

and that the appellant do pay to the respondent

> "his costs of an incidental to this application and of the order to be made thereon and of the filing of an execution of such proceedings for attachment . . .".

This motion after a number of adjournments came before the Supreme Court on February 15, 1961, when the appellant appeared in person, and was adjourned to February 16, 1961. On the following day the appellant did not appear but the record discloses that Mr. Sampat appeared for him and handed in a medical certificate stating that the appellant was suffering from influenza and was not fit to attend court and that he applied for an adjournment. The court thereupon granted an adjournment to February 24. On February 24 in the morning there was no appearance of the appellant nor did anyone appear for him, but a medical certificate stating that the appellant was unable to attend court was handed into court. The court then directed that the application should proceed ex parte and eventually in the morning the record discloses that the following decision was made by the court:

"Order.

> "In my view the respondent, an officer of this court, has treated the court with contempt in not appearing in person or by counsel on this motion.
>
> "The motion for committal is supported by affidavits and on the evidence before me, I am satisfied that the respondent is in contempt also for not having complied with the order of December 15, 1959.
>
> "The respondent is committed to prison as prayed and will pay forthwith all costs of these proceedings."

This decision was formally embodied in a committal order (hereinafter referred to as the committal order) which was headed in "Miscellaneous Civil Case No. 106 of 1959" and read as follows:

"Committal Order.

> "Upon reading the application presented to this court on the 3rd day of June, 1960, by counsel for the applicant, and upon hearing counsel for the applicant and in the absence of the respondent, It is Ordered:
>
> "1. That the respondent be and is hereby committed to prison as prayed in the notice of motion dated 3rd day of June, 1960.
>
> "2. That the respondent do pay forthwith all costs of these proceedings."

In the afternoon of the same day the appellant appeared before the judge who had made the committal order and after the appellant had been examined on oath the record discloses that the following order was made:

"Order.

> "This, although not framed in the appropriate terms, is an application by the respondent seeking the court's forgiveness for his contempt in disobeying

> its order of December 15, 1959. The respondent has given evidence on oath and has been cross-examined at great length on the matters in question. He has denied that he has ever received the book, the subject matter of the order. In these circumstances I am satisfied, but only now, that the respondent is not in contempt. The respondent should have made this perfectly plain to the court in the application and if he had chosen to file an affidavit in more specific terms than his previous affidavits filed in this matter. I am satisfied that the respondent has purged his contempt, if there was contempt. I am not, however, satisfied that the respondent has acted in good faith in this matter and I, therefore, order him to pay all the costs of these proceedings forthwith. The respondent is to be released from custody.
>
> "Mandavia: My lord, some time will be fixed, I hope.
>
> "Court: Time for what?
>
> "Mandavia: Payment.
>
> "Court: Forthwith. Is there anything, Mr. Khanna, I have missed?
>
> "Khanna: One for striking out, one for setting aside. They should be disposed of.
>
> "Court: And the respondent's costs . . .
>
> "Mandavia: I should be given leave to appeal.
>
> "Court: I am constantly being asked for leave to appeal and I am told there is no right of appeal without leave. In this particular case I have no hesitation. As far as I am concerned I refuse leave to appeal. Leave to appeal is refused."

The appellant on March 9, 1961, gave notice of appeal and in due course filed his appeal. The heading of the memorandum of appeal states that it is an

> "Appeal from the decision/committal order (decree) of Her Majesty's Supreme Court of Kenya at Nairobi (the Honourable Mr. Justice Pelly Murphy) dated the 24th day of February, 1961 (in the morning) in its Miscellaneous Civil Application No. 106 of 1959".

and also states as follows:

> "Appeal as of right as from decree sections 2 and 34 of Kenya C.P. Ordinance, and as involving liberty of the subject."

When this appeal came on for hearing the preliminary objection was taken on behalf of the respondent that the appeal did not lie for the following reasons: first, that the committal order was a decision given in a criminal cause or matter and no appeal therefrom lay; secondly, that there was no jurisdiction to hear the appeal from the committal order as it was an interim order which was no longer in force and which had become merged with the order made in the afternoon and the afternoon order had not been formally extracted; thirdly, that the committal order was not a decree and that without leave of the court, which had not been obtained, no appeal from it lay. Having heard argument on the preliminary objection the court reserved its decision and stated that if the preliminary objection failed the substantive appeal would have to be relisted.

Turning now to the first issue raised on the preliminary objection, it is to be noted that the committal order was made in Civil Case No. 106 of 1959 and is stated to be made upon a civil application. In his order the judge refers to the appellant as being in contempt for two reasons, but the formal order and the afternoon proceedings relate only to the contempt in disobeying the

December order and it can be seen from the judge's notes that the committal order was made in respect of that contempt and any other contempt was merely an aggravating factor. Contempt can clearly be of two natures, the one criminal and the other civil. Is a committal order for a contempt committed not in the face of the court but in disobeying an order of the court for delivery of certain documents an order in a criminal cause or matter? In my view it is not. As I have said, the committal order purports to be made in a civil case and it was sought by the respondent as a means of enforcing obedience to the December order. Lord Greene, M.R., said in *Gordon v. Gordon* (1), [1946] 1 All E.R. 247 at p. 251:

> "It is to be remembered that the process of enforcing orders in civil litigation made for the benefit of a party against the other party by committal or attachment is nothing more than a form of execution".

Section 38 of the Civil Procedure Code provides that the court may order execution of a decree "by arrest and detention in prison of any person". In *Scott v. Scott* (2), [1913] A.C. 417, Lord Atkinson at p. 462 quoted as a correct statement of the law the following passage:

> "It is only the legislature that can render criminal an act which is not so by the common law of the land. An order of the court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be and in general will be punished by the court, and in proper cases such punishment may include imprisonment. But it does no more. It does not make such disobedience a criminal act, and therefore it is that the Court of Appeal has consistently and without any exception held that orders punishing persons for disobedience to an order of the court are subject to appeal."

For those reasons I am of opinion that this committal order was not made in a criminal cause or matter but was made in a civil case and is appealable in accordance with the law relating to civil appeals.

As regards the second issue raised on the preliminary objection, I confess to some difficulty in understanding the argument that the committal order was merely an interim order and is merged in the afternoon order. The fact that the appellant was subsequently released because he had purged his contempt does not make the committal order an interim order. As I have not seen any formal order extracted in respect of the order made in the afternoon I cannot be sure what is the position, but even if the afternoon order covers the costs which were included in the committal order, this would not mean that the committal order was either an interim order or was merged in the afternoon order. The one dealt with a committal and the other with a release, two quite separate matters founded upon quite separate sets of facts. The fact that the sanction imposed by the committal order has been remitted does not make it an interim order, it merely makes it an order which no longer has effect. The fact that it no longer has effect does not mean that it is merged in any other order nor make it any the less a separate and individual order. As Hodson, L.J., said at p. 865 in *Wiltshire v. Fell* (3), [1959] 3 All E.R. 862:

> ". . . the committal order which has been made must stand and can only be revoked on appeal. That does not in any way take away from the learned judge the power to vary the effect of the order, or to suspend its operation, or in any way remove his control of the case."

For these reasons I am of opinion that there is no ground for holding that this court has no jurisdiction to hear the appeal because the committal order has merged in the afternoon order and the afternoon order has not been extracted.

The third ground argued as a preliminary objection was that the committal order was only appealable with leave and leave to appeal has been refused. If this submission is correct then this court has no jurisdiction to hear the appeal. To meet this submission the appellant argued, first, that the December order was a decree and that the joint effect of s. 34 (1) and the definition of "decree" in s. 2 of the Civil Procedure Ordinance (Cap. 5 of the Laws of Kenya, 1948) (hereinafter referred to as the Ordinance) was to make the committal order, which was merely a form of execution of the December order, itself a decree and appealable as of right; and, secondly, that it was an order directing detention in prison and was thus appealable as of right under s. 75(1)(*g*) of the Ordinance.

Whether the formal instrument setting out a decision of the Supreme Court is a decree or an order involves an examination of the arid field of the distinction between these two instruments, a field which has already produced a crop of decisions of this court. I do not propose to cull any further crop from this field and will merely accept that I am bound by the existing decisions. I consider that the decisions in *Mansion House Ltd. v. Wilkinson* (4) (1954), 21 E.A.C.A. 98, and *Saint Benoist Plantations Ltd. v. Felix* (5) (1954), 21 E.A.C.A. 105, require me to regard the December order as a decree. As I have already stated I accept the argument that the committal order is a form of execution of the December order. Whether the English distinction in contempt proceedings between committal and attachment exists in Kenya and whether the power to enforce obedience by imprisonment exists under the inherent jurisdiction or is merged in the powers conferred by s. 38(*d*) of the Ordinance I find it unnecessary to consider in this case. As it is a form of execution of a decree, the appellant argues that by s. 34 (1) and the definition of "decree" in s. 2 the committal order is itself a decree. I do not agree. The definition of decree specifically excludes any adjudication from which an appeal lies as an appeal from an order. In the *Mansion House* case (4) Briggs, J.A., delivering a judgment with which the other members of the court agreed, said at p. 102 and p. 103:

> "I have, however, quoted above only part of the statutory definition of 'decree'. It is provided in s. 2 that 'decree' 'shall not include – (*a*) any adjudication from which an appeal lies as an appeal from an order . . .'. An argument for the appellant was based on these words on the following lines. If some orders are *not* to be considered as decrees, the normal implication is that other orders should be so considered. The answer to this argument is historical. Under the Indian Code and Rules there was a strong policy, the wisdom of which I do not wish to discuss, of discouraging appeals wherever possible without doing clear injustice. In accordance with this policy very few orders were made appealable. The law in Kenya was the same until 1947, when other and, as I think, wiser counsels prevailed and s. 75 of the Civil Procedure Ordinance was drastically amended, so as to allow appeals from certain types of orders of the Supreme Court as of right and from all other orders of the Supreme Court with leave either of the court below or the Court of Appeal. No consequential amendment of the definition of 'decree' in s. 2 was then made. In the result the words 'any adjudication from which an appeal lies an appeal from an order' are now in this country no more than an elaborate periphrasis for the words 'any order', and para. (*a*) of the definition of 'decree' does no more than restate what appears already in the definition of 'order', that decrees and orders are mutually exclusive. Mr. Khanna asks us to interpret para. (*a*) as referring only to procedural or interlocutory orders, and refers to s. 76 and s. 77 of the Ordinance, but this leaves out of account the factual explanation of the now rather peculiar wording of the paragraph. The facts

> are that at one time some orders were appealable, but most orders were not: it was necessary then to make clear that the favoured class of order was not so much favoured as to enjoy the special status of decrees. There is no reason whatever for interpreting the word 'appealable' in para. (*a*) as meaning 'appealable as of right' or 'without leave'; but, even if that were done, it cannot be supposed that, because orders appealable as of right are not decrees, orders appealable only with leave are decrees. They must clearly have a lower status, if not a similar one. I conclude that para. (*a*) does not assist the appellant."

It is clear that the Ordinance and the Civil Procedure Rules regard adjudications enforcing decrees as orders (see, for example, s. 33 and s. 35, O. XXI, O. XLI, r. 5, and O. XLII, r. 1 (1)). Such orders are, by s. 75 (1) of the Ordinance and O. XLII appealable either as of right or by leave. This being so it is clear that an adjudication of the court enforcing a decree is an order from which an appeal lies and is thus neither a decree nor appealable as of right in every case.

The next question is whether the committal order, being an order within the definition of that word in s. 2 of the Ordinance, is appealable as of right by reason of s. 75(1)(*g*). I shall assume that the committal order was made under the provisions of the Ordinance, but I have already stated that it was made in execution of a decree. This being so it is excluded from s. 75(1)(*g*). It has not been argued that the committal order is appealable as of right under any other provision. It is undoubtedly appealable with leave, but leave, though asked for, was refused. The appellant could then have asked leave from this court but did not do so.

In the result in my opinion the preliminary objection succeeds and this court has no jurisdiction to hear the appeal. I would therefore dismiss the appeal with costs.

Sir Trevor Gould JA: I agree. The procedure by which the December order was obtained, i.e. by originating motion under O. L of the Civil Procedure (Revised) Rules, 1948, has not been challenged at any stage. The motion therefore initiated a civil proceeding commenced in manner prescribed by those Rules, and the resultant proceeding fell within the definition of a "suit" in s. 2 of the Civil Procedure Ordinance (Cap. 5 of the Laws of Kenya, 1948). The December order, which conclusively determined the rights of the parties as to the matters in controversy, was the formal expression of the court's adjudication in that suit and was therefore a decree, as defined in s. 2. For the reasons given by Newbold, J.A., and upon the authorities quoted by him the committal order itself was not a decree but an order, and it follows that no appeal from it lay as of right under s. 75(1)(*g*) which makes an exception of the case of an order directing detention in prison where the detention is in execution of a decree, which the December order was. It follows further, that the committal order, not being itself a decree, and not being appealable as of right under s. 75(1)(*g*), is only appealable under the general provisions of that section with leave of the Supreme Court or of this court.

The appeal is therefore dismissed with costs.

CRAWSHAW JA: I agree the judgments of Newbold, J.A., and Gould, J.A., and have nothing to add.

Appeal dismissed.

The appellant in person.

For the respondent:
Winayak, Johor & Co., Nairobi
Bryan O'Donovan, Q.C., and *J. K. Winayak*

Ishfaq Begum Butt v the Vulcan Insurance Co Ltd
[1962] 1 EA 737 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	26 September 1962
Case Number:	50/1962
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Arbitration – Setting aside award – Misconduct of umpire – Umpire's indirect business interest with party – Interest not disclosed – Whether prima facie case of misconduct shown – Arbitration Ordinance (*Cap*. 21), *s*. 12 (*U*.) *– Arbitration Rules, r*. 7 *and r*. 10 (*a*) (*U*.).

Editor's Summary

The applicant applied under s. 12 of the Arbitration Ordinance for an award to be set aside on the ground of misconduct. The misconduct alleged was that the umpire had an indirect business interest with the respondents, an insurance company, which interest he had not disclosed.

Held – a prima facie case of improper conduct by the umpire had been shown so as to justify making him a defendant with the respondents in objection proceedings.

Order accordingly.

Cases referred to in judgment:

(1) *Eckersley and Others v. The Mersey Docks and Harbour Board*, [1894] 2 Q.B. 667.

(2) *Bright v. River Plate Construction Company*, [1900] 2 Ch. 835.

(3) *Vineberg v. Guardian Fire and Life Assurance* (1892), 19 A.R. 293.

Judgment

Sheridan J: This is an application under s. 12 of the Arbitration Ordinance to set aside the award of an umpire on the grounds of misconduct. Under r. 7 and r. 10(*a*) of the Arbitration Rules the objections with supporting affidavits have been served on the respondents, who were the successful party in the arbitration, and on the umpire. No affidavits in reply have been filed so that at this stage their contents are uncontradicted. Mr. Phadke has appeared on behalf of the respondents; the umpire has not appeared on this application. All I have to decide now is whether under r. 11, I am satisfied that there is a prima facie case of improper conduct against the umpire so as to justify making him a defendant with the respondents to objection proceedings, the objector being the plaintiff.

The affidavits aver that the umpire had an indirect business interest with the respondents, who are an

insurance company, which interest he did not disclose. Mr. Hunt, for the objector, draws a distinction between an arbitrator chosen by a party and an umpire who is not so chosen. He relies on *Eckersley and Others v. The Mersey Docks and Harbour Board* (1), [1894] 2 Q.B. 667, where the arbitrator had been selected by the parties. At p. 672, Lopes, L.J., said:

> "Now, it is to be observed that the rule to be applied to a case of this kind is entirely different to that which is applied to judges, magistrates, or any person in a judicial capacity, where the tribunal is not chosen by the parties who are sending their disputes to be settled by it, but is a tribunal constituted apart from any agreement or consent of the parties. Where the tribunal is not chosen by the parties, no doubt the rule is very strict.

> There is no principle better recognised than that a man is not to be a judge in his own cause; and in the case of magistrates it is well established that, if there is any reason which, it can be suggested, would influence the minds of ordinary persons, and induce them to think that the magistrates might be biased, that will be sufficient to render the tribunal incompetent. But where the parties choose their own tribunal the case is very different. In the present case it is of the essence of the submission that questions shall be submitted to the engineer as arbitrator which must involve the decision of matters connected with his own competency, care, and caution, and with the way in which he discharged his duties under the contract. The parties agree that the arbitrator is to adjudicate on matters in which he has an interest."

Here the umpire was in the position of a judge and the very strict rule should be applied. It is only in the case of a named arbitrator that suspicions of bias will not suffice: *Bright v. River Plate Construction Company* (2), [1900] 2 Ch. 835. The umpire's link with the respondents may have been tenuous but he was in some sort of agency relationship with them and that should have been disclosed. In *Vineberg v. Guardian Fire and Life Assurance* (3) (1892), 19 A.R. 293, a Canadian case which is noted in 2 Digest 682, 1520, it was held that arbitrators must be indifferent, and an award made by arbitrators one of whom was at the time of the arbitration subagent for an agent of the defendants in obtaining risks, was void, although he only acted in that capacity to a small extent. On the affidavit evidence as it stands the facts here are not dissimilar. I am satisfied that there is a prima facie case. Accordingly, I made the umpire and the respondents parties to the objection proceedings which after any further objections or cross-objections have been filed within twenty-one days shall be set down for hearing. Costs in those proceedings.

Order accordingly.

For the applicant:
R. E. Hunt, Kampala

For the respondents:
Y. V. Phadke, Kampala

Premchand Nathu & Co. Ltd. v The Land Officer

[1962] 1 EA 738 (PC)

Division:	Privy Council
Date of judgment:	27 November 1962
Case Number:	24/1961
Before:	Lord Morton of Henryton, Lord Keith of Avonholm and Lord Pearce
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 67 of 1960 on appeal from H.M. High Court of Tanganyika – Murphy, J.

[1] Statute – Crown – Intention to bind Crown – Inference from circumstances – Land Ordinance (*Cap*. 113) (*T*.) *– Conveyancing and Law of Property Act*, 1881, *s*. 14 (1) *– Land* (*Law of Property and Conveyancing*) *Ordinance* (*Cap*. 114), *s*. 2 (*T*.).

[2] Landlord and tenant – Crown land – Right of occupancy subject to building conditions – Extension of time for compliance with conditions – Failure to erect buildings within extended time – Revocation of right of occupancy – No notice of revocation served – Whether purported revocation invalid – Land Ordinance (*Cap*. 113), *s*. 2, *s*. 3, *s*. 4, *s*. 6, *s*. 7, *s*. 8, *s*. 10, *s*. 11, *s*. 13 *and s*. 21 (*T*.) *– Conveyancing and Law of Property Act*, 1881, *s*. 14 (1) *– Land* (*Law of Property and Conveyancing*) *Ordinance* (*Cap*. 114), *s*. 2 *and s*. 10 *– Law of Property Act*, 1925 *– Crown Lands Ordinance* (*Cap*. 155), *s*. 83 (*K*.).

Editor's Summary

The appellants occupied land under a certificate giving the appellants a right of occupancy for ninety-nine years from 1952, subject to the building conditions contained in the certificate of occupancy. There was considerable delay in compliance with these conditions, and certain extensions of time were granted. Although the appellants built a godown on the plot they did not commence construction of the main buildings, namely shops and flats, and the right of occupancy was revoked in May, 1957. The appellants refused to give up possession and the respondent took proceedings for inter alia possession. The High Court held that the right of occupancy had been lawfully revoked, and ordered the appellants to deliver possession to the respondent. On appeal the Court of Appeal dismissed the occupiers' appeal and on further appeal it was contended that s. 14 (1) of the Conveyancing and Law of Property Act, 1881, applied to the exercise by the Governor of any rights of revocation and, therefore, since no notice had been served in compliance with that sub-section, the purported revocation was invalid. It was further submitted that as s. 14 (1) of the Act was imported into the law of Tanganyika, the courts should infer, from all the surrounding circumstances, that it was intended to bind the Crown although s. 14 (1) did not bind the Crown in England.

Held – there was not in the law of Tanganyika any necessary implication that s. 14 (1) of the Conveyancing and Property Act, 1881, bound the Crown, and accordingly the right of occupancy was validly revoked without notice.

Appeal dismissed.

Cases referred to in judgment:

(1) *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58.

(2) *Bashir v. The Commissioner of Lands*, [1960] A.C. 44; [1960] 1 All E.R. 117.

(3) *Director of Lands and Mines v. Sohan Singh*, 1 T.L.R. (R.) 631.

Judgment

Lord Morton of Henryton: This is an appeal from a judgment of the Court of Appeal for Eastern Africa, dismissing an appeal from an order of the High Court of Tanganyika, ordering the appellants to deliver up possession of a plot of land at Moshi to the respondent.

The appellants were occupiers of the plot in question under a certificate of occupancy signed by both parties to this appeal, giving the appellants a right of occupancy for a term of ninety-nine years from April 4, 1952, at a rent of Shs. 435/- a year, subject to revision as therein mentioned.

The conditions of occupancy contained in the certificate provided (inter alia), as follows:

2. The occupier undertakes:

 (i) To erect buildings on the said land of a value of not less than Shillings sixty thousand (Shs. 60,000/-).

 (ii) Within a period of six months from the date of commencement of the said right of occupancy to submit to the township authority, Moshi (hereinafter called "the said authority"), such plans of

the proposed buildings (including block plans showing the position of the buildings) drawings elevations and specifications thereof as will satisfy the said authority and as will ensure compliance with the building covenant contained in sub-para. (i) supra. Such plans and specifications shall be submitted in triplicate.

(iii) To commence building operations within a period of three months from the date of notification in writing by the said authority of approval of the plans and specifications, such buildings to conform to a building line decided upon and notified by the said authority.

(iv) To complete the buildings according to the said plans and specifications so that the said buildings are ready for use and occupation within a period of twenty-four months from the date of commencement of the said right of occupancy.

.

"6. Failure to comply with any of the terms or conditions herein contained or implied will be deemed to constitute good cause for revocation of the said right of occupancy."

The words "good cause for revocation of the said right of occupancy" refer to s. 10 of the Tanganyika Land Ordinance of January 26, 1923 (Cap. 113) which their lordships will quote later.

There was considerable delay in compliance with these conditions, and certain extensions of time were granted. On March 11, 1954, the respondent wrote to the appellants extending the time for submission of detailed plans to April 30, 1954, and saying that if this was not done the right of occupancy would be revoked. The appellants complied with the requirements of this letter by submitting detailed plans for a godown or store on April 11, 1954, and detailed plans for the whole plot on April 29, 1954. These two sets of plans were approved on May 3, and May 20, 1954, respectively.

On January 26, 1955, the respondent wrote to the appellants extending the time for completion to July 31, 1955, and indicating that the right of occupancy would be revoked if the building was not completed by that date. This represented an extension of nearly sixteen months beyond the original date for completion. By September, 1955, the godown had been completed and the appellants had received permission from the township authority to occupy it. But the building of the shops and flats shown on the detailed plans had not been commenced and on November 21, 1955, the respondent granted a further extension of time to January 31, 1956, for completion of these buildings. The appellants then submitted altered plans, which were subsequently approved by the township authority on February 15, 1956. The appellants also asked the respondent, through their architects, for an extension of six months in which to erect the remainder of the buildings.

The respondent in a letter dated January, 1956, replied that this was not approved. He granted the appellants an extension up to February 29, 1956, to have their plans approved and commence building operations, stating that he would call for a further report during the first week of March, 1956, and unless building operations were by then under way he would recommend to the Governor that the right of occupancy should be revoked. If the report revealed that building was proceeding satisfactorily a further short extension of time would be granted to complete the erection of the building. The appellants replied in a letter dated February 8, 1956, pointing out that they had already built a store costing Shs. 60,000/- but had not yet received approval from the township authority for shops; that they would require further time for inviting tenders; that it would not appear economical to build shops at that moment because there were many empty shops in the vicinity, and asking for another six months to arrive at a final decision. On May 31, 1956, the respondent wrote to the appellants giving them thirty days in which to inform him of the reasons why construction of the main buildings had still not been put in hand. On May 4, 1957, the right of occupancy was revoked. The learned trial judge said in his judgment:

> "I have no evidence of any further correspondence between these two dates. It is not disputed that no building other than the godown has ever been commenced on the plot."

The appellants refused to deliver up possession of the plot, and these proceedings were started by the respondent on April 8, 1959, claiming possession, a revocation fee and damages. The appellants contested the validity of the revocation on various grounds. The learned trial judge held that the respondent was entitled to possession and ordered accordingly. He also entered judgment for the amount of the revocation fee but awarded no damages, since the appellants would have to yield up the godown which they had built.

The Court of Appeal dismissed the appellants' appeal. Of the defences raised before the trial judge and the Court of Appeal one only has been argued before their lordships' board. The appellants contend that s. 14 (1) of the Conveyancing and Law of Property Act, 1881, is applicable to the exercise by the Governor of any right of revocation and therefore, since no notice was served in compliance with that sub-section, the purported revocation was invalid. The sub-section just mentioned is in the following terms:

> "14(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

The relevant provisions of the Tanganyika Land Ordinance (Cap. 113) are as follows:

> "Section 2 `occupier' means the holder of a right of occupancy . . . The `right of occupancy' means a title to the use and occupation of land . . .
>
> "3.(1) The whole of the lands of the Territory, whether occupied or unoccupied, on the date of the commencement of this Ordinance are hereby declared to be public lands:
>
> "Provided that . . . nothing in this Ordinance shall be deemed to affect the validity of any title to land or any interest therein lawfully acquired before the date of the commencement thereof and that all such titles shall have the same effect and validity in all respects as they had before that date.
>
> "4. Subject to the proviso to sub-s. (1) of s. 3, all public lands and all rights over the same are hereby declared to be under the control and subject to the disposition of the Governor and shall be held and administered for the use and common benefit, direct or indirect, of the natives of the Territory, and no title to the occupation and use of any such lands shall be valid without the consent of the Governor.
>
>
>
> "6. The Governor may, where it appears to him to be in the general interests of the Territory –
>
> (*a*) grant a right of occupancy to a native or a non-native whether with or without the payment of a premium at the Governor's discretion;

(*b*) demand a rental for the use of any public land granted to any native or non-native;

(*c*) revise the said rental at intervals of not more than thirty-three years:

"Provided that before any public land in an area over which a native authority has been established is so disposed of the said native authority shall be consulted.

"7. Such rights of occupancy shall be for any definite term not exceeding ninety-nine years, and shall be granted subject to the terms of any contract which may be made between the Governor and the occupier not inconsistent with the provisions of this Ordinance:

"Provided that the Governor shall not (save in the case of a right granted in connection with a mining lease) grant rights of occupancy to any non-native free of rent or upon any conditions which may preclude him from revising the rent at intervals of not more than thirty-three years."

.

"10. It shall not be lawful for the Governor to revoke a right of occupancy granted as aforesaid save for good cause. Good cause shall include –

(*a*) non-payment of rent, taxes, or other dues imposed upon the land;

(*b*) requirement of the land by the Government for public purposes;

(*c*) requirement of the land for mining purposes or for any purpose connected therewith;

(*d*) abandonment or non-use of the land for a period of five years;

(*e*) breach of the provisions of s. 14;

(*f*) breach of any term or condition contained or to be implied in the certificate of occupancy or in any contract made in accordance with s. 7;

(*g*) attempted alienation by a native in favour of a non-native;

(*h*) breach of any regulations under this Ordinance relating to the transfer of or other dealings with rights of occupancy or interests therein."

The Land (Law of Property and Conveyancing) Ordinance of January, 1923 (Cap. 114), provided as follows:

"2.(1) Subject to the provisions of this Ordinance, the law relating to real and personal property, mortgagor and mortgagee, landlord and tenant, and trusts and trustees in force in England on the first day of January 1922, shall apply to real and personal property, mortgages, leases and tenancies, and trusts and trustees in the Territory in like manner as it applies to real and personal property, mortgages, leases and tenancies, and trusts and trustees in England, and the English law and practice of conveyancing in force in England on the day aforesaid shall be in force in the Territory.

"(2) Such English law and practice shall be in force so far only as the circumstances of the Territory and its inhabitants, and the limits of Her Majesty's jurisdiction permit.

"(3) When such English law or practice is inconsistent with any provision contained in any Ordinance or other legislative Act or Indian Act for the time being in force in the Territory, such last mentioned provision shall prevail."

> "10. The Governor may, if he thinks fit, from time to time by order published in the Gazette declare that any English Act of Parliament or part of an Act is or is not by virtue of this Ordinance in force in the Territory, and every such declaration shall be conclusive."

If regard is to be had only to the provisions of the two Tanganyika Ordinances the revocation of the right of occupancy granted to the appellants would appear to be entirely in order. The appellants were clearly in breach of condition 2 (iv) in the certificate of occupancy, and this was "good cause" for revocation under s. 10(*f*) of the Land Ordinance.

Counsel for the appellants contended, however, that s. 14 (1) of the English Act of 1881, was imported into the law of Tanganyika by s. 2 of the Land (Law of Property and Conveyancing) Ordinance, that the section bound the Crown and that the certificate of occupancy had all the characteristics of a lease. Consequently, as no notice was served in comliance with s. 14 (1) the Governor could not validly revoke the right of occupancy. Counsel conceded that the Act of 1881, as applied in England, did not bind the Crown, but contended that when the provisions of section 14 (1) were imported into the law of Tanganyika the courts should infer, from all the surrounding circumstances, that they were intended to bind the Crown. He pointed out that all the land in Tanganyika had been public land since the date of the Land Ordinance of 1923, subject to the proviso in s. 3 (1) of that Ordinance, and was vested in the Crown, and submitted that it was most likely that the legislature, having imported the English law of landlord and tenant into Tanganyika, should have intended it to apply only to the interests in land "lawfully acquired before the date of the commencement" of the said Ordinance. Counsel suggested that the lands coming within the proviso were small in extent compared with the total area of Tanganyika. No evidence on this matter was called by the appellants in the courts of Tanganyika, but their lordships are willing to assume that by far the greater portion of the country was made public land by the Land Ordinance of 1923.

The general principle to be applied in considering whether or not the Crown is bound by general words in a statute is well established and it is common ground between the parties that this general principle is applicable in Tanganyika. The principle was stated by the board in the case of *Province of Bombay v. Municipal Corporation of Bombay* (1), [1947] A.C. 58 at p. 61, in the following terms:

> "The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein . . . but the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, `by necessary implication'. If, that is to say, it is manifest from the very terms of the statute that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions."

There is nothing in the wording of the Conveyancing and Law of Property Act, 1881, which manifests an intention that the Crown should be bound, but counsel for the appellants submits that a necessary implication can arise from a consideration of the Ordinances in force in Tanganyika, and relies upon the decision of the board in *Bashir v. The Commissioner of Lands* (2), [1960] A.C. 44 and upon the judgment of Abernethy, J., in *Director of Lands and Mines v. Sohan Singh* (3), 1 T.L.R. (R.) 631.

Their lordships will return to these cases later, but for the moment they will assume, without so deciding, that counsel's submission is well-founded, and will consider how far the provisions of the two Ordinances of January,

1923, give rise to the implication for which counsel contends. Section 14 (1) of the English Act of 1881, deals only with

> "a right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease",

and it is to be observed at once that in the Land Ordinance of 1923, the word "lease" appears to be deliberately avoided. It is discarded in favour of the words "right of occupancy", and there are other indications that s. 14 (1) of the Act of 1881, was not intended to apply to the "public lands" of Tanganyika.

For instance –

(1) the right of occupancy can only arise under a grant by the Governor;

(2) there is no mention in the Ordinances of a right of "re-entry or forfeiture". This again appears to be a deliberate avoidance of the words in the English statute;

(3) the right of revocation conferred upon the Governor is a right which is quite unknown in the law of England and bears little resemblance to a lessor's right of re-entry or forfeiture. All that the Governor has to do is to execute a document saying that the right of occupancy is revoked, and the list of "good causes" deals to a large extent with matters of public policy which have nothing to do with any "breach" by the occupier of any "covenant or condition".

Other striking differences between a right of occupancy and a lease are contained in s. 7, s. 8, s. 11, s. 13 and s. 21. In their lordships' opinion the intention of the Land Ordinance was to establish an entirely new interest in land, similar to leases in some respects but different in others. They think that the Act was intended to be a complete code regulating the respective rights of the Crown and the occupier.

For these reasons their lordships are quite unable to find in the law of Tanganyika any necessary implication that s. 14 (1) of the English Act of 1881, when incorporated therein, binds the Crown, even if it be assumed, in favour of the appellants, that it is legitimate to look outside the terms of the 1881 Act for the purpose of seeking such an implication. It is true that if s. 14 (1) of the Act of 1881 does not apply to Crown lands that section will have a somewhat restricted operation in Tanganyika, but this fact is not sufficient to create a necessary implication that the Crown was to be bound thereby. They see no reason to doubt that s. 14 (1) applies to any leases, properly so-called, coming within the proviso to s. 3 (1) of the Tanganyika Land Ordinance. They have not overlooked the fact that the Law of Property Act, 1925, expressly binds the Crown, with certain immaterial exceptions, but that Act is not incorporated in the law of Tanganyika by s. 2 (1) of the Land (Law of Property and Conveyancing) Ordinance, 1923, since that section applies the law in force in England on January 1, 1922.

The cases of *Bashir v. The Commissioner of Lands* (2), and *Director of Lands and Mines v. Sohan Singh* (3), already mentioned afford no assistance to the argument on behalf of the appellants. The decision in *Bashir's* case depended on the interpretation of s. 83 of the Kenya Crown Lands Ordinance. That section, so far as material, provides:

> ". . . if there shall be any breach of the lessee's covenants . . . the Commissioner may serve a notice upon the lessee specifying . . . the covenant of which a breach has been committed, and . . . may commence an action in the Supreme Court for the recovery of the premises, and, on proof of the facts, the Supreme Court shall, subject to relief upon such terms as may appear just declare the lease forfeited . . ."

> "In exercising the power of granting relief against forfeiture under this section the court shall be guided by the principles of English law and the doctrines of equity."

It was clear that the section, dealing as it did with Crown lands, was intended to bind the Crown, and the board held that the reference to "principles of English law" clearly applied to Crown lands, s. 14 of the Act of 1881. (See pp. 61 Fin. and 62 of the report.)

In *Sohan Singh's* case (3), Abernethy, J., did not hold that s. 14 (1) of the Act of 1881 applied to certificates of occupancy, but held that in the circumstances of the case before him the respondent "ought in all fairness to have been given an opportunity" to answer an opinion which had been expressed by the executive officer. The learned judge continued:

> "It is entirely contrary to justice that a certificate of occupancy should have been revoked on the mere opinion of someone that a building cannot be erected by a specified date."

In the present case it was not suggested that equity required the giving of notice of revocation or of intention to revoke; consequently their lordships have not considered whether such a defence would or would not have been open to the appellants.

Their lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the respondent.

Appeal dismissed.

For the appellants:
Gibson & Weldon, London
Dingle Foot, *Q.C.* and *Dick Taverne*

For the respondent:
Charles Russell & Co., London
Raymond Walton (of the English Bar)

The Attorney-General v Chimanbhai Motibhai Patel and Another
[1962] 1 EA 745 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 October 1962
Case Number:	862/1962
Before:	Rudd Ag CJ and Edmonds J
Sourced by:	LawAfrica

[1] Criminal law – Case stated – Magistrate's findings of fact in complex case not stated – Appellate court invited to refer to long record and judgment to establish facts – Whether case should be remitted to

lower court for re-statement of facts – Penal Code, s. 318 (*K.*) – *Criminal Procedure Code, s.* 368 *and s.* 376 (*K.*).

Editor's Summary

Both respondents were acquitted by a senior resident magistrate on two counts of conspiring to defraud contrary to s. 318 of the Penal Code. A case was stated by the magistrate, on the application of the Crown, which contained virtually none of the essential findings on which the Crown intended to rely at the hearing but a copy of the record of evidence and of the judgment was attached. At the hearing counsel for the Crown stated that he would have to refer to the file of the lower court and to many exhibits to establish the findings of fact on which he relied as the basis of his argument and he invited the court to refer to the original record and exhibits to establish the findings of fact made by the magistrate which were not specified in the case as stated. These

findings were alleged to follow from the magistrate's bare statement in his judgment that he accepted the evidence of twenty-two of the thirty-four witnesses called for the prosecution.

Held –

(i) the course proposed by the Crown would involve going completely beyond the case as stated and could not be allowed because the alleged findings of fact on which the Crown hoped to rely were not specifically stated either in the judgment attached to the case or in the case itself.

(ii) it was not within the competence of the appellate court to decide what the findings of fact of the lower court were.

(iii) a magistrate is not to be relieved from stating in his case the facts which he found proved or admitted by either the complexity of the record or the practice that reference to the record itself is occasionally allowed.

Cases remitted to the magistrate for re-statement of the findings of facts.

Cases referred to in judgment:

(1) *Bracegirdle v. Oxley*, [1947] 1 All E.R. 126.

(2) *Edwards* (*Inspector of Taxes*) *v. Bairstow and Another*, [1955] 3 All E.R. 48.

(3) *Attorney-General v. David Marakaru*, [1960] E.A. 484 (K.).

(4) *R. v. Dishon Odinga and Others*, [1959] E.A. 12 (K.).

Judgment

Rudd Ag CJ, read the following judgment of the court:

When this appeal, by way of case stated, at the instance of the Attorney-General from the acquittal of both the respondents by the senior resident magistrate, Nairobi, on two counts of conspiring to defraud contrary to s. 318 of the Penal Code, came before the court on October 1, we ordered the case to be remitted to the senior resident magistrate for re-statement as regards the facts and said that we would give reasons for the adoption of this course in writing at a later date.

In opening the appeal Mr. O'Donovan, appearing for the Attorney-General, said that it would be his contention that the lower court by stating in its judgment that it accepted the evidence given by twenty-two of the witnesses for the prosecution thereby found such facts as would necessarily establish as a matter of law against the accused the offences charged, that in the light of such findings there was no evidence to support any other findings capable of justifying the acquittals of the respondent and that the acquittal constituted a result which no court could reasonably come to on the material before it. He relied on *Bracegirdle v. Oxley* (1), [1947] 1 All E.R. 126, and *Edwards* (*Inspector of Taxes*) *v. Bairstow and Another* (2), [1955] 3 All E.R. 48. The case as stated contained virtually none of the essential findings on which the applicant intended to rely but a copy of the record of the evidence and of the judgment was attached to the case stated. The file before this court contains 242 pages of typescript of which only the first five pages comprise the case as actually stated. Mr. O'Donovan stated that in addition to the 242 pages on the file he would have to refer to a large number of exhibits attached to the file of the

proceedings in the lower court and that it would take him a full day in court to establish the findings of fact on which he relied as establishing the basis of the argument for the Crown. He, therefore, invited the court to refer to the original record and exhibits for the purpose of satisfying itself as to the findings of fact made by the lower court which are not specified in the case as stated and which constitute virtually

the entire basis of the arguments for the Attorney-General. These findings are alleged to follow from the magistrate's bare statement in the judgment that he accepted the evidence of twenty-two of the thirty-four witnesses that were called for the prosecution.

A number of cases were cited to us in which on a case stated this court referred to the judgment and record of proceedings in the lower court as well as to the case as actually stated. It is sufficient for us to mention two of these cases. In *Attorney-General v. David Marakaru* (3), [1960] E.A. 484 (K.), the court referred to the judgment of the lower court annexed to the case stated in order to ascertain specific findings of fact explicitly stated in the judgment but not properly set out in the case as they should have been. In reference to this matter the Supreme Court stated at p. 486:

> "The facts found by the learned trial magistrate are not set out in the case, as they should have been, and for the facts it is necessary to refer to the judgment which is annexed to the case. The magistrate is referred to the judgment of this court in *R. v. Dishon Odinga and Others*, [1959] E.A. 12 (K.), for the manner in which a case should be stated."

The judgment of the Supreme Court then cited the passage in the judgment of the lower court which set out its findings of fact.

R. v. Dishon Odinga and Others (4), [1959] E.A. 12 (K.), was another case in which the magistrate relied upon his judgment attached to the case stated as showing his findings of fact. He said at p. 13:

> "The facts alleged in this case are set out in the evidence a copy of which is annexed hereto and the facts found by the court are set out in the judgement of the court a copy of which is also annexed hereto. In particular in respect of count 1 the court found the following facts" . . .

He then set out two findings of fact only. The following passage is taken from the judgment in this court at p. 14 of the report:

> "At the hearing of the appeal there was at first a dispute as to some of the relevant facts which were not particularised in the case itself, and not clearly found in the judgment. If counsel for the respondents had not later conceded that certain relevant facts had been proved and were not in dispute, it would have been necessary to send the case back for re-statement.
>
> "A case stated should be complete in itself and reference to the judgment or the record of the evidence should not be necessary to ascertain the facts found by the trial court or the decision of the court. There is no room for argument if the facts found are clearly set out in the case. Section 375 of the Criminal Procedure Code provides that a case stated shall set out, inter alia, 'the facts found by the subordinate court to be admitted or proved'. As a general rule only the facts as found should be stated, and not the evidence upon which the trial court's finding is based. Exceptions to this rule occur where the question on which the opinion of the court is sought is whether there was no evidence to support the decision or whether a decision that there was no case to answer is correct in law. In those instances it is convenient to attach a copy of the record of the evidence so as to form part of the case stated. It is essential that at the hearing of an appeal by case stated the court should have before it in an undisputed form all the material required by both parties for the determination of the question on which the opinion of the court is sought. In *Cowlishaw v. Chalkley*, [1955] 1 All E.R. 367, Lord Goddard, C.J., said:
>
> > " 'We also desire to say that as a rule it is better practice, though it cannot be insisted on, that where justices agree to state a case, if they

> state it themselves or cause their clerk to draft it, it should be submitted to both parties, and in case of any complication it should be left to the parties themselves to draft the case and submit it to the justices for their consideration, and then a point like this would not arise.'
>
> We, too, wish to say that, in suitable cases, that practice could be followed with advantage in Kenya."

The cases to which we have referred were cases in which the case stated referred to the whole judgment which was attached to the case for the purpose of showing the facts which were found by the lower court and in each of them the Supreme Court said that that was not the proper practice as a general rule. In the present case, however, the judgment though attached to the case stated is not referred to therein as a source or as an intimation of the facts which were found by the lower court. The facts so found as stated in the case are relatively few and taken as a whole support the acquittal of the respondents. However, the applicant seeks to establish a very large number of findings of fact by referring to the record of the evidence of twenty-two witnesses in respect of whom the senior resident magistrate said that he accepted their evidence. Such a course would involve going completely beyond the case as stated and cannot be allowed because the alleged findings of fact on which the applicant hopes to rely are not specifically stated either in the judgment attached to the case or in the case itself.

With reference to the two exceptions referred to in the extract which we have quoted in the judgment in *Dishon Odinga's* case (4), that is where the question on which the opinion of the court is sought is whether there was no evidence to support the decision or whether a decision that there was no case to answer was correct in law, we would say that these exceptions do not apply where the case stated is an appeal from an acquittal after the accused have been put upon their defence. If such an appeal is to succeed there must be proved sufficient primary facts to establish the offence and these should be stated in the case. There must be no doubt but that these essential primary facts have been found by the lower court. We can see no reason why such facts should not be stated in the case and, in fact, s. 368 and s. 376 of the Criminal Procedure Code requires them to be stated in the case. It may be that where, as in *Dishon Odinga's* case (4), the facts as found are clearly undisputed and not unduly complicated the Supreme Court may entertain the case, even though the facts are not fully stated in the case itself. Such cases are not exceptions to the rule. They are cases where in its discretion the Supreme Court waived the rule.

In the instant case the conspiracies are alleged in the charge to cover a period of more than a year. The findings or alleged findings of fact on which the applicant relies are so extensive and so complicated that we understand it would take expreienced Queen's counsel a full day's hearing to set them forth and establish them to the satisfaction of the court. They are not explicitly stated either in the judgment of the lower court or in the case as stated. We believe that some of these alleged unspecified findings of fact may be disputed and we consider that to attempt to try on these issues the case as stated at present would have the effect of placing the court in an impossible position. It would mean that this court would have to decide what were the findings of fact of the lower court which is a matter which is not within the competence of this court on the hearing of a case stated.

The Supreme Court has of course the right to refer to the record of the proceedings in the lower court if it considers it desirable to do so. This may be desirable where the findings are not sufficiently stated in the case and where further findings require investigation or to ascertain whether further findings should be required to be stated if they are not relatively simple or agreed by the parties. But the fact that reference to the original record may occasionally

be allowed is no ground for relieving the magistrate from stating in his case the facts which he found to be proved or admitted.

Mr. O'Donovan has suggested that owing to the complexity of the evidence and to the voluminous exhibits before the lower court, it would be almost impracticable for the learned magistrate to state a case so as to make it complete in itself and so as to obviate the necessity of any reference to the record at the hearing of the case. We think there has been a misapprehension of the grounds of our objection to the form in which the case has been stated. We object to the fact that the magistrate has not set out the facts found by him to be admitted or proved as is required by para. (*b*) of s. 376 of the Criminal Procedure Code. In his judgment the magistrate said:

> "It may be convenient if I now say that I accept the evidence, which needs no comment, of P.W. s. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 22, 23, 28, 29, 30, 31, 32, 33, but I do not intend to indicate that that is all the evidence I accept, for it is not."

As we have already indicated, Mr. O'Donovan informed us that it would take him a day to state the primary facts to which those witnesses deponed and which the magistrate said he accepted. If Mr. O'Donovan is able to state those facts before us we are quite unable to understand why it should be impracticable for the magistrate to state them in his case. The complexity of a record is no ground for relieving a court from stating a case in such terms as to obviate the necessity for the appellate court to refer to the evidence in order to discover what facts have been found by that court to have been proved or admitted.

Another point made by Mr. O'Donovan is that if the record cannot be referred to without leave of the court, it would be necessary when stating the case to set out in laborious detail the contents of each exhibit. We do not agree. We know of no objection to the attaching of exhibits to the case stated if that be necessary and provided the relevancy and materiality of each exhibit is set out in the facts as found to be proved. We think, however, that it should seldom be necessary to adopt such a course on a case stated where it is not any part of the function of the Supreme Court to inquire into the correctness of the findings of fact provided they are at all reasonable.

Case remitted to the magistrate for re-statement of the finding of facts.

For the appellant:
The Attorney-General, Kenya
Bryan O'Donovan, Q.C., and *F. Mallon* (Crown Counsel, Kenya)

For the first respondent:
B. C. Syal, Nairobi
A. R. Kapila and *B. C. Syal*

For the second respondent:
G. S. Vohra, Nairobi
Clive Salter, Q.C., and *G.S. Vohra*

Rajabu Suleman v R

[1962] 1 EA 750 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	30 November 1962
Case Number:	166/1962
Before:	Rudd Ag CJ and Goudie J
Sourced by:	LawAfrica

[1] Criminal law – Personating a person employed in the public service – Accused claiming to be employed by a statutory corporation – Whether accused employed in the public service – Penal Code (*Cap*. 24), *s.* 4 *and s.* 105(*b*) (*K.*) – *Kenya Broadcasting Corporation Ordinance*, 1961, *s.* 2, *s.* 4, *s.* 6, *s.* 20, *s.* 28, *s.* 29, *s.* 33 *and s.* 45 (*K.*).

Editor's Summary

The appellant was convicted of personating a person employed in the public service contrary to s. 105(*b*) of the Penal Code. It was fully proved that the appellant purported to be and to act as a wireless inspector employed by the Kenya Broadcasting Corporation to inspect wireless licences in Mombasa. On appeal the argument was whether the appellant personated himself to be a person employed in the public service as defined in s. 4 of the Penal Code.

Held –

(i) the board of the Kenya Broadcasting Corporation is a public board within the definition of a person employed in the public service, contained in s. 4 of the Penal Code.

(ii) whether the appointment of such a servant, as the appellant represented himself to be, is controlled by the board or the director-general, a servant of the corporation must be a public officer under para. (*c*) of s. 4 of the Penal Code; accordingly the appellant personated himself to be a person employed by the public services.

Appeal dismissed.

Judgment

Rudd Ag CJ, read the following judgment of the court: The appellant appeals from conviction of personating a person employed in the public service contrary to s. 105(*b*) of the Penal Code. It was abundantly proved that the appellant purported to be and to act as a wireless inspector employed by the Kenya Broadcasting Corporation to inspect wireless licences in Mombasa. The only question in the appeal is whether or not the appellant personated himself to be a person employed in the public service as defined in s. 4 of the Penal Code. The material part of the definition reads as follows:

> " 'person employed in the public service' means any person holding any of the following offices or performing the duty thereof, whether as a deputy or otherwise, namely –
>
> (*a*) any civil office including the office of Governor, the power of appointing a person to which or of removing from which is vested in Her Majesty or in the Governor or in the Governor-in-Council of

Ministers or in any public commission or board; or

(*b*) any office to which a person is appointed or nominated by Ordinance or Statue or by election; or

(*c*) any civil office the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind included in para. (*a*) or para. (*b*) of this definition;"

The Kenya Broadcasting Corporation is a statutory corporation constituted by the Kenya Broadcasting Corporation Ordinance, 1961, and is a body corporate with a common seal, with power to sue and be sued, and subject to the provisions of s. 28 of the Ordinance, to purchase, hold, manage and dispose of land and other property, and to enter into contracts and to do all things necessary to facilitate the proper discharge of its functions under the Ordinance. The operations of this corporation are controlled and governed by a board constituted under s. 4 of the Ordinance. This board consists of a chairman appointed by the Governor and nine members of which three are appointed by the Governor-in-Council, three are appointed by the Governor in the first instance and, subsequently by the Governor on advice by a special council, and three other members are appointed by the contractors. The contractors are persons employed by the corporation under s. 45 of the Ordinance and no such person can be employed without the consent of the Governor-in-Council.

Although s. 45 says that contractors shall be appointed by the corporation, s. 2 defines contractors as meaning "the contractors appointed by the board under s. 45 of this Ordinance". It is therefore clear that the board is in fact the corporation. This is confirmed by the marginal note to s. 4 which provides the constitution of the board. This note reads "Constitution of and appointments to Corporation", and by the marginal note to s. 5 which reads "Duration of office of chairman and members of Corporation". Under s. 29 of the Ordinance the corporation may appoint and employ such officers, servants and agents as it deems necessary for the discharge of its functions under the Ordinance upon such terms and conditions of service as it may determine.

Section 20 of the Ordinance provides for the appointment of a director-general as an officer of the corporation and, that he should be the chief executive officer of the corporation, and responsible for the execution of the policy of the corporation and, for the control and management of its day-to-day business. Sub-section (2) provides for the delegation by the corporation to the director-general of such of its functions under the Ordinance as are necessary to enable him to transact effectively the day-to-day business of the corporation of every kind whatsoever, and in particular, and without prejudice to the generality of the foregoing, that the corporation shall delegate to the director-general the power subject to any instructions or regulations, of a general nature as may be given or made by the corporation, inter alia, to exercise supervision and control over the acts of all servants of the corporation, in matters of executive administration in the whole field of broadcasting, and in all matters concerning the accounts and records of the corporation. The director-general is appointed by the Governor.

Section 33 of the Ordinance provides that the corporation shall make regulations generally relating to the conditions of service of officers and servants of the corporation and in particular, but without prejudice of the generality of the foregoing, shall make regulations relating to, inter alia (*a*) the appointment, dismissal, discipline, pay and leave of, and the security to be given to officers and servants. As far as this court is concerned, it has had no knowledge or notice of any such regulations having been made.

Now it is perfectly clear that the appellant represented himself to be a servant of the corporation and that the appointment of servants of the corporation is controlled by the board which is constituted by statute or possibly by the director-general under powers delegated by the board, and that the director-general is himself a person appointed by and under the Ordinance.

The board is certainly a public board within the meaning of the definition of a person employed in the public service, contained in s. 4 of the Penal Code. Whether the appointment of such a servant, as the appellant represented himself to be, is controlled by the board or by the director-general, it is clear

that a servant of the corporation must be a public officer under para.(*c*) of the definition. The conviction was therefore right and the appeal is dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Kenya
G. A. Twelftree (Acting Senior Crown Counsel, Kenya)

Jamal Ramji and Co Ltd v Lint Marketing Board
[1962] 1 EA 752 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	13 December 1962
Case Number:	620/1961
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Mistake – Mistake of fact – Money paid under mistake of fact induced by fraud – Recovery – Estoppel – Indian Contract Act, 1872, *s.* 72.

Editor's Summary

The plaintiffs used to purchase cotton from the defendants. After the cotton was delivered to the plaintiffs the defendants used to send them invoices by hand. These invoices were checked and passed to an accounts clerk who would then make out the cheques for payment to the defendants. The cheques were normally sent by hand within a few days after receipt of the invoices and receipts were obtained and filed. In April and June, 1959, the accounts clerk made two cheques drawn on The Standard Bank of South Africa Limited for Shs. 213, 272/37 and Shs. 210,340/50 respectively payable to the defendants and by fraud and conspiracy with a director of U.P. Ltd., which was indebted to the defendants, paid these cheques on behalf of U.P. Ltd., to the credit of the defendants' account with Barclays Bank. These sums were thus credited by the defendants to the account of U.P. Ltd., and the monthly statements of account sent by the defendants to the plaintiffs showed that the plaintiffs had not been credited with the amounts of the two cheques. The fraud was discovered in July, 1960, and both the accounts clerk and the director of U.P. Ltd., were convicted of theft and receiving the cheques respectively. In this action the plaintiffs claimed Shs. 423,612/87 being the value of the two cheques, which they alleged were paid to the defendants by a mistake of fact. The defendants disclaimed liability on the grounds that they acted as agent for collection of the cheques from U.P. Ltd, as the money was used to recover what was due from

them, they were not liable, and that in any event the plaintiffs were estopped by their conduct from recovering.

Held –

(i) the relationship between the plaintiffs and the defendants was that of debtor and creditor; the cheques were made out to the defendants as principals, as creditors of the plaintiffs and not as agents, and accordingly the defendants were not entitled to rely on the defence open to an agent.

Dukhiya v. The Standard Bank of South Africa Limited, [1959] E.A. 958 (C.A.) applied.

(ii) the plaintiffs as purchasers owed no duty to the defendants as sellers to inform them that their statement of account was incorrect and since there was no breach of duty, nor any representation or inducement by the plaintiffs to the defendants to believe that U.P. Ltd., were entitled to be credited with the proceeds of the two cheques, the defendants were not estopped from recovering sums paid under a mistake of fact.

Judgment for the plaintiffs for Shs. 423.612/87.

Cases referred to in judgment:

(1) *Dukhiya v. The Standard Bank of South Africa Limited*, [1959] E.A. 958 (C.A.).

(2) *Jones* (*R.E.*) *Ltd. v. Waring & Gillow Ltd*., [1926] A.C. 670.

(3) *Sri Shiba Prasad Singh v. Maharaja Srish Chandra Nanli and Another* (1949), 76 I.A. 244.

(4) *Nagorao v. Governor-General-in-Council* (1951), A.I.R. Nag. 372.

Judgment

Sheridan J: The plaintiffs claim Shs. 423,612/87, being the value of two cheques of Shs. 213,272/37 and Shs. 210,340/50 respectively, which they allege were paid to the defendants by a mistake of fact. By their written statement of defence the defendants disclaim liability on the grounds (1) that they were merely a conduit pipe acting as collecting agents (2) estoppel.

The facts as established by the evidence, oral, documentary and circumstantial are as follows. The plaintiffs purchase cotton for export from the defendant board by auction or by private treaty. After the contracts are made the cotton is delivered to the plaintiffs and invoices of the purchase are sent to them by hand. The particulars of the invoices are entered in the cotton purchase book (exhibit 1), at the instance of Mr. Ghulamali Mohamedali Alibhai (P.W. 3), a director of the plaintiffs who is in charge of their cotton business. The invoices are then sent to Mr. A.N. Muley (P.W. 5), in their cotton department for checking. Then they were passed to Mohamed Jaffer Walli, an accounts clerk who made out the cheques for payment to the defendants and entered the details of the invoices, including the amount and the payees' name on the counterfoils. He handed over the cheque book with the invoices to Mr. Shah, the chief accountant, who died in 1959. The cheques required two signatures and they were signed by Mr. Shah and one of the three directors, Ghulamali, Mohamed Hussein Kara (P.W. 7), and Mohamedali Ramji or by Roshamali Alibhai (P.W. 6) the manager. If Ghulamali was available his would be the second signature. The cheques were payable within three to five days of the receipt of the invoices. Jaffer would then send the cheques to the defendants by hand and receipt would be obtained and filed. I accept it that the defendants sent regular monthly statements of account. The plaintiffs state that they did not pay much attention to these statements as they were paying promptly against invoices. Such was the procedure in dealings between the parties. I now come to the particulars of the present claim. On April 8, 1959, Jaffer made out a cheque No. AP24423 for Shs. 213,272/37 payable to the defendants. It was in respect of three invoices. It was signed by Mr. Shah and probably by Ghulamali because he was the only other cosignatory who did not initial the counterfoils. The cheque itself has disappeared although it was returned paid to the plaintiffs by The Standard Bank of South Africa Ltd., their bankers. However, I am satisfied from the counterfoil (exhibit A) and from other evidence that this was the position. The numbers of the invoices on the counterfoil have been altered. Jaffer wrote non-existent numbers over the original numbers which related to amounts which had already been paid. By this means he enriched himself to the extent of Shs. 213,272/37. What he did with the money emerges from a statement (exhibit P), which Manibhai Shankerbhai Patel made to Superintendent Hassan (P.W. 4) of the C.I.D. Kampala. Manibhai was a director of Uganda Produce Ltd. who bought cotton seed from the defendants. It appears from the evidence of Mr. Lindsay (D.W. 1), the defendant's senior accountant, that Uganda Produce Ltd. were having difficulties in meeting their financial commitments with the defendants. Jaffer and Manibhai entered

into a conspiracy to swindle the plaintiffs by paying in the cheque on behalf of Uganda Produce Ltd. to the credit of the defendants in their account with Barclays Bank. This was done on April 14. It is clear from the paying in slip (exhibit M), that this was the same Standard Bank cheque No. AP24423. Mr. Lindsay states that when the credit was brought to his notice in the daily bank statement he instructed his clerk to telephone the bank and inquire the nature of the lodgment. He was informed that it was an amount credited to their account by Uganda Produce Ltd. through the Standard Bank. Here I may say that I prefer this evidence to that of Mr. Joshi Kalidas (P.W. 2), the submanager of Barclays Bank, that the defendants merely wanted to know if the money had been paid in and did not inquire who had paid it in. There would be no point in this. As Uganda Produce Ltd. were indebted to the defendants in the sum of Shs. 192,471/25 this was credited to their account and the balance of Shs. 20,801/12 was repaid to them. The story, mutatis mutandis, was exactly the same in relation to the second cheque No. AP32204 for Shs. 210,340/50 dated June 2, 1959. The relevant counterfoil is exhibit B. It is a reasonable inference that both these cheques have been "spirited away" by Mohamed Jaffer. The fraud did not come to light until July, 1960. Both Jaffer and Manibhai were convicted on their pleas on charges of theft and receiving the cheques respectively. It is common ground that before the alleged mistake was discovered an order for the compulsory winding-up of Uganda Produce Ltd. was made and it is improbable that any dividend will be paid to unsecured creditors such as the defendants, if that is their position.

This suit once more raises the question: Which of two innocent parties is to suffer for the fraud of a third party? As a general answer it should be the party by whose neglect the loss has arisen and Mr. Russell, for the defendants, has strenuously contended that it was the plaintiffs who were negligent. All they had to do was to scrutinize and query the statements of account when they were not credited with the amounts of the two cheques. Also they allowed some fourteen months to elapse before the fraud was discovered. Meanwhile, the defendants had altered their position for the worse. There was nothing suspicious to put the defendants on their guard. Mr. Russell goes further and submits that the plaintiffs were under a duty to inform the defendants of the omissions in the monthly statements. He probably had to go as far as that because it is only if the plaintiffs were in breach of a duty to the defendants that negligence is relevant; for that purpose it will be necessary to consider the relationship between the parties.

As I understand the first line of defence it is that the defendants acted as agent for collection of the cheques from Uganda Produce Ltd. and that as the money was used to recover what was due from them the defendants are not liable. As against that the cheques were made out to them as principals, as creditors of the plaintiffs and not as agents and there was the same relationship between the defendants and the Uganda Produce Ltd. Further the receipts (exhibits Q and R), were issued by the defendants to Uganda Produce Ltd. as purchasers of cotton seed. In *Dukhiya v. The Standard Bank of South Africa Ltd.* (1), [1959] E.A. 958 (C.A.), the facts were that the appellant agreed to act as the banker of N.S. Patel, the respondents bank clerk. By fraud the clerk had the appellant's bank account credited with Shs. 32,800/-. As a result of this the appellant paid the clerk the money. The respondents sued the appellant for the return of the money alleging that he had received the money under a mistake of fact induced by the clerk's fraud. The appellant claimed that he had received the money and later paid it to the clerk in good faith. It was held on appeal that the relationship of the appellant with the bank clerk was that of creditor and debtor and that the appellant was not the agent of the bank clerk in receiving the money and that the respondent dealt with and regarded the appellant as a principal and customer. Per Gould, Ag. V.-P., p. 965

> "When the appellant paid the money out he did so partly to Patel and partly at his direction and he might therefore be regarded as Patel's agent to make the last-mentioned payments. That does not alter the fact that he was not Patel's agent to collect or receive the moneys from the bank, and I consider that the learned judge correctly regarded the relationship as that of debtor and creditor."

In other words the appellant was not a mere conduit pipe and he was not entitled to rely on the defence open to an agent. It follows that the first defence fails.

The law relating to the recovery of money paid under a mistake of fact is authoritatively set out in the majority decision of the House of Lords in *Jones* (*R.E.*) *Ltd. v. Waring & Gillow Ltd.* (2), [1926] A.C. 670. The facts were that one B. had purchased goods from the respondent on hire-purchase and was indebted to them for £5,000. He falsely represented to the appellant that he was interested in some motor project and he persuaded the appellant to sign an agreement by the motor firm appointing the appellant as their agent provided that he deposited £5,000. B. falsely represented that the respondents were financing the firm and were his principals and the money was paid to them whereupon the goods seized under the hire-purchase agreement were returned to B. It was held that negligence on the part of the appellant did not afford any defence to the respondent. To quote from Paget's Law of Banking (5th Edn.), p. 243

> "The first and main proposition derivable from *Jones* (*R.E.*) *Ltd. v. Waring & Gillow Ltd.* (2), is that money paid to a man as principal, not agent, under a mistake of fact can be recovered against him, although he has detrimentally altered his position, if he did so merely in consequence of the payment and not in reliance on some independent act or representation of the payers or by reason of some breach of duty on the payers' part."

Mr. Russell distinguishes this case on the ground that in Uganda the law relating to payment by mistake is governed by s. 72 of the Indian Contract Act, 1872, which provides that

> "A person to whom money has been paid . . . by mistake . . . must repay or return it."

This section was considered by the Privy Council in *Sri Shiba Prasad Singh v. Maharaja Srish Chandra Nanli and Another* (3) (1949), 76 I.A. 244, where it is made clear that it covers mistakes of law as well as mistakes of fact. It was held that it is not to be implied that every sum paid under mistake is recoverable no matter what the circumstances may be; there may be in a particular case circumstances which disentitle a plaintiff by estoppel or otherwise. It is to be noted that the Indian Contract Act is more favourable to the plaintiffs than would be the common law in that it permits of the recovery of money paid under a mistake of law but the distinction is immaterial in this case as only a mistake of fact is in issue. The highwater mark of the defence is *Nagorao v. Governor-General-in-Council* (4) (1951), A.I.R. Nag. 372, but although the appellate judge allowed the appeal against an order for the recovery of money paid under mistake on the grounds of estoppel it was not in fact necessary for him to consider that doctrine because on the facts it was clear that the defendant who received the money was no more than a collecting agent who parted with the money to his principal. He was not a creditor. He was merely allowing himself to be used as a post office.

Can estoppel defeat this claim? Before it can do so the defendants must show so some act or representation of the plaintiffs or some breach of duty on their part to the defendant. On the evidence the plaintiffs did nothing to

induce the defendants to believe that Uganda Produce Ltd. were entitled to be credited with the proceeds of the two cheques. They made no representation about Uganda Produce Ltd. The defendants derived their information about that company from Barclays Bank, who were not the plaintiff's agents. Contrast *Dukhiya's* case (1), where it was held that the respondent owed a duty to the appellant to inform him of the true state of his account and if the detrimental alteration of his position was due to the breach of that duty it followed that the breach amounted to a representation to the appellant, either positive or negative. The plaintiffs as purchasers owed no such duty to the defendants as sellers to inform them that their statement of account was incorrect. They were both principals. To hold otherwise would means that the defence to a claim such as this. In the absence of any representation or duty the defence of estoppel must fail.

For the above reasons there will be judgment for the plaintiffs for Shs. 423,612/87 with interest and costs as prayed.

Judgment for the plaintiffs for Shs. 423,612/87.

For the plaintiffs:
Shaukat, Viriji, Daphtary & Co., Kampala
H. P. Asaria

For the defendants:
Russell & Co., Kampala
R .E. G. Russell

Olinda De Souza Figueiredo v Kassamali Nanji
[1962] 1 EA 756 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	18 December 1962
Case Number:	258/1962
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Mortgage – Mortgage not signed by mortgage – No positive covenants by mortgage – Mortgage registered – Validity of mortgage – Registration of Titles Ordinance (*Cap.* 123), *s.* 49, *s.* 51, *s.* 56, *s.* 94, *s.* 96, *s.* 114, *s.* 119, *s.* 125, *s.* 155, *s.* 156, *s.* 181, *s.* 184, *s.* 185, *s.* 209 (1) (*U.*) – *The Land Registration Rules*, 1925, *r.* 121 (1).

Editor's Summary

The plaintiff signed a mortgage of her property to secure an advance to her and the mortgage deed was duly registered. The mortgage deed was not signed by the mortgagee and the plaintiff later sued for a declaration that the mortgage was void against her on the ground that, lacking the signature of the mortgagee and attestation thereof, the mortgage was a nullity and had been registered contrary to s. 114 and s. 156 of the Registration of Titles Ordinance. The defence was that the mortgage, having been registered on the certificate of title to the property, could not be impeached.

Held – once the mortgage had been registered it could not, in the absence of fraud under s. 184 of the Registration of Titles Ordinance or in the exercise by the High Court of its power under s. 185 of the Ordinance, be impeached.

Suit dismissed.

Cases referred to in judgment:

(1) *Morelle Ltd. v. Wakeling*, [1955] 1 All E.R. 708.

(2) *Harshad Ltd. v. Globe Cinema Ltd. and Others*, [1960] E.A. 1046 (U.).

(3) *Fels v. Knowles* (1906), 26 N.Z.L.R. 604.

(4) *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd*., [1926] A.C. 101.

(5) *Gibbs v. Messer*, [1891] A.C. 248.

Judgment

Sheridan J: The plaintiff claims a declaration that a mortgage signed by her (exhibit B) is void against her in that it was registered contrary to s. 114 and s. 156 of the Registration of Titles Ordinance. Various other consequential reliefs are also claimed. The defence is that the mortgage is registered on the Certificate of Title to the property and that the validity of the mortgage cannot be impeached.

By the mortgage dated June 24, 1959, the plaintiff, as registered proprietor, mortgaged Plot No. 8 Impala Avenue to secure a sum of Shs. 70,000/-. It is to be noted that the mortgage does not contain any positive convenants by the defendant mortgagee so that, apart from the provisions of the Ordinance, the absence of his signature would seem to be immaterial as there was nothing in the mortgage upon which he could be sued.

Section 114 and s. 156 of the Ordinance provide as follows:

> "114. The proprietor of any land under the operation of this Ordinance may mortgage the same by signing a mortgage thereof in the form in the Eleventh Schedule.
>
> "156. No instrument or power of attorney shall be deemed to be duly executed unless either –
>
> (*a*) the signature of each party thereto is in Latin character; or
>
> (*b*) a transliteration into Latin character of the signature of any party whose signature is not in Latin character and the name of any party who has affixed a mark instead of signing his name are added thereto by or in the presence of the attesting witness at the time of execution, and beneath such signature or mark there is inserted a certificate in the form in the Eighteenth Schedule."

While it is true that s. 114 does not say anything about the signature of the mortgagee the form in the Eleventh Schedule does. The answer to that might be s. 209 (1) which provides:

> "209 (1) The forms contained in the several schedules may be modified or altered in expression to suit the circumstances of every case; and any variation from such forms respectively in any respect not being matter of substance shall not affect their validity or regularity."

For myself I cannot see how the absence of the mortgagee's signature on this particular mortgage is a matter of substance. However, there remains s. 156 to consider. In my view the intention of that section was to secure that signatures should be in Latin character although I realise that the wording is "the signature of each party thereto". A contrary argument could be advanced in relation to s. 155 which deals with attestation. There the wording is

> "Instruments . . . signed by any person and attested by one witness shall be held to be duly executed".

If this section is construed literally it means that any one person with one attesting witness can execute an instrument but that cannot have been the intention of the legislature. No assistance is to be derived from the Australian authorities as no similar provision was needed there. In some Australian states it is the practice for only the transferor to sign unless the transferee undertakes some liability. Hogg's Australian Torrens System (1905) 910. For this reason and subject to consideration of the interesting submissions which have been made to me I would interpose the word "necessary" between the words "each" and "party" in s. 156(*a*) to give it proper sense.

Mr. Khanna, for the plaintiff, submits that this is purely a statutory mortgage in a prescribed form and that if a necessary signature and attestation is missing the instrument is a nullity and registration cannot cure it. This is a bold submission in view of s. 49, s. 51 and s. 56 of the Ordinance. Section 49 provides that the certificate of registration shall be received in the courts as conclusive evidence that the instrument has been duly registered. Section 51 could only defeat a registered title if I am wrong in my construction of s. 156. It is true that s. 56 only applies to applications to bring land under the Ordinance but by analogy it shows the pattern of the legislation by providing that once a certificate of title has been issued it shall not be impeached or defeasible by reason of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate of title. Section 94, s. 96, s. 119 and s. 125 point the same way. Section 181 gives the registrar a discretion to reject defective instruments. Once he has admitted an instrument then in the absence of fraud under s. 184 or the exercise by the High Court of its powers under s. 185 I would say that that is the end of the matter. In *Morelle Ltd. v. Wakeling* (1), [1955] 1 All E.R. 708 it was held that a departure from a form under The Land Registration Rules, 1925, r. 121 (1) did not invalidate the transfer as the registrar was given a wide discretion and that although the departure from r. 121 (1) was based on an erroneous view of the law, the acceptance of the transfer for registration must be taken as conclusive of its sufficiency in form.

I have always understood the law to be, in the absence of fraud, that a court will not go behind the fact of registration and I said so in *Harshad Ltd v. Globe Cinema Ltd. and Others* (2), [1960] E.A. 1046 (U.). As was said by the Court of Appeal in *Fels v. Knowles* (3) (1906), 26 N.Z.L.R. 604, p. 620 and repeated with approval by the Privy Council in *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* (4), [1926] A.C. 101 at p. 106

> "The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of title under which he takes from the registered proprietor has an indefeasible title against all the world".

I would distinguish the case of *Gibbs v. Messer* (5), [1891] A.C. 248 as there the court was dealing with a certificate of title which was issued in favour of a fictitious person. It was held that the only obligation which was imposed on a person who dealt with a registered proprietor was to ascertain the existence of the registered proprietor and the genuineness of the instrument signed by him. I fail to see how the mortgage in the present case can be described as a null deed or as other than genuine. On any other conclusion the purpose of the Ordinance would be defeated.

For the above reasons I dismiss the suit with costs.

Suit dismissed.

For the plaintiff:
D. N. Khanna and *J. S. Shah*, Kampala

For the defendant:
M. V. Jobanputra, Kampala

Kehar Singh and another v B D Bhatt
[1962] 1 EA 759 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	30 October 1962
Case Number:	46/1961
Before:	Sir Alastair Forbes VP, Crawshaw and Newbold JJA
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Kenya – Mayers, J.

[1] Mortgage – Possession of premises – Sale by mortgagee without intervention of court – Property purchased by stranger at auction – Application by mortgagee subsequently for order for possession – Whether sale of property terminated mortgagee's interest in property – Civil Procedure (*Revised*) *Rules*, 1948, *O. XXXVI, r.* 3*A* (*K.*) *– Indian Transfer of Property Act*, 1882, *s.* 69*B – Indian Transfer of Property Act* (*Amendment*) *Ordinance*, 1959 (*K.*).

Editor's Summary

The appellants took out an originating summons under O. XXXVI, r. 3A, of the Civil Procedure (Revised) Rules, 1948, for an order for possession of certain property mortgaged to them by the respondent. Prior to the issue of the summons, however, the appellants in exercise of purported exercise of statutory powers of sale, had, without application to the court, caused the mortgaged property to be sold by auction. The trial judge dismissed the summons and the appellants appealed.

Held –

(i) upon a sale of mortgaged property under a power of sale the equity of redemption is destroyed and possession of the property by the mortgagor subsequent to the sale is possession adverse to the purchaser and not possession by permission of the mortgagee.

(ii) by the sale the appellants had terminated their interest in the property and had acquired instead the proceeds of the sale; accordingly the appellants had no right to possession of the property nor to the relief claimed in the summons.

Appeal dismissed.

Case referred to in judgment:

(1) *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan* (1879), 6 I.A. 145.

(2) *Chabildas Lallubhoy v. Mowji Dayal* (1902), 26 Bom. 82.

The following judgments were read:

Judgment

Sir Alastair Forbes VP: This is an appeal from a ruling and order of the Supreme Court of Kenya on an originating summons taken out by the appellants under O. XXXVI, r. 3A, of the Civil Procedure (Revised) Rules, 1948. That rule inter alia enables a mortgagee to take out as of course an originating

summons, returnable before a judge in chambers, seeking various forms of relief, including delivery of possession by the mortgagor; and the appellants on this originating summons sought possession as mortgagees of certain property which had been mortgaged to them by the respondent.

Prior to the issue of the summons, however, the appellants, in exercise or purported exercise of power conferred by the mortgage instrument and statutory powers of sale, had, without application to the court, caused the mortgaged property to be sold by auction. The originating summons was in fact originally

taken out by the purchasers, but was subsequently amended by the substitution of the appellants (the mortgagees) for the purchasers as applicants when it was realised that the purchasers were not empowered to proceed by originating summons for recovery of possession of the property. The propriety of this amendment appears to me to be open to doubt, but there has been no appeal against it. In supporting affidavits sworn by one of the purchasers and the second appellant respectively it is averred inter alia that upon the sale by auction the right and title of the respondent in the mortgaged property had ceased and been extinguished. The respondent, in an affidavit in reply, averred inter alia that up to the time of swearing the affidavit no transfer to the purchasers had been registered and that he remained the registered proprietor of the property.

The learned judge of the Supreme Court dismissed the summons with costs, saying, inter alia:

> "A mortgagee's right to the possession of the mortgaged premises is essentially alternative in nature to his right to sell the land. He may go into possession and thereafter sell, but having sold the land, he could not claim to remain in possession by reason of the mortgage having given him a right to go into possession. The same conclusion may be arrived at in another way. By selling land, any vendor parts with all his rights and interest in the land except in so far as those rights and interests may be reserved to him at the time of the sale. There is no material before me to suggest that the right to the possession of the suit premises was reserved to the applicants at the time of the sale or purported sale to the purchasers. It would appear manifestly wrong for the court to make an order putting someone into possession of land who upon his own showing has parted with the right to possession to someone else."

Against this decision the appellants appeal on the following grounds:

> "1. O. XXXVI, r. 3A, contains no limitation in the rule itself, about a mortgagee seeking an order for or going into possession, for any specified purpose or for no purpose at all, or doing so before or after fall of the hammer, (at an auction sale at the instance of the mortgagee), but before a registered instrument of discharge.
>
> "2. No discharge having been executed or registered, the relationship of mortgagor or mortagee subsisted for the purpose of the rule.
>
> "3. There was no evidence that the price realised at the sale, was sufficient to extinguish the debt secured by the mortgage, with or without a formal discharge by registered instrument.
>
> "4. No conveyance, incorporating a discharge, had ever been executed or registered in favour of the purchaser, and as such no right to sue for possession on the facts before the court below, had passed to the purchasers, or had left the appellants."

A further ground of appeal relates to the question of mesne profits, but this does not arise unless the appeal succeeds.

In my view the learned judge's decision was right. Upon a sale of mortgaged property under a power of sale the equity of redemption is destroyed (*Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan* (1) (1879), 6 I.A. 145 at p. 160); and possession of the property by the mortgagor subsequent to the sale is possession adverse to the purchaser and not possession by permission of the mortgagee (*Chabildas Lallubhoy v. Mowji Dayal* (2) (1902), 26 Bom. 82 at p. 87). By the sale the mortgagee has terminated his interest in the property and has acquired instead the proceeds of the sale, subject, of course, to any trust which may affect surplus proceeds. It follows that the mortgagee has

left no right to possession which he can enforce. It is true here the sale had apparently not been completed by registration of an instrument of transfer. However, under s. 69B of the Indian Transfer of Property Act, 1882, as amended by the Indian Transfer of Property Act (Amendment) Ordinance, 1959, the transfer upon the sale of the property under the power of sale was to be effected by the appellants; and as between the appellants and the purchasers there is no suggestion that the sale was not valid; or that execution of a transfer by the appellants could not have been enforced by the purchasers. In the circumstances I think the appellants/mortgagees, in equity at least, lost their right to possession of the property upon the auction sale taking place, and, therefore, had no right to the relief claimed in the originating summons.

I would dismiss the appeal with costs.

Crawshaw JA: The appellants' application to the court was, in my opinion, ill-conceived, and the learned judge was right to refuse it. I do not think it is really necessary to decide whether in the circumstances the learned judge had jurisdiction to make an order for possession, for it is clear from the wording of his decision that he would have thought it a most inappropriate application to grant even if he had the power to grant it, which he held he had not. I agree that it would have been most inappropriate. The cases cited by Mr. Khanna on foreclosure appear to me to be irrelevant to a sale. I agree with the Hon. Vice-President that the appeal should be dismissed with costs.

Newbold JA: I agree with Forbes, V.-P. In my view it is manifestly patent that a mortgagee who has exercised his power of sale of the mortgaged property is thereafter no more entitled to take out an originating summons under O. XXXVI, r. 3A, asking for possession of the property than the mortgagor is to take out such a summons asking for redemption. I would dismiss the appeal with costs.

Appeal dismissed.

For the appellants:
D. N. & R. N. Khanna, Nairobi
D. N. Khanna

For the respondent:
H. D. Trivedi and *C. S. Joshi*, Nairobi

Iddi Halfani v Hamisa Binti Athumani
[1962] 1 EA 761 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	13 September 1962
Case Number:	14/1962
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Practice – Ex parte judgment – Application for stay of execution pending determination of cross-suit by applicant – Cross-suit filed to set aside ex parte judgment – No appeal from ex parte judgment nor application to set it aside – Whether stay of execution can be granted – Whether court hearing application can inquire into merits of cross-suit – Indian Civil Procedure Rules, O. IX, r 13 *and O. XXI, r.* 29.

Editor's Summary

An ex parte judgment having been given against the appellant by a magistrate, he applied for a stay of execution pending the disposal of a cross-suit filed by him against the respondent alleging that the ex parte judgment was obtained by fraud. The appellant did not appeal against the judgment nor apply that it should be set aside under O. IX, r. 13 of the Civil Procedure Rules. The application for a stay was made under O. XXI, r. 29 which provides for a stay of execution where a suit is pending in any court against the holder of a decree

of such court. The magistrate did not decide whether the cross-suit had any likelihood of success, or whether it disclosed any cause of action, but dismissed the application on the ground that the cross-suit was not the kind of suit contemplated or covered by O. XXI, r. 29. On appeal,

Held –

(i) the words of O. XXI, r. 29 impose no condition regarding the nature of the pending suit, or the effect of a stay of proceedings granted under the rule as regards adjustment of claims or prevention of multiplicity of execution proceedings; all the rule requires is that there shall be a pending suit, which in the absence of limiting words means any kind of suit, brought by the unsuccessful against the successful party in the earlier suit whose decree is to be executed.

(ii) O. XXI, r. 29 ibid. gave the court a discretion whether to stay execution where a cross-suit was pending, and the likelihood or even the possibility of the cross-suit being successful must always be a relevant factor in deciding whether the discretion should be exercised upon terms or at all.

(iii) on the face of it, the allegations in the cross-suit disclosed no cause of action for setting aside the ex parte judgment on the ground of fraud.

Appeal dismissed. Application for stay refused. Decision of the magistrate affirmed on different grounds.

Case referred to in judgment:

(1) *Mahesh Chandra Sadhu v. Jogendra Lal Sarkar* (1928), 55 Cal. 512.

(2) *Salomon v. Salomon & Co*., [1897] A.C. 22.

(3) *Aziz Ahmad Khan v. Chhote Lal* (1928), A.I.R. All. 241.

(4) *Rasul Khan v. Emperor* (1939), A.I.R. Lah. 70.

(5) *Flower v. Lloyd* (1879), 10 Ch. D. 327.

(6) *Mohamed Golab v. Mohamed Sulliman* (1894), 21 Cal. 612.

(7) *Basdevanand Gir v. Shantanand* (1942), A.I.R. All. 302.

(8) *Muktamala Dasi v. Ram Chandra De* (1927), A.I.R. Cal. 84.

(9) *Malik v. Callow*, [1958] E.A. 99 (T.).

Judgment

Sir Ralph Windham CJ: This is an appeal against the dismissal by the district court, Dar-es-Salaam, of an application by the defendant in Civil Case No. 723 of 1961, against whom ex parte judgment had been given in his absence, for a stay of execution of that judgment pending the disposal of a cross-suit filed by him against the plaintiff-respondent. The ex parte judgment was given on May 8, 1961, the appellant having failed to turn up either on the day fixed for the hearing or subsequently. It was given upon the respondent formally proving her case through the testimony of herself and two witnesses. The appellant did not appeal against the judgment, nor apply to have it set aside under O. IX, r. 13 of the Civil Procedure Rules. Execution of the judgment was applied for on October 7, 1961, and is not yet

completed. On May 8, 1962, the appellant filed a cross-suit against the respondent, Civil Case No. 1471 of 1962. On May 18, 1962, he filed his application, for stay of execution, on the basis of that cross-suit. On May 24 his application was dismissed. The cross-suit is fixed for hearing next week, on September 18, 1962. On June 15, 1962, the appellant obtained from this court a temporary stay of execution pending the determination of the present appeal.

The appellant's application in the district court, dated May 18, for a stay of execution of the ex parte judgment in Civil Case No. 723 of 1961 was made under O. XXI, r. 29 of the Indian Civil Procedure Rules, which reads as follows:

> "29. Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."

The application was supported by an affidavit by the appellant, to whose terms I will refer presently. The learned magistrate delivered a reasoned written order in which, after considering but not deciding the question whether the cross-suit had upon the face of it any likelihood of success, or even whether it disclosed any cause of action, he proceeded to dismiss the application upon a narrower ground, namely that the cross-suit was not the kind of suit contemplated or covered by O. XXI, r. 29. In brief, it is a suit seeking to set aside the ex parte judgment of May 8, 1961, on the ground that it was obtained by fraud. The ex parte judgment had been upon a pecuniary claim for Shs. 3,700/- with interest. In holding as he did, the learned magistrate relied on a passage, from Chitaley's Commentary on the Code of Civil Procedure (2nd Edn.), at p. 1781, on the scope of the rule, in which it is stated that –

> "The object of this rule is twofold: (i) to enable the judgment-debtor and the decree-holder to adjust their claims against each other, and (ii) to prevent a multiplicity of execution proceedings".

This passage appears to be based on a single Indian authority, that of *Mahesh Chandra Sadhu v. Jogendra Lal Sarkar* (1) (1928), 55 Cal. 512, in which the court, at p. 516, merely observed that the above was

> "the two-fold object which, I think, the legislature had in view when enacting O. XXI, r. 29".

That may be so. But the legislature, with one or two particular objects in view, may enact legislation whose wording, intentionally or unintentionally, is wide enough to cover other matters as well; and if so, then, unless the result is so unreasonable that it could not have been comtemplated, the legislation must be construed to cover those other things, even if the legislature may not have had them in view. It is hardly necessary to cite authority for so cardinal a principle of interpretation; but it is enshrined in *Salomon v. Salomon & Co.* (2), [1897] A.C. 22, at p. 38, and followed in such Indian decisions as *Aziz Ahmad Khan v. Chhote Lal* (3) (1928), A.I.R. All. 241, and *Rasul Khan v. Emperor* (4) (1939), A.I.R. Lah. 70. If the language of a statute is clear it is not for the courts, nor I would add for text-book commentators, to seek to cut down its scope by speculating on the intention of the legislature in enacting it. So here, the words of O. XXI, r. 29, impose no condition regarding the nature of the pending suit, or the effect of a stay of proceedings granted under the rule as regards adjustment of claims or prevention of multiplicity of execution proceedings. All that the rule requires is that there shall be a pending suit, which in the absence of limiting words means any kind of suit, brought by the unsuccessful against the successful party in the earlier suit whose decree is to be executed. And in the present case there was and is such a pending suit, even though it is no cross pecuniary claim but is a suit to set aside the judgment in the earlier suit. In my view, therefore, the learned magistrate erred, understandably perhaps in view of Chitaley's commentary on r. 29, in holding that the pending suit did not fall within the scope of the rule.

But this is by no means the end of the matter; for it now falls to this court to consider, what the learned magistrate by reason of his decision on the narrower ground found it unnecessary to decide, namely whether upon a reading of the affidavit in support of the application, the pending suit appears to have any chance of success, or even whether the plaint itself discloses any

cause of action. It has been suggested that neither the learned magistrate nor this court was or is concerned with that question. But that is not so. Order XXI, r. 29, gives the court a discretion whether or not to stay execution where a cross-suit is pending, the words used being "the court may" and not "the court shall". And the likelihood or even the possibility in law of the cross-suit being successful, upon the materials before the court at the hearing of the application, must always be a relevant factor in deciding whether the discretion should be exercised, upon terms or at all. The materials before the court in the present case, both here and below, are the affidavit in support of the application and the plaint filed in the pending suit.

Now the supporting affidavit makes no allegation that the ex parte judgment sought to be set aside was obtained by fraud. In it the applicant merely alleges that

> "because of some misunderstanding and ignorance of courts procedure a decree was passed against me in the above suit".

It contains no imputation against the plaintiff-respondent. This might possibly have afforded a ground for setting aside the ex parte judgment upon an application under O. IX, r. 13; but no such application was ever made. It certainly discloses no legal ground to support a cross-suit to set aside the judgment. Nor, as I say, does the affidavit give any indication that fraud on the respondent's part is being or is going to be alleged. In it the appellant simply alleges that the cross-suit has been filed to set aside the ex parte decree because of the unspecified "misunderstanding and ignorance of courts procedure" already alluded to, and because

> "I had and still have a complete and genuine defence in answer to the plaintiff's claim against me in the above suit".

On these bare allegations no cross-suit to set aside the earlier decree could succeed in law.

Turning to the plaint itself in the cross-suit, we find the allegations of misunderstanding of court procedure repeated, and in addition it is alleged that the appellant was ill at the relevant time when the ex parte judgment was entered against him on May 8, 1961, and that he only came to know of the judgment in the following February, 1962. But here again, there is no suggestion that it was through any fraudulent or dishonest action on the respondent's part that the appellant was prevented from attending court at the hearing, thus letting judgment be entered against him upon ex parte proof. Eventually, in para. 6 of the plaint in the cross-suit, fraud on the respondent's part in obtaining the judgment is alleged for the first time, the paragraph stating that –

> "the defendant obtained the said judgment and decree in the said Civil Case No. 723 of 1961 by fraud".

There follow the particulars of the alleged fraud.

In brief, the particulars of fraud amount to no more than allegations that the "statements in the plaint" on the strength of which the plaintiff (the present respondent, the defendant in the cross-suit) obtained his ex parte judgment, were untrue. Paragraph 7 of the plaint in the cross-suit alleges that

> "the said statements in the plaint were made by the defendant well knowing the same to be false and untrue or recklessly not caring to inquire whether they were true or false, and thus were made fraudulently to secure a decree against the plaintiff".

Now on the face of it, these allegations disclose no cause of action for setting aside the ex parte judgment on the ground that it was obtained by fraud. To begin with, it was not simply on the statements of fact as set out in the plaint that the ex parte judgment was given, but on the evidence given by the plaintiff

in that suit (the present respondent) and her two witnesses, by way of ex parte proof of those statements of fact. But even if, as an act of indulgence to loose drafting, the allegations of untruth in the particulars of fraud in the cross-suit be taken to refer to the evidence given in support of the statements of fact set out in the plaint in the earlier suit, rather than to those statements of fact themselves, these allegations of untruth do not amount to fraud, in the legal sense of that term, for the purpose of setting aside a judgment "obtained by fraud". It is very well settled law that the mere fact that perjured evidence was tendered in the earlier suit, and that the judgment sought to be set aside was given on the strength of it, does not amount to an obtaining of that judgment by fraud. The fraud must be extrinsic or collateral to the evidence given in the case. No fraud of that kind is alleged here. The leading English decision on the point is *Flower v. Lloyd* (5) (1879), 10 Ch. D. 327, in which James, L.J., laying down the rule, said at p. 333:

> "Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sui juris and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately ad infinitum."

The decision in *Flower v. Lloyd* has been consistently followed in the courts of India, among the many of whose judgments on the point may be mentioned *Mohamed Golab v. Mohamed Sulliman* (6) (1894), 21 Cal. 612, and *Basdevanand Gir v. Shantanand* (7) (1942), A.I.R. All. 302. In *Muktamala Dasi v. Ram Chandra De* (8) (1927), A.I.R. Cal. 84, the rule was applied to an ex parte judgment said to have been obtained by perjured evidence, just as in the present case. Lastly, the rule has been followed by this court, in *Malik v. Callow* (9), [1958] E.A. 99 (T.).

I am aware that in holding that the plaint in the cross-suit, as it stands at present, discloses no cause of action, I may in effect be pre-judging that suit. But I have no alternative to so holding, since it is necessary to pronounce on the point for the purpose of determining this appeal and deciding whether this is a proper case for the exercise of the court's discretion under O. XXI, r. 29, to order a stay of execution. Whether between now and the hearing of the pending suit the plaint may or can be amended in such a manner as to establish a cause of action where none lies now, is not my present concern. Nor is my decision affected by any hardship that may result to the appellant from a refusal of the stay of execution. Even if such hardship were likely to result, as perhaps it will, a stay could not properly be granted under O. XXI, r. 29, even upon terms, in a case such as this where the pending suit could not, on the face of it, succeed.

For the foregoing reasons I hold that the learned magistrate was right, albeit for the wrong reasons, in refusing the application for a stay. This appeal must therefore be dismissed with costs.

Appeal dismissed. Application for stay refused. Decision of the magistrate affirmed on different grounds.

For the appellant:
Sayani & Co., Dar-es-Salaam
A. G. Kinariwala

For the respondent:
Fraser Murray, Thornton & Co., Dar-es-Salaam
S. H. M. Kanji

R v Ngereza s/o Masaga & others
[1962] 1 EA 766 (HCT)

Division:	High Court of Tanganyika at Mwanza
Date of judgment:	21 August 1962
Case Number:	33/1962
Before:	Reide J
Sourced by:	LawAfrica

[1] Criminal law – Manslaughter – Common intent – Death caused by assault by several assailants – Court unable to say who struck the fatal blow – Suspected fatal blow struck before other assailants attacked – Penal Code, s. 22, *s.* 23 *and s.* 241 (*T.*).

Editor's Summary

The four accused were charged with the manslaughter of one, Kabozya, who, it was alleged, died as a result of injuries inflicted by the accused. The evidence indicated that the attack on the deceased was made by sticks and that Kwigema, one of the accused, led the attack by striking the deceased at least once in the abdomen with a pestle and then returned to her house. From the medical evidence it was not possible to say with certainty from what injury the deceased had died, but it appeared that the injury to the abdomen could have proved fatal. The judgment considered whether there was a common intention, especially in relation to Kwigema's assault.

Held –

(i) it was impossible to say which of the assailants struck the fatal blow or blows.

(ii) it could not be said that when Kwigema struck the deceased the first blow or blows, she had a common intention with the others, nor that the fatal blow or blows was or were struck by any of the assailants when carrying out a common intention with the others.

Accused acquitted of manslaughter and convicted of assault causing actual bodily harm.

Case referred to in judgment:

(1) *R. v. Tabuyalenka and Another* (1943), 10 E.A.C.A. 51.

(2) *Tindira s/o Chiru and Another v. R.* (1951), 18 E.A.C.A. 180.

Judgment

Reide J: In this case two men and two women are charged with manslaughter of one Kabozya s/o Nyaganga on January 12, 1962. I will refer to Kabozya as “the deceased”. The four accused are Ngereza s/o Masaga, Mohamedi s/o Nassoro, Kwigema d/o Masobo and Bituro d/o Kahole. I will refer to them by their first names. Bituro is the wife of Ngereza.

The prosecution case is that these four persons, the deceased, and others, were all at a pombe party in the compound of one Manoti, and that at the conclusion of the party the deceased, who had apparently given offence by his drunken behaviour, was set upon by all the accused, and by Manoti and his son Mwanamweru, and received such injuries at their hands that he shortly afterwards died.

[After reviewing the evidence at length, the judgment continued:]

On the whole, and making the fullest allowance in favour of the accused for the discrepancies in the witnesses’ evidence, I have no real doubt, nor had the assessors, that all the accused participated in some measure in the assault upon

the deceased and that they all, except Mohamedi used sticks or other weapons. All the witnesses have said that Bituro struck the deceased across the legs with the cassava stick. I think there is no real doubt that Mohamedi struck or (or "and") stamped upon the deceased with his shod feet (although Yohana happened not to see this). The other three eyewitnesses have all testified to this. All the witnesses agreed that they saw Ngereza and Kwigema strike the deceased, though there are discrepancies about the number and nature of blows, and the weapon used. There can be no doubt that Kwigema inflicted at least one blow with her pestle (which three witnesses have testified to seeing in her hand), and that Ngereza, who took a principal part in the attack and had urged the others on, struck the deceased with a stick or with the pestle, or possibly with both.

There remains to be considered the question of common intention especially in relation to Kwigema's assault. I have decided that it is quite impossible to say which of the six assailants struck the fatal blow or blows. It might have been any of them, except Bituro. Provided that I could be satisfied beyond reasonable doubt that each of these six persons had a common intention with the other five at the time they assaulted the deceased, then the question of who struck the fatal blow or blows would be, so far as this charge of manslaughter is concerned, irrelevant. They would all six be guilty of manslaughter. I have not found this an easy matter to decide. I have borne in mind the decision in *R. v. Tabuyalenka and Another* (1) (1943), 10 E.A.C.A. 51, where it was held (I quote from the head note) that:

> "To constitute a common intention to prosecute an unlawful purpose within the meaning of s. 22, Penal Code, e.g. to beat a so-called thief, there being no suggestion that the violence used was necessary to effect the thief's arrest, it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so-called thief. Their common intention may be inferred from their presence, their actions, and the omission of any of them to dissociate himself from the assault."

It will be noted that the court did not say that the intention of the accused is constituted by their presence and actions, and the omission of any of them to dissociate themselves from the assault, but only that a common intention may be inferred from those circumstances. It does not appear to me that the court was then making a finding on the question whether a common intention is constituted for the purposes of s. 23 of the Penal Code between persons, who attack another, acting in pursuance or execution of an intention which they have formed independently, and without any prior concerted agreement. That question, as it seems to me, is one of considerable difficulty, and one which involves a determination of the meaning of the word "common" in the words "common intention", a question altogether different from and antecedent to that of determining what evidence may constitute a common intention.

I will put the matter in this way – does "a common intention" for the purposes of s. 23 of the Penal Code means a "shared intention" in the sense that there is a notional single intention in which all the accused persons participate and share? Such a conception, appertaining perhaps to the realm of philosophy rather than that of law, would seem to me to require a measure in each accused of conscious participation in a joint plan, and agreement with the others. Or is the true meaning of "common intention" the sum total of a number of similar intentions formed in the minds of the accused persons (though originating possibly in different motives) and irrespective of any measure of conscious agreement between them? In my view a common intention within the meaning of s. 23 of the Penal Code may be found in and constituted by the latter premises as well as the former. So to hold appears to be consistent

both with authority, and, if I may say so, the dictates of common sense. That finding is, however, subject to this restriction, that where persons have each formed separate intentions to prosecute the same unlawful purpose, without there being any preconceived agreement or plan existing between them in relation to that purpose, then, for the prosecution of those several purposes to constitute or to creat a "common intention" there must be such a degree of simultaneity in the prosecution of those purposes as fairly to constitute them a single transaction carried out by a number of persons. That is to say, in this case, the assaults by each of the assailants must have been simultaneous, or virtually so. I do not think it is possible or desirable to attempt to put the matter more precisely than that.

In so finding, I have been guided by and have respectfully followed the judgment of the Eastern African Court of Appeal in *Tindira s/o Chiru and Another v. R.* (2) (1951), 18 E.A.C.A. 180. In that case,

> "the two accused who were drunk and armed with sticks, intervened in a quarrel over a woman. The deceased unarmed came up and asked what was going on. The second appellant thereupon hit him a blow on the left temple with a bamboo stick from which the deceased's skull was cracked, and there was a haemorrhage. The first appellant then hit deceased over the head with a heavy stick inflicting a wound skull-deep fracturing his skull and there was bleeding from the brain. The cause of death was haemorrhage from his latter fracture. The doctor gave his opinion that the effect of the fracture was necessarily fatal and that the crack over the temple if left untreated would also have proved fatal and it accelerated death in conjunction with the fracture".

Both accused were convicted for murder. On appeal the court said this:

> "We do not find in the record any evidence to support a common intention formed in the minds of the two appellants to attack the deceased. There is nothing to suggest that when either of the appellants struck his blow, it was in pursuance of a preconceived plan."

and dismissed the appeal of the first appellant and allowed that of the other and substituted a conviction for manslaughter.

That decision is in point in considering whether Kwigema had a common intention with the others. She seems to have some special and peculiar grudge against the deceased. It is not disputed that it was she who struck the deceased the first blow or blows (either with the pestle or the stick). Can it be said that when she did that, she then had a common intention with all the other assailants? In my view it is not possible to answer that question affirmatively. She ran up before the other assailants arrived, and it seems likely that her assault was completed before any of the others began theirs (if one excludes for this purpose the tripping up of the deceased by Mohamedi). There is no evidence, and I cannot be certain, that she heard the cry, "Beat, beat!" uttered by Ngereza and Manoti, or that she acted because of, or was influenced by it. There is some evidence that having struck her blow or blows, she left the place and returned to her cooking pots. If then one cannot say that Kwigema had a common intention with all the other assailants to prosecute an unlawful purpose, and since it may well be that it was her assault (particularly if she used the pestle) that was fatal, then it cannot be said that fatal blow or blows was or were struck by any of the assailants in the course of carrying out a common intention with the others, and accordingly it must follow that none of the accused can be convicted of manslaughter (though all are guilty of assaults causing actual bodily harm) and that the further question otherwise arising out of s. 23, that is, whether the fatal blow or blows, by whomsoever struck, was

or were a probable consequence of the prosecution of an unlawful purpose, does not fail to be considered.

Accordingly, I now acquit the four accused of manslaughter as charged and find each of them guilty of assaults causing actual bodily harm contrary to s. 241 of the Penal Code, and I convict them accordingly.

Accused acquitted of manslaughter and convicted of assault causing actual bodily harm.

For the Crown:
The Attorney-General, Tanganyika
Norman D. MacLeod (Crown Counsel, Tanganyika)

For the first, second and fourth accused:
Laxman & Co., Mwanza
D. N. Parekh

For the third accused:
C. C. Patel & Ruparell, Mwanza
C. C. Patel

Ghela Manek Shah and Two others v Mohamed Haji Abdulla and another

[1962] 1 EA 769 (SCK)

Division:	HM High Court of Kenya at Nairobi
Date of judgment:	28 March 1962
Case Number:	115/1959
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Damages – Claim to share of rents – Plaintiffs unaware of amount – Request for account – Account not supplied by defendants before action – Claim for general damages – Whether claim defective.

[2] Limitation – Action for damages – Claim founded on breach of contract for sale of land – Execution of documents refused by defendants – When cause of action arises – Limitation Ordinance (*Cap.* 11), *s.* 5 (1) (*K.*) *– Civil Procedure* (*Revised*) *Rules*, 1948, *O. VI, r.* 27 (*K.*) *– Rules of the Supreme Court, O. XXV, r.* 2.

[3] Practice – Action for specific performance – Subsequent action for damages – Both actions arising from same transaction – Different causes of action – Whether subsequent action competent – Civil Procedure Ordinance, s. 7 (*K.*) *– Civil Procedure* (*Revised*) *Rules*, 1948, *O. II, r.* 1 (*K.*).

[4] Evidence – Contract for sale of land – Contract signed by vendors and purchaser – Averment in plaint that purchaser was agent for undisclosed principal – Plaintiffs suing as principals – Whether evidence in proof of averment can be admitted – Indian Evidence Act, 1872, *s.* 91 *and s.* 92.

Editor's Summary

The plaintiffs sought a declaration that they were entitled to damages for breach of contract or, alternatively, as money had and received, and an order for an account of moneys due. By an agreement of sale executed on December 6, 1951, the defendants agreed to sell to one, K.G., who, according to the plaint, was acting for the plaintiffs as undisclosed principals, a plot of land with buildings thereon which at the time were let by the defendants under three separate tenancies. A portion of the purchase price was paid and the balance was to be paid against execution of the conveyance by March 31, 1952. The agreement provided that the purchaser should be entitled to one-fifth of the net rents of the premises from the date of the agreement to the date of execution of the transfer. On January 16, 1953, the plaintiffs' advocates submitted to the defendants' advocates an assignment for execution which on January 24, 1953, the defendants declined to execute on the ground that they were unable by reason

of a subsequent re-letting to give the plaintiffs vacant possession of the portion re-let. They further declined to pay any compensation to the plaintiffs for their inability to give vacant possession, whereupon the plaintiffs sued for specific performance of the agreement and abatement of purchase price and on appeal obtained an order from the Court of Appeal for Eastern Africa to this effect. On January 22, 1959, the plaintiffs sued for damages occasioned by the defendants' refusal to complete the agreement of sale, namely, four-fifths of the net rents, and averred that they were unaware of the true amount due, despite a formal request to the defendants to furnish an account. At the hearing four preliminary points were taken by counsel for the defendants, namely, (*a*) that the cause of action in respect of breach of contract was not maintainable because the damages were in the nature of special damages and yet no particulars were given nor any specific amount claimed, and that in any event the cause of action was barred by limitation, (*b*) that the cause of action in respect of money had and received was not sustainable because no specific amount was claimed and because there was no privity of contract, (*c*) that by virtue of O. II, r. 1, of the Civil Procedure Rules the plaintiffs were barred from asking for the reliefs claimed as they should have been included in the former action, and moreover, the present action was res judicata and (*d*) that as there was nothing in the agreement between K.G. and the defendants to show that the former was acting for an undisclosed principal, evidence could not now be admitted to add to, vary or contradict the terms of the agreement.

Held –

(i) it is not necessary in pleadings to use the words "special damage", where such damage should be claimed, provided such a claim can be said to be intended from a reading of the pleadings:

Longdon-Griffiths v. Smith, [1950] 2 All E.R. 662 applied.

(ii) the plaintiffs' cause of action in claiming damages could not have arisen and did not arise before January 24, 1953, and, therefore, was within the period of six years' limitation.

(iii) the final act of the defendants which gave the plaintiffs their cause of action had not been committed when the plaintiffs filed their original suit, and, in any event, the cause of action for damages being different from the cause of action for specific performance, the plaintiffs could at their election file a separate suit.

(iv) evidence was admissible to establish an undisclosed principal, though its admission did not have the effect of discharging the agent from liability under the contract which he signed.

Preliminary objections overruled.

Cases referred to in judgment:

(1) *Ratcliffe v. Evans*, [1892] 2 Q.B. 524.

(2) *Longdon-Griffiths v. Smith*, [1950] 2 All E.R. 662.

(3) *Engell v. Fitch* (1869), L.R. 4 Q.B. 659.

(4) *Jaques v. Millar* (1877), 6 Ch. D. 153.

(5) *Royal Bristol Permanent Building Society v. Bomash* (1887), 35 Ch. D. 390.

(6) *Phillips v. Landin*, [1949] 2 K.B. 33; [1949] 1 All E.R. 770.

(7) *Jackson v. Spittall* (1870), L.R. 5 C.P. 542.

(8) *Payana Reena Saminathan v. Pana Lana Palaniappa*, [1914] A.C. 618.

(9) *Brunsden v. Humphrey* (1884), 14 Q.B.D. 141.

(10) *Fateh Singh v. Jagannath Bakhsh Singh* (1924), 52 I.A. 100.

(11) *Shankar v. Shankar* (1956), A.I.R. Bom. 165.

Judgment

Edmonds J: In this suit the plaintiffs seek a declaration that they are entitled to damages for breach of contract or, alternatively, as money had and received, and an order for an account of the moneys due to the plaintiffs by the defendants.

By an agreement of sale executed on December 6, 1951, the defendants agreed to sell to one Khetshi Ghelabhai, whom it is averred in the plaint was acting as agent for the plaintiffs, as undisclosed principals, a plot of land in River Road, Nairobi, together with the building standing thereon which at the time was rented out by the defendants under three separate tenancies. Of the purchase price a portion was paid on the signing of the agreement, and the balance was due to be paid against execution of the conveyance of the property on or before March 31, 1952. It was provided under the agreement that the purchaser should be entitled to one-fifth of the net rent of the premises from the date of the agreement to the date of execution of the conveyance. In February, 1952, one of the three tenancies was terminated and the defendants, without the knowledge of the plaintiffs and in breach of their obligations under the agreement, re-let the premises. On January 16, 1953, the plaintiffs' advocates submitted to the defendants' advocates an engrossment of indenture of assignment for execution by the defendants in pursuance of the agreement. The defendants, however, declined to execute the documents on the grounds that they were unable by reason of the re-letting to give the plaintiffs vacant possession of the portion re-let, and further declined to pay any compensation to the plaintiffs in respect of their refusal or inability to give the plaintiffs vacant possession. The plaintiffs thereupon filed an action against the defendants claiming specific performance of the agreement and abatement of the purchase price consequent upon the diminution of the market value of the property as a result of the sub-letting of a portion of the premises sold and, by an order of the Court of Appeal for Eastern Africa, which was made on an appeal from a judgment and decree of this court, the order sought was made. An appeal to Her Majesty in Council was taken by the defendants but was dismissed.

This action has now been filed by the plaintiffs in order to recover their loss occasioned by the refusal of the defendants to complete the agreement of sale, this loss being said to be represented by four-fifths of the net rents of the premises which the defendants have received but which the plaintiffs would have collected and received had the sale been completed by the defendants. It is averred by para. 12 of the plaint that the plaintiffs are unaware of the true amount of the net rent, despite a formal request to the defendants to furnish an account. Subsequent to the filing of the plaint and before the defence was filed, the defendants furnished such an account and the plaintiffs are now in a position to calculate the amount of their loss and consequently the amount of their claim for damages against the defendants.

Argument has been heard on four preliminary objections in law taken by the defence, on any one of which, it is submitted, the plaintiffs' action must fail. They are briefly these:

1. In so far as the plaintiffs are suing upon the agreement and for damages for breach of contract, the cause of action is not sustainable because:
 - (*a*) the damages are in the nature of special damages, yet no particulars thereof have been given nor any specific amount claimed, and
 - (*b*) in any event, the cause of action is barred by limitation.
2. In so far as the plaintiffs' cause of action is for money had and received, it is not sustainable because:
 - (*a*) no specific amount is claimed, and

(*b*) there was no privity of contract between the plaintiffs and the defendants; and the plaintiffs, not being owners, are not entitled to the money had and received by the defendants.

3. By virtue of O. II, r. 1, of the Civil Procedure Rules the plaintiffs are barred from asking for the reliefs claimed as they should have been included in the former action, and, moreover, the present action is resjudicata.

4. The agreement was between Khetshi Ghelabhai and the defendants, and there being nothing in the agreement to show that he was acting for an undisclosed principal evidence cannot now be admitted to add to, vary or contradict the terms of the agreement.

On the first limb of the initial contention for the defendants, I understand the submission to be that if a definite figure can be ascertained as representing a plaintiff's damage it must be claimed as special damage and particulars given. In this case, so it is argued, the plaintiffs' damages are represented by four-fifths of the net rents of the three portions comprised in the premises, and that this fraction can be ascertained with certainty. No matter, so it is submitted, that the plaintiffs had failed at the time they filed this suit to ascertain from the defendants what the rents and outgoings in fact were and were thus unable to claim a specific sum, they were, owing to the nature of their damage, bound to particularise and, as they have not done so, are not permitted to adduce evidence to prove the amount of their claim, nor are they entitled to anything more than nominal damages. The plaintiffs, on the other hand, say that they asked the defendants to furnish them with an account, which was refused, and they thus were unable to give details of their loss, and have consequently prayed for an accout. But it is contended for them that in any event their damage flows as a natural and probable consequence of the defendants' acts and hence is claimable as general damage.

As I understand the law the principle underlying the rule that special damages must be specially pleaded and particularised is that a defendant must not be taken by surprise or embarrassed in his defence to a plaintiff's claim. It is stated in Mayne and McGregor on Damages (12th Edn.), p. 813 that:

> "The basic test of whether damage is general or special is whether particularity is necessary and useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial."

In *Ratcliffe v. Evans* (1) (1892), 2 Q.B. 524, Bowen, L.J., said at p. 528:

> "Special damage . . . means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial."

It is true that at p. 815 of Mayne and McGregor's work it is stated that:

> "Where the precise amount of a particular item of damage has become clear before the trial, either because it has already occured and so become crystallised or because it can be measured with complete accuracy, this exact loss must be pleaded as special damage."

I take the view that this is in reference only to the circumstances where the facts and factors leading to an accurate assessment of damage is solely within the knowledge of the plaintiff, and unknown to the defendant. The cases to which the learned authors referred, some of which have been relied on by the defendants in this action, appear to bear out this view. I think, therefore, that

the contention for the defendants that where a definite figure of damage can be ascertained the claim must always be pleaded as special damage is erroneous. For this argument postulates the theory that where a precise measure of damage can be indicated, the claim must be for special damage.

I do not propose to discuss in this judgment the various authorities cited to me. I think it sufficient to say that the principles are clear enough. It can undoubtedly be held that the loss which is the basis of the plaintiffs' claim in the instant case flows naturally and in the ordinary course from the act of the defendants in refusing to carry out the agreement of sale. The loss is not exceptional in character, and can be said to have been within the reasonable contemplation of the parties; and finally, and most important, the defendants are fully aware of and cannot be taken by surprise by the nature and quantum of the plaintiffs' claim. I would accordingly hold that there is nothing objectionable in the plaintiffs; claim for general damages. But, even if it could be held that their damage is special, there are sufficient particulars in the plaint fully to acquaint the defendants of the extent of the claim. The plaint alleges that the defendants have deprived the plaintiffs of four-fifths of the rent, and that is the measure of the damages which they claim. The exact figure which this represents is not stated and I do not think it is necessary to state it. The information given in the plaint is sufficient to allow the defendants to make an exact calculation of the plaintiffs' claim. It is not necessary in pleadings to use the words "special damage" where such damage should be claimed provided that such a claim can be said to be intended from a reading of the pleadings. In *Longdon-Griffiths v. Smith* (2), [1950] 2 All E.R. 662, Slade, J., at p. 677 said:

> "The function of pleading is to make it clear to your opponent what case he has to meet . . . Where the statement of claim suggests the probability that a claim for special damages is intended, I think it is a question of degree whether the statement of claim does not put forward a claim for special damages, albeit without the particulars which the rules of pleadings strictly require, or whether it is so nebulous that the defendant can treat it as not being a claim for special damage at all. A statement of claim is supposed to be delivered with full particulars, but it is a rule which is more honoured in the breach than in the observance."

It is next contended for the defendants that the plaintiffs' action is barred by limitation. It is agreed that the suit falls within the provisions of s. 5 (1) of the Limitation Ordinance, Cap. 11, Laws of Kenya, by which it is provide that a suit of this nature must be brought within six years of the date when the cause of action arose. The question then is; when did the plaintiffs' cause of action arise? It is contended for the defendants that it arose as soon as the date for completion of the contract, as provided in the agreement of December 6, 1951, was passed. For the plaintiffs it is contended that, this being an action for damages for delay in completing the contract by execution of the conveyance and the giving of vacant possession by the defendants to the plaintiffs, the cause of action began to run only when unreasonable delay occurred. Now, for the purpose of considering the objection in law taken by the defendants, I accept the submission for the plaintiffs, which I do not think was seriously contested, that all facts pleaded in the plaint and appearing from the record before me must be taken as being admitted by the defendants (Civil Procedure Rules, O. VI, r. 27; 1961 Annual Practice, O. XXV, r. 2 and r. 3). According to the plaint the date of completion of the contract as provided by the agreement was March 31, 1952. However, it was not until January 16, 1953, that an engrossment of an indenture of assignment was submitted by the plaintiffs' advocates to the defendants' advocates for execution, and it was on January 24, 1953, that the defendants advised the plaintiffs of their refusal to execute the engrossment and to complete the contract. From this it will be seen that the

original delay in completion was due to the fault of the plaintiffs, and it is contended for them that their cause of action cannot have arisen until the defendants declined to complete the contract and a reasonable time had elapsed subsequent to the submission of the engrossment for execution. It is contended that the earliest date on which it could be said that their cause of action arose was January 24, 1953, the date on which the defendants intimated their refusal to complete the contract. Hence, so it is contended, as the plaint was filed on January 22, 1959, the suit is not barred by limitation.

In Franks' Limitation of Actions, at p. 11 the author suggests that the best known definition of cause of action is this, that:

> ". . . it consists of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment."

The defendants relied on *Engell v. Fitch* (3) (1869), L.R. 4 Q.B. 659. In that case, on a breach of contract by the defendant for the sale of premises, the plaintiff was allowed to recover the loss which he sustained as a result of losing a re-sale of the premises at a profit. This case is no support for the defendants in the instant case as no issue arose as to the date from which the plaintiff was entitled to claim damages, nor was the calculation of damages related to the period of the delay in completing the contract, the question being solely whether the defendant's default was such as to entitle the plaintiff to damages. In *Jaques v. Millar* (4) (1877), 6 Ch. D. 153, the issues were two, the first, as to the date when the agreement for lease was to commence, and the second, as to whether the plaintiff was entitled to recover for his loss of profits resulting from the defendants' delay in performing the contract. In *Royal Bristol Permanent Building Society v. Bomash* (5) (1887), 35 Ch. D. 390, a date was fixed for completion of a contract for the sale of two houses, and damages were awarded by way of compensation from that date. In both these cases damages were calculated and awarded to the plaintiffs from the date of the assumed or named completion date, on the ground presumably that time was of the essence of the contract, thus making the effective completion dates the dates on which the plaintiffs' cause of action arose. Those cases do not, therefore, assist the defendants' objection in this case, as it is not suggested that the time, by which it was stated in the agreement that the contract was to be completed, was of the essence of the contract.

Learned counsel for both parties relied on *Philips v. Lamdin* (6), [1949] 2 K.B. 33; [1949] 1 All E.R. 770, the facts of which are a close parallel to those in the case before me. In that case the plaintiff entered into a contract with the defendant for the purchase of certain premises, the completion date being fixed as March 28, 1947. On April 15, 1947, the defendant in the meantime having refused to complete the contract, the plaintiff issued a writ for specific performance but the matter did not come to trial as possession was granted on June 5, 1947. The plaintiff then brought an action to recover damages, claiming that there was unreasonable delay on the part of the defendant in completing the contract and that as a result she had sustained loss. It was admitted that her solicitors, through an oversight, did not send the engrossment of the assignment to the defendant for execution as soon as they might have done. The learned trial judge in that case, Croom-Johnson, J., after dealing with the question of whether the plaintiff was entitled to damages and finding that she was on the ground of unreasonable delay, then said at p. 44 of the report:

> ". . . it seems to me that this plaintiff has made out her case for damages, and the only question in my mind is whether I can give her damages from March 28 down to June 5, or whether I should give her damages only from April 9. I think that, on the whole, it is safer to say that as there was

> a breach by the plaintiff's solicitors in not sending the engrossment of the assignment at once, although I do not think it made any difference to anybody, that the damages should start from April 9."

The latter date was the date on which the engrossment was sent to the defendant's solicitors. In the instant case, it is contended for the defendant that that case is authority to support the submission that the cause of action runs from the named date of completion although damages may not start until a later date; while for the plaintiff it is argued that the passage which I have quoted is an indication that the learned judge was holding in effect that the cause of action could run only from the date when the defendant in that case was guilty of unreasonable delay.

In deciding this issue I think the definition of a cause of action given by Brett, J. (as he then was), in *Jackson v. Spittall* (7) (1870), L.R. 5 C.P. 542 must not be overlooked. At p. 552 he said that the meaning of cause of action was:

> "The act on the part of the defendant which gives the plaintiff his cause of complaint."

To me it seems manifestly clear that until January 24, 1953, when the defendants' advocates intimated their refusal to complete the contract, the plaintiffs had no cause for complaint against the defendants for delay. They could not have filed the suit before that date claiming damages for unreasonable delay by the defendants, as the delay previous to that date had been caused by the defendants to give grounds for a complaint by the plaintiffs until that date. It seems to me, therefore, quite clear that the plaintiffs' cause of action in claiming damages could not have arisen and did not arise before the latter date, and it follows that this suit has been filed within the six-year limitation period.

The next objection taken for the defendants relates to the plaintiffs' claim for money had and received by the defendants to or for the use of the plaintiffs. As this claim is framed in the alternative to the claim for damages, and as I have no doubt that the latter is sound, I do not propose to consider it. I will, therefore, turn to the third objection.

In the original suit against the defendants, the plaintiffs sought and obtained a prayer for specific performance and abatement of the purchase price. It is now contended by the defendants that by virtue of the provisions of O. II, r. 1, of the Civil Procedure Rules the plaintiffs should in that suit have asked for all reliefs arising out of the agreement and should, therefore, have included their present prayer for damages. Order II, r. 1, is in those terms:

> "1.(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.
>
> "(2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished.
>
> "(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted."

There is no question here of the leave of the court having been granted for the omission of the prayer for damages from the original suit.

A number of authorities were cited to me on behalf of both parties, but I think the case which best illustrates the effect of the above rule is that of *Payana Reena Saminathan v. Pana Lana Palaniappa* (8), [1914] A.C. 618. This is a report of an appeal to the judicial committee when the effect of s. 34 of the Ceylon Civil Procedure Code, 1889, was considered. This section is in almost identical terms with O. II, r. 1, of the local Rules, and at p. 624 of the report of that case the following passage appears from the judgment which was delivered by Lord Moulton:

> "Their lordships are of opinion that the learned district judge took an erroneous view of the object and meaning of this section. It is directed to securing the exhaustion of relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transactions."

The question, therefore, which arises in the case before me is whether the plaintiffs' present claim is based on a cause of action different from or the same as their cause of action in their original suit. Certainly, both claims arise out of the same transaction, namely the agreement of December 6, 1951. In their first suit the reliefs claimed arose as a result of the refusal by the defendants to complete the agreement by executing the engrossment of assignment. The present cause of action also arises out of that refusal, but it is contended for the plaintiffs that the final act on the defendants' part which was necessary to complete the plaintiffs' present cause of action was their unreasonable delay in giving possession of the premises to the plaintiffs. As I have stated before, the defendants wrote on January 24, 1953, intimating their refusal to complete the agreement, and it was then on January 31, 1953, only a week later, that the plaintiffs filed their original suit claiming specific performance. However, it is contended for the plaintiffs that although they knew on January 24, 1953, that the defendants were refusing to complete the contract, the plaintiffs' cause of action for damages for delay could not have arisen until at least a reasonable time had elapsed for the defendants to execute the engrossment and give possession. If, it is argued, the defendants had, on the filing of the plaintiffs' suit for specific performance, seen the light of day, then taken no steps to defend the action and had completed the agreement, provided that they did so within a reasonable time, the plaintiffs would have had no cause of action for damages. I think it is clear that the time stipulated in the agreement by which the contract was to be completed was not of the essence of the contract, as it was in *Philips v. Lamdin* (6). Yet in that case the plaintiff, after suing for specific performance, then filed a separate action for damages for delay, in which she was successful, and she based her claim for damages as running from the date named for completion in her contract on the ground, presumably, that time was the essence of the contract.

Apart from this aspect of the matter, the plaintiffs contend that the facts upon which their present cause of action depend were not pleaded in their earlier suit, that evidence to support the claim was not led, and the claim was not adjudicated upon. They rely on *Brunsdon v. Humphrey* (9) (1884), 14 Q.B.D. 141. The following appears from the headnote of the report:

> "The plaintiff brought an action in a county court for damage to his cab occasioned by the negligence of the defendant's servant, and, having recovered the amount claimed, afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence:
>
> "Held, by Brett, M.R., and Bowen, L.J., Lord Coleridge, C.J., dissenting, that the action in the High Court was maintainable, and was not barred by the previous proceedings in the county court."

At p. 145 of the report, Brett, M.R., said:

> "For the defendant, reliance has in effect been placed upon the maxim, interest reipublicae ut sit finis litium; and it has been contended that it enunciates an admirable rule of law. When that rule is applied to damages which are patent, it is a good rule; but where damages are afterwards developed, it is not a rule to be commended."

At p. 147 there appears the following passage from the judgment of Bowen, L.J.:

> "The principle is frequently stated in the form of another legal proverb, nemo debet bis vexari pro eadem causa. It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit. 'The principal consideration,' says De Grey, C.J., in *Kitchen v. Campbell* is 'whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case'. 'And one great criterion,' he adds, 'of this identity is that the same evidence will maintain both actions'. See per Lord Eldon in *Martin v. Kennedy*. 'The question,' says Gross, J., in *Seddon v. Tutop*, 'is not whether the sum demanded *might have been* recovered in the former action, the only enquiry is whether the same cause of action has been litigated and considered in the former action'. Accordingly 'though a declaration contain counts under which the plaintiff's whole claim might have been recovered, yet if no attempt was made to give evidence upon some of the claims, they might be recovered in another action': *Thorpe v. Cooper*. It is evident therefore that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance."

It is thus argued for the plaintiffs that, being bound as it is said they were, to allow a reasonable time to elapse after the defendants' letter of January 24, 1953, for them still to complete the contract, the plaintiffs' cause of action was not complete, i.e. the final act of the defendants to give them their cause of action had not been committed by the date of the filing of the original suit. Hence, on this ground alone, it is contended they were unable to include a claim for damages in that suit. But it is further contended that, their cause of action for damages being different from their cause of action for specific performance, they may at their election either include it with the latter claim or file a separate suit.

I think these contentions are sound. Inevitably a consideration of the effect of O. II, r. 1, encroaches upon the ground to be covered when considering the further contention for the defendants that by virtue of the provisions of s. 7 of the Civil Procedure Ordinance the plaintiffs' action is res judicata. That section is in the following terms:

> "7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

It is on Explanation (4) that the defendants rely. That explanation is in these terms:

> "(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It was, however, contended for the plaintiffs that this explanation is directed at a defendant and not at a plaintiff. In this, I think, counsel was wrong, as is evident from a perusal of the case of *Fateh Singh v. Jagannath Bakhsh Singh* (10) (1924), 52 I.A. 100. But I do not think I need give a detailed consideration to this plea of res judicata beyond what I have already said when discussing the effect of O. II, r. 1. I would add only that, in regard to Explanation (4), the plaintiffs could not have made their present claim for damages a ground of attack in the earlier suit because, in my view, their cause of action had not arisen at the time that suit was filed.

The fourth objection taken for the defendants is that as the written agreement shows Khetshi Ghelabhai as the purchaser, evidence cannot be admitted to contradict the terms of the agreement and to show that he was acting as the agent of the plaintiffs, and for this objection the defendants rely on s. 91 and s. 92 of the Indian Evidence Act. In answer to this objection it is contended for the plaintiffs:

(*a*) that, for the purpose of considering this objection, the defendants must be taken as admitting the facts pleaded, and that, as the agency is pleaded, they must be taken as admitting it;

(*b*) that evidence may be led to establish the true contracting parties;

(*c*) that the defendants are estopped from taking this objection as it was not taken in the earlier suit filed by the plaintiffs; or

(*d*) if it was taken, the plea is now res judicata.

I think I need deal only with the issue as to whether oral evidence to establish that Khetshi Ghelabhi was acting as the agent of the plaintiffs may be admitted. I am clear in my mind that such evidence is admissible. At p. 679 of Sarkar on Evidence (10th Edn.), it is stated:

> "Even though a contract in writing was signed only by a certain party, oral evidence could be adduced to show that another person was also a party to the arrangement or was bound by it (*Muniswami v. Thandavaraya*, A 1936, M. 5; see however *Shankar v. S.*, A 1956, B. 165 where names of contracting parties were regarded as terms of contract)".

The latter statement in regard to *Shankar v. Shankar* (11) (1956), A.I.R. Bom. 165 is rather misleading, but reference to the judgment in that case serves to clear up any ambiguity and bears out the view I take of the admissibility of the evidence. At p. 167 of the report Shah, J., said:

> "Mr. Jahagirdar contended that a recital as to the names of contracting parties cannot be regarded as a term of the contract. I am unable to accept that argument without qualifications. Where a contract is entered into between parties, the contract deals with the subject matter as well as the persons between whom it is entered into, and the names of the parties in so far as they relate to terms which create obligations cannot be regarded as so divorced from the terms of the contracts, that evidence may be led to show that some other persons who intended to incur obligations under the contract instead of the parties designated therein.
>
> "Reliance was sought to be placed in support of his contention by Mr. Jahagirdar upon a judgment of the Madras High Court reported in – '*Venkatasubbiah Chetty v. Govindarajulu Naidu*', 31 Mad. 45. The headnote of that case is as follows:
>
> > 'Under English Law, in an action on a written contract, oral evidence is admissible to show that the party liable on the contract contracted for himself and as the agent of his partners. Such partners are liable to be sued on the contract, though no allusion is made to them in it.

> 'This is also the law in India as there is nothing in s. 91 of he Evidence Act to show that the legislature intended to depart from this settled rule of English Law.'
>
> "It is difficult to see how this case assists the contention which is sought to be raised by Mr. Jahagirdar. As I will presently point out, instead of supporting the contention raised by Mr. Jahagirdar, it destroys the argument which is sought to be raised by him. If one person has entered into a contract with others, evidence may be led for the purpose of showing that he acted not only for himself, but for others as well. But that is far from saying that the names of the parties to the contracts are not at all to be regarded as terms of the contract.
>
> "In the judgment in *Venkatasubbiah's* case, at p. 46, there is a quotation from Roscoe's Misi Prius Evidence which is to the following effect:
>
> > 'In an action on a written contract between plaintiff and B, oral evidence is admissible, on behalf of the plaintiff, to show that the contract was in fact, though not in form, made by B, as agent of the defendant; for the evidence tends not to discharge B, but to charge the dormant principal; "*Wilson v. Hart*", (1817) 7 Taunt 295.'
>
> "The statement contained in the second part of the sentence that 'the evidence does not tend to discharge B, but to charge the dormant principal', would clearly show that evidence cannot be led for the purpose of discharging the second defendant from liability which he has undertaken under the agreement Ex. 58."

It is clear from the above that evidence is admissible to establish an undisclosed principal, though its admission does not have the effect of discharging the agent from liability under the contract which he signed. That is, I think, sufficient answer to the defendants' fourth objection.

In the result, therefore, I rule that none of the objections taken are sustainable.

I will now hear counsel on the amendment which the plaintiffs seek to the second prayer to their plaint.

Preliminary objections overruled.

For the plaintiff:
Hamilton, Harrison & Mathews, Nairobi
L. G. E. Harris and *J. D. M. Silvester*

For the defendant:
Khanna & Khanna, Nairobi
D. N. Khanna

Thiongo s/o Mboi v R

[1962] 1 EA 780 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	30 November 1962
Case Number:	755/1962
Before:	Rudd Ag CJ and Goudie J
Sourced by:	LawAfrica

[1] Criminal law – Property suspected of having been stolen – Charge of stealing – Acquittal on charge of stealing – Conviction of conveying or possessing property suspected of having been stolen or unlawfully obtained – Penal Code (*Cap*. 24), *s*. 276 *and s*. 324 (*K*.).

Editor's Summary

The appellant was originally charged jointly with five other accused with stealing contrary to s. 276 of the Penal Code. It was alleged that they stole some empty sacks from a godown. There was, however, evidence that a check of the bundles of empty sacks in that godown showed no obvious shortfall and if any sacks were missing from the godown they would not amount to anything like the number of sacks which were found with the appellant and other accused. The magistrate acquitted the appellant and the other accused on the charge of theft but convicted the appellant of having possession of and conveying property suspected of having been stolen or unlawfully obtained contrary to s. 324 of the Penal Code. On appeal

Held –

(i) as there was nothing to suggest that the empty sacks had been stolen elsewhere than from the godown and as there was no evidence that in fact they were stolen from that godown, it was not open to the magistrate to convict the appellant of an offence under s. 324 of the Penal Code.

(ii) there may be cases in which discrepant explanations in conjunction with other circumstances afford reasonable ground for suspecting that goods have been stolen or unlawfully obtained but this was not such a case, despite certain discrepancies in the explanations offered by the appellant at different times.

(iii) the appellant in the circumstances was not bound to give an explanation to the satisfaction of the magistrate of how he came in possession of the sacks as required by s. 324 of the Penal Code.

Appeal allowed. Conviction quashed and sentence set aside.

Judgment

Rudd Ag CJ, read the following judgment of the court: This is an appeal against conviction.

The appellant (accused 1 in the lower court) was originally charged jointly with five other accused with stealing contrary to s. 276 of the Penal Code and it was alleged that on May 3, 1962, at K.F.A. Godown, Kingston Road, Nairobi, they stole 545 empty sacks, the property of the K.F.A. of the value of Shs. 816/-.

The evidence for the prosecution was directed to showing that the empty sacks were stolen from the K.F.A. Godown at Kingston Road but there was evidence that a check of the bundles of empty sacks in that godown showed no obvious shortfall and that if any sacks were missing from the godown they would not amount to anything like so many as 545 empty sacks which was the number found with the appellant and his companions.

The magistrate was not very satisfied with the evidence of the check and was inclined to cast some doubt on the bona fides of the witness who gave evidence.

The magistrate however was not prepared to discount that evidence to the extent of convicting of theft from the K.F.A. or of receiving property stolen from the K.F.A.

Nevertheless the magistrate found that there was reason to suspect that the sacks had been stolen and as the appellant was proved to have had them in his possession and to be conveying them when he was stopped by the police and did not give an account of how he came by them to the satisfaction of the magistrate he was convicted of an offence contrary to s. 324 of the Penal Code.

Inasmuch as there was nothing to suggest that the empty sacks had been stolen elsewhere than from the K.F.A. Godown and inasmuch as there was evidence that in fact they were not stolen from that godown which evidence was not completely rejected and formed the basis of an acquittal of theft, we consider that it was not open to convict of an offence under s. 324.

There were undoubtedly certain discrepancies in the explanations offered by the appellant at different times and the explanations of the appellant and his co-accused inter se. There may well be cases in which discrepant explanations in conjunction with the other circumstances of the case afford reasonable ground for suspecting that goods were stolen or unlawfully obtained. We do not think that this was such a case. The real cause for suspicion in this case was evidence suggesting that the bags were stolen from the K.F.A. Godown and that suspicion must be taken to have been disproved or not established. In these circumstances the appellant was not bound to give an explanation to the satisfaction of the magistrate of how he came by the sacks.

So far as the appellant's explanation is concerned in this instant case there was no evidence to disprove his statement that he purchased the sacks for Shs. 480/-, a not unduly low price.

The conviction against the appellant is quashed and the sentence set aside.

Appeal allowed. Conviction quashed and sentence set aside.

For the appellant:
H. C. Kapila, Nairobi

For the respondent:
The Attorney-General, Kenya
G. A. Twelftree (Ag. Senior Crown Counsel, Kenya)

Ingangi s/o Gichingiri v R

[1962] 1 EA 781 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	30 November 1962
Case Number:	943/1962
Before:	Rudd Ag CJ and Goudie J
Sourced by:	LawAfrica

[1] Firearms – Charge of manufacturing firearm – Materials and tools for manufacturing firearm found in accused's house – Manufacture of firearm not completed – Whether accused had manufactured or attempted to manufacture – Firearms Ordinance, 1953, *s*. 9 (*K*.).

Editor's Summary

The appellant was convicted under s. 9 of the Firearms Ordinance, 1953, of manufacturing a firearm. It was proved that a saw, two chisels and other tools and metal were found in the appellant's house and that, outside the house, the police found a piece of wood which had been worked on so as to form a crude gun stock and an iron pipe which had also been worked on. The evidence showed that cuts on the wood had been made by one of the chisels found in the appellant's house, and that the wood had been worked upon so that the bolt, found in the accused's house, could fit it. There was also evidence that the wood and the pipe had been in process of manufacture to fit each other and together form a firearm,

but the fitting was not complete and in other respects the work had not proceeded to the extent that a firearm was actually made. The magistrate considered that a thing could not be called a component part of a firearm until the firearm was completed and capable of assembly but convicted the appellant of manufacturing a firearm because he was satisfied that the appellant was in the process of manufacturing a firearm.

Held –

(i) when the process of manufacturing a firearm is incomplete so that no actual firearm has been created, a firearm has not been manufactured, since the work is incomplete and no firearm has been produced; accordingly, the conviction of manufacturing a firearm could not be sustained.

(ii) the evidence established an attempt to manufacture a firearm and the conviction should be altered to attempting to manufacture a firearm.

Conviction of manufacturing a firearm quashed and a conviction of an attempt to manufacture a firearm substituted. Sentence reduced.

Judgment

Rudd Ag CJ, read the following judgment of the court: The appellant appeals from a conviction under s. 9 of the Firearms Ordinance, 1953, of manufacturing a firearm and from sentence of three years' imprisonment in respect thereof.

It was proved that a number of tools including a saw and two chisels together with some pieces of metal, including a bolt were found in the appellant's house. Hidden in some grass, from one to three yards outside that house, the police found a piece of wood which had been worked on so as to form a crude gun stock and an iron pipe which had also been worked on. There was evidence to show that cuts on the piece of wood had been made by one of the chisels which was found in the appellant's house, and that the wood had been worked upon so that the bolt, found in the accused's house, could fit it and, there was evidence that the piece of wood and the pipe had been in process of manufacture to fit each other and together to form a firearm, but the fitting was not complete and in other respects the work had not proceeded to the extent that a firearm was actually made. The definition of firearm includes a barrel, bolt, chamber, and any other essential component part. The trial magistrate considered that a thing could not be called a component part of a firearm until the firearm was completed and capable of assembly as a firearm. In this the magistrate may not have been entirely correct. Nevertheless, we would agree with him that in this case no component part of a firearm had been completed. The magistrate convicted the appellant of manufacturing a firearm because he was satisfied that he was in the process of manufacturing a firearm. But it is not correct to speak of an article as being manufactured until it is actually made. When the process of manufacturing a firearm is incomplete so that no actual firearm has been created, it is not correct to say that a firearm had been manufactured since the work is incomplete and no firearm has been produced. We think that in such circumstances a conviction of manufacturing a firearm should not be sustained. Crown counsel did not support the conviction.

We are satisfied, however, that the evidence established an attempt to manufacture a firearm. The work which was done went far beyond mere preparation and constituted part of an actual attempt to manufacture a firearm, which attempt, in the circumstances, was never completed to the point of actual manufacture of a firearm, probably because of the intervention of the police. The conviction is altered to

an attempt to manufacture a firearm. Such an

attempt is a misdemeanour, under s. 392 of the Penal Code and punishable under s. 36 of the Penal Code with imprisonment for a term not exceeding two years or with a fine or with both. The sentence is reduced to a sentence of two years' imprisonment.

Conviction of manufacturing a firearm quashed and a conviction of an attempt to manufacture a firearm substituted.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Kenya
O. P. Nagpal (Crown Counsel, Kenya)

Waera s/o Madoya and others v R
[1962] 1 EA 783 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	30 November 1962
Case Number:	920, 921, 922 and 923/1962
Before:	Rudd Ag CJ and Goudie J
Sourced by:	LawAfrica

[1] Criminal law – Assaulting police officers in due execution of duty – Police not wearing identifiable uniform – Honest belief that police merely masquerading as policemen for unlawful purposes – Onus on accused to justify assault as made under reasonable and honest mistake – Penal Code (*Cap*. 24), *s*. 10 *and s*. 254(*b*) (*K*.).

Editor's Summary

The appellants were convicted of assaulting police officers in the due execution of their duty contrary to s. 254(*b*) of the Penal Code. According to the evidence a police constable in plain clothes and a police driver, not wearing clearly identifiable police uniform, accompanied by two civilians, entered the third appellant's house, to look for a stolen bicycle. After the police had discovered the bicycle, the police party, according to the defence, evinced interest in a radio and asked questions about it and then noticing a safe in the house, asked and almost cross-examined the third appellant how much money was in the safe. The third appellant thereupon became suspicious and, concluding that the police were masquerading as a police party, raised an alarm whereupon the other appellants came to the house and joined in the attack upon the police party. Except for the constable who escaped, the police were tied up and immediately taken by the third appellant to a police post where they were handed over to the police there as persons masquerading as policemen with intent to rob. On appeal,

Held –

(i) the policemen were assaulted in the execution of their duty and it was immaterial whether or not the appellants knew that they were policemen and that they were acting in execution of their duty.

(ii) if a policeman is acting in the course of his duty and is assaulted or obstructed while so acting, the person who so assaults or obstructs the policeman cannot escape criminal liability under s. 254(*b*) of the Penal Code, merely on the ground that he did not know that the person he assaulted or obstructed was in fact a policeman and acting in execution of his duty; but if he has reasonable ground for his belief and honestly did believe that the person was not a policeman then he is entitled to the benefit of s. 10 of the Penal Code to the extent that his honest and reasonable belief, if true, would have justified his actions.

(iii) the onus is on the accused to establish circumstances which are capable of justifying the conclusions that the accused acted under such a reasonable

and honest mistake and it is sufficient if on all material in the case, it is open to the court to find that the mistaken belief might reasonably and honestly have existed in the mind of the accused; the onus of establishing that this was not in fact so would rest upon the prosecution and would have to be established with certainty.

(iv) the appellants did honestly believe that the police party was not a police party and that it was masquerading as a police party for unlawful purposes.

(v) there was very reasonable ground for the mistaken belief of the other appellants, inasmuch as they responded to what would for them have all the appearance of a genuine alarm and their information would have been given to them by the third appellant, in conditions in which, if appearances were true, they would have been fully justified in the action which they took.

Appeal allowed. Convictions and sentences set aside.

Judgment

Rudd Ag CJ, read the following judgment of the court: These appeals have been consolidated. The appellants appeal from conviction under s. 254(*b*) of the Penal Code of assaulting police officers in due execution of their duty.

The appellants were all employed on Mr. Stevenson's farm at Moiben.

Mr. Stevenson did not live on his farm, the running of which was left to the appellants, and particularly, to the third appellant who appears to have been the headman. Mr. Stevenson reposed very considerable confidence and trust in all the appellants.

It is common cause that a police constable attached to Eldoret Police Station arrested a man called Shem for stealing a bicycle and that, Shem said that he had left the bicycle with the third appellant on Mr. Stevenson's farm. Accordingly the inspector of police at Eldoret instructed a plain clothes constable to go to the farm at Moiben to recover the bicycle. He went there in a police van driven by a police driver, and he took with him the owner of the bicycle and Shem. We shall refer to this party as "the police party". The constable was in plain clothes, the driver was wearing dark police overalls and he had with him a light police overcoat and a Cromwell helmet. But, it is disputed as to whether he actually wore the overcoat and helmet during the events in question.

The police party arrived at the farm at Moiben at about 8 o'clock at night. They left the van fifty to eighty yards away from the third appellant's house, which the whole party entered. There is a conflict of evidence as to some of the events that occurred thereafter. According to most of the witness for the prosecution, one of the party informed the third appellant that he was looking for a bicycle stolen by Shem. They found the bicycle in the house and the third appellant said that it had been left with him by Shem as a pledge for Shs. 12/-, but the prosecution witnesses said that the third appellant refused to let the police take away the bicycle unless he was paid his Shs. 12/-, that the police then suggested that they should all go to Eldoret where the appellant could get his Shs. 12/-.

Shem told a slightly different story. He said that he left the bicycle with the third appellant because it was punctured and not by way of pledge. He admitted that he owed the third appellant Shs. 12/- but said that was in connection with a watch and had nothing to do with the bicycle. He said further that the police party offered to leave the third appellant and the bicycle there, and to return to Eldoret, telling the

third appellant not to remove the bicycle, but that this appellant then began to attack the police party.

It is substantially common cause that while the police were in the house the third appellant and his wife announced that the intruders were not police at all and that they had come there to rob. The third appellant and his wife raised an alarm on that basis with the result that the other appellants came to the house and joined in the attack upon the police party, who got the worst of the encounter. The plain clothes constable escaped and ran away and hid. The rest of the police party were tied up and immediately taken by the third appellant in a motor-car to the police post at Moiben where they were handed over to the police there, as persons who were masquerading as policemen with intent to rob. The police at Moiben identified the driver as a policeman and brought him back to the scene. The driver's overcoat was found on the ground near the police van. It is said by the prosecution witnesses that it was not there when the party from Moiben arrived at the scene, but that it was found beside the van before they left. There was no evidence as to who put it there. If it was put there by the appellants or by someone else employed at the farm, while the Moiben party was at the farm, someone in that party should have seen how it got there. But no one did.

The evidence for the defence for the defence was to the effect that after the police party had discovered the bicycle, and the appellant had mentioned that he was owed Shs. 12/- the police party evinced interest in a radio and asked questions about it, and then they turned their attention to Mr. Stevenson's safe which was in the house, asking and almost cross-examining the third appellant as to how much money was in the safe. The third appellant became suspicious and concluded that they were masquerading as a police party, saying,

> "I do not know if you are really policemen or not, because these days the country is bad".

He said that upon this his arm was caught and twisted up behind his back and he and his wife then both raised the alarm with the consequences already stated. Shem was not handcuffed and, according to the defence, none of the police party wore any obvious items of police uniform. They did not produce any warrant card or search warrant. The third appellant said that as they were leaving for Moiben police post he noticed a thing which looked like a car but that as it was not a Land Rover he did not believe that it was a police car.

The trial magistrate held correctly that the policemen were assaulted in the execution of their duty and he further directed himself that it was immaterial whether or not the appellants knew that the policemen were policemen and that they were acting in execution of their duty. He accepted the evidence for the prosecution.

Crown counsel has conceded that in accordance with s. 10 of the Penal Code, if the appellants honestly and reasonably believed that none of the policemen were policemen and believed that they were in fact wrongdoers then the appellants would be entitled to be acquitted.

We think that the legal position is as follows: If a policeman is actually acting in the course of his duty and is assaulted or obstructed while so acting, the person who so assaulted or obstructed the policeman cannot escape criminal liability under the section quoted in the charge, merely on the ground that he did not know that the person he assaulted or obstructed was in fact a policeman and acting in execution of his duty. But if he has reasonable ground for belief and honestly did believe that the person was not a policeman then he is entitled to the benefit of s. 10 to the extent that his honest and reasonable belief if true would have justified his actions.

The onus is on the accused to establish circumstances which are capable of justifying the conclusion that the accused acted under such a reasonable and

honest mistake. This onus does not go so far as to require that conclusion to be established affirmatively by the defence even on the basis of a mere balance of probability in its favour. It is sufficient if on all the material in the case, it is open to the court to find that the mistaken belief might reasonably and honestly have existed in the mind of the accused and the onus of establishing that that was not so in fact, would rest upon the prosecution and would require to be established with certainty.

We think that it is very plain that the appellants did honestly believe that the police party was not a police party and that it was masquerading as a police party for unlawful purposes. There is no question of any intent on the part of any of the appellants to gain time in which to dispose of the bicycle or anything of that kind. Their action in proceeding to the Moiben police post immediately amply indicates the bona fides of their conduct and belief. But the belief must be reasonable as well as honest and this is a matter which should have been considered by the trial magistrate. We are not satisfied that it was satisfactorily proved that the driver was actually wearing clearly identifiable police uniform in the presence of the appellants. We think that the finding of the greatcoat beside the police van was not satisfactorily explained. In the circumstances we consider it undesirable for a policeman to go out on investigation wearing overalls, which we take to mean some kind of workshop or fatigue uniform quite different from the regular police uniform usually worn by police on investigation or beat duty. If the proper procedure had been followed and the policemen had been provided with a search warrant from the inspector of the police station, or had produced the usual warrant card the mistake which occurred might have been avoided or at any rate discovered by the appellants at a much earlier stage. In our opinion the evidence of the third appellant afforded a much more reasonable and likely explanation for the subsequent events. He was alarmed for the safety of the safe. On the whole case we are not satisfied that if the magistrate had appreciated the legal effect of an honest and reasonable mistake of fact that he should not have acquitted the third appellant, since on a review of all the circumstances we are not prepared to say that the third appellant may not have had reasonable grounds for belief to justify his honest mistake.

As regards the other appellants we think that there was very reasonable ground for their mistaken belief, inasmuch as they responded to what would for them have all the appearance of a genuine alarm, and when they arrived at the scene they would have found what appeared to be a gang of civilians molesting the third appellant in his house. Their information as to the events would have been information given to them by the third appellant and his wife, in conditions in which if appearances were true, they would have been fully justified in the action which they took.

We allow the appeal, set aside the convictions and sentences and acquit all the appellants.

Appeal allowed. Convictions and sentences set aside.

The appellants did not appear and were not represented.

For the respondent:
The Attorney-General, Kenya
G. A. Twelftree (Ag. Senior Crown Counsel, Kenya)

James Okwanyi v R
[1962] 1 EA 787 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	30 November 1962
Case Number:	845/1962
Before:	Rudd Ag CJ and Goudie J
Sourced by:	LawAfrica

[1] Criminal law – Forgery – Charge of using counterfeit coin – Forged note purporting to be a currency note passed – Whether currency note is coin – Whether charge properly framed – Penal Code (*Cap.* 24), *s.* 356 *and s.* 370 (*K.*).

Editor's Summary

The appellant was convicted of "using counterfeit coin" contrary to s. 370(*e*) of the Penal Code. The evidence proved that the appellant passed a forged note purporting to be a currency note of Shs. 20/- value and gave no satisfactory explanation as to how he came by it. The note did not appear to have been forged on paper resembling the paper on which genuine currency notes are printed or made, and the marks and devices on it did not appear to have been made by any method of printing or duplication or by any special instrument; further there was no proof how the design and marks constituting the forgery had been made and the trial magistrate did not consider that matter. On appeal,

Held –

(i) it was not correct to allege that the appellant used counterfeit coin, since a currency note is not coin as defined by s. 367 of the Penal Code, and further, s. 370 refers to bank or currency notes and the implements and materials for counterfeiting bank or currency notes and not to coins or coining.

(ii) the appellant should have been charged with uttering a forged currency note contrary to s. 356 of the Penal Code.

(iii) the words "figures, letters, marks, lines or devices" in s. 370(*b*) of the Penal Code mean such things as watermarks, background and the like.

(iv) the magistrate did not fully consider the meaning and scope of s. 370 of the Penal Code and the charge was not worded so as to conform with the section; accordingly the conviction could not stand.

Appeal allowed. Conviction quashed.

Judgment

Rudd Ag CJ, read the following judgment of the court: The appellant appeals from a conviction of "using counterfeit coin", contrary to s. 370(*e*) of the Penal Code. On November 20, 1962, we allowed the appeal and acquitted the appellant stating that reasons would be given at a later date. We now give our reasons.

The charge was badly framed and reads as follows:

"Using counterfeit coin, contrary to s. 370(*e*) of the Penal Code.

Particulars:

"James Okwanyi s/o Musundi on July 30, 1962, at Kitale Township of Trans Nzoia District in Rift Valley Province, used a paper forged in a manner purporting to be a valid currency note of Shs. 20/-."

Section 370 of the Penal Code reads as follows:

"370. Any person who, without lawful authority or excuse, the proof of which lies on him –

(*a*) makes, uses or knowingly has in his custody or possession any paper intended to resemble and pass as a special paper such as is provided and used for making any bank note or currency note;

(*b*) makes, uses or knowingly has in his custody or possession any frame, mould or instrument for making such paper, or for producing in or on such paper any words, figures, letters, marks, lines or devices peculiar to and used in or on any such paper;

(*c*) engraves or in anywise makes upon any plate, wood, stone or other material any words, figures, letters, marks, lines, or devices the print whereof resembles in whole or in part any words, figures, letters, marks, lines or devices peculiar to and used in or on any bank note or currency note;

(*d*) uses or knowingly has in his custody or possession any plate, wood, stone or other material upon which any such words, figures, letters, marks, lines or devices have been engraved or in anywise made as aforesaid;

(*e*) uses or knowingly has in his custody or possession any paper upon which any such words, figures, letters, marks, lines or devices have been printed or in anywise made as aforesaid,

is guilty of a felony and is liable to imprisonment for seven years."

It was proved that the appellant passed a forged note purporting to be a currency note of Shs. 20/- value and gave no satisfactory explanation as to how he came by it. The note did not appear to have been forged on paper resembling the paper on which genuine currency notes are printed or made, and the marks and devices on it did not appear to have been made by any method of printing or duplication or, by any special instrument. It appeared to be a single rather clumsy individual forgery. There was no proof as to how the design and marks constituting the forgery had been made and the trial magistrate did not address his mind to that matter. Crown counsel did not support the conviction.

It was not correct for the charge to allege that the appellant used counterfeit coin since a currency note is not coin as defined by s. 367 of the Penal Code. Further, s. 370 refers to bank or currency notes and the implements and materials for counterfeiting bank or currency notes. It does not refer in any way to coins or coining.

In our opinion the appellant should have been charged with uttering a forged currency note contrary to s. 356 of the Penal Code, rather than with an offence contrary to s. 370, which we are inclined to think refers to the materials and implements for counterfeiting bank or currency notes and the process of making them by some duplicating process such as printing.

Paragraph (*a*) of s. 370 prohibits the making, using or possession of paper intended to resemble and pass as a special paper, such as is provided and used for making any bank or currency notes. This paragraph appears to have no application to the present appeal.

Paragraph (*b*) of the section prohibits the making, using or possession of any frame, mould or instrument for making such paper as is referred to in para. (*a*) or for producing in or on such paper any words, figures, letters, marks, lines or devices, peculiar to and used in or on any such paper. This paragraph like para. (*a*) refers to the paper on which a counterfeit note is or can be made. We think the words "figures, letters, marks, lines or devices", mean such things

as water marks, background and the like in this paragraph. They must be peculiar to the paper as well as used in or on it.

Paragraph (*c*) refers to the making of such things as engraved plates, printer's blocks and the like from which prints can be taken resembling the whole or part of the design of a bank or currency note.

Paragraph (*d*) prohibits the use or possession of such engraved plates, printer's blocks and the like.

Finally para. (*e*) prohibits the use or possession of such things as the prints from such plates, blocks or the like. They must be printed or made as aforesaid, that is to say, they must be a print within the meaning of para. (*c*) or, perhaps, made with a frame, mould or instrument for producing marks peculiar to the paper within para. (*b*).

In all the circumstances we agreed with the submission of learned Crown counsel that the magistrate did not fully consider the meaning and scope of s. 370 of the Penal Code. The charge was not worded so as to conform with the provisions of the section and the conviction could not stand.

Appeal allowed. Conviction quashed.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Kenya
G. A. Twelftree (Senior Crown Counsel, Kenya)

Ali s/o Nassoro and another v R
[1962] 1 EA 789 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	15 August 1962
Case Number:	480/1962
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Criminal law – Receiving stolen property – Theft – Resumption of possession of stolen property by owner after theft – Property then deposited at shop – Property later collected at shop by accused – Whether offence of receiving stolen property committed – Penal Code (*Cap.* 16), *s.* 265, *s.* 269(*c*) *and s.* 311 (1) (*T.*).

Editor's Summary

The appellants were convicted of stealing and receiving stolen property respectively and the appeal of the

first appellant was dismissed. The evidence showed that shortly after a bundle of soap was discovered to have been stolen from a motor car the owner saw the first appellant carrying soap and chased him whereupon the second appellant dropped the bundle and ran away. The soap was then picked up by the owner and left with a shopkeeper. Next day when the second appellant went to collect the soap from the shopkeeper, the latter let the appellant take it, whereupon, after a chase, the appellant was arrested by the police. On appeal,

Held – the owner having resumed possession of the stolen soap and left it at the shop, the shopkeeper was bailee of the owner; accordingly the second appellant was not guilty of receiving property knowing it to have been stolen. *R. v. Thomas Dolan*, 169 E.R. 794 followed.

Appeal of the first appellant dismissed. Appeal of the second appellant allowed. Conviction quashed and sentence set aside.

Cases referred to in judgment:

(1) *R. v. Thomas Dolan*, 169 E.R. 794.

(2) *R. v. Fanny Schmidt* (1866), L.R. 1 C.C.R. 15.

(3) *R. v. Villensky*, [1892] 2 Q.B. 597.

Judgment

Mosdell J: The first appellant Ali Nassoro and the second appellant Ali Salum alias Moshi were convicted in the district court of Tabora at Tabora on June 23, 1962, the first appellant of stealing from a motor vehicle contrary to s. 269(*c*) and s. 265 of the Penal Code and the second appellant of receiving contrary to s. 311 (1) of the Penal Code. The two appellants had been jointly charged with another, who was acquitted, with stealing from a motor vehicle. All three accused had pleaded not guilty. The two appellants were each sentenced to imprisonment for nine months. They are now appealing.

The particulars of offence alleged that the two appellants together with their co-accused

> "on the 11th day of June, 1962, at about 10.30 a.m. at Mission Street in the township and district of Tabora Western Region, did jointly and together steal one bundle of twenty-five bars of washing soap from Vauxwagon (sic) No. DSN 366. The value of the stolen bundle is about 28/-. The property of one Abdul Mkubel".

No one, I think, could cavil with the finding of the learned resident magistrate that a box containing twenty-five bars of soap was stolen from a Volkswagen belonging to the first prosecution witness, Abdul Mkubel, at about 10.30 a.m. on June 11, 1962, in Mission Street, Tabora, or that the twenty-five bars of soap produced to the trial court were in fact the twenty-five bars which had been stolen from the latter vehicle, nor could anybody, I think, cavil with the other findings of fact made by the learned resident magistrate. That portion of his judgment dealing with the facts is relatively short and can be quoted in full. It is as follows:

> "The case against accused 1 is this. The soap is stolen shortly after 10.30 a.m. At about 11.30 a.m. he is seen by a detective in company with accused 2 [the first appellant] and one or other of them is carrying a bundle of soap. The detective knowing nothing of the theft takes no action. In the course of the events of that day the soap finds itself in the shop of one Mohamed Abdallah. The following morning accused 1 comes with accused 3 [the second appellant] and asks for the soap which they say they left there the previous day. The soap is taken by accused 3 and accused 1 walks off. Mohamed Abdallah suggests he ran away when the police appeared but this is denied by the police. Accused 1 makes no defence.
>
> "The case against accused 2 is that he is seen very shortly after the theft with accused 1 and the soap. A short while later he is seen by the owner apparently alone, and when the owner gives chase accused 2 drops the soap and runs away. He does not appear again until he is arrested. He also makes no defence.
>
> "The case against accused 3 is that he comes to the shop of Mohamed Abdallah on the day after the theft with accused 1. It is he who takes the soap from the shop and when a police whistle is blown he drops the soap and runs but is caught. His defence is that the police are lying when they say they heard him and accused 1 ask for the soap; they are lying when they say he ran away and he gives his version."

Having stated that that was the case against the third accused, the magistrate went on to deal with the question of credibility and believed the evidence of the prosecution, being of the opinion that the conflict between the evidence of Mohamed Abdallah, the second prosecution witness, and the evidence of Lazaro Ernest, the third prosecution witness, as to the actions of the two appellants' co-accused when Lazaro approached them on June 12, 1962, arose out of interpretation.

As regards the conviction of the first appellant, the learned resident magistrate in his judgment stated:

> "The clearest case is against accused 2. He is in possession within an hour of the theft and when pursued drops the loot and runs. I am satisfied he was in possession and he has given no explanation to account for it save in so far as his hurried departure may be an explanation, albeit not in his favour. I can draw no conclusion from this evidence coupled with his behaviour but that he was a thief. He is convicted as charged."

I see no reason for differing from the conclusion of the learned resident magistrate in this regard.

As regards the conviction of the second appellant for receiving the twenty-five bars of soap, this conviction cannot be allowed to stand. It is clear from the evidence of Abdul Mkubel that when he discovered the loss of the soap, about half an hour after he had parked his vehicle, he went around looking for the missing property, and he went on in his evidence-in-chief:

> "When I got near Mohamed Abdallah's place I saw accused 2 (identified). He was carrying soap. I stopped him and he at once started to run away. He threw down the soap and ran off. He was alone. I told Mohamed Abdallah the soap was mine and he sent me to the police. The soap is here in court – all of it. This is the soap accused threw down when he ran away. I gave it to Mohamed Abdallah."

This evidence must be read together with that of Mohamed Abdallah, who deposed as follows:

> "I am a shop-keeper in Livingstone Street. On June 11, 1962, about 11 a.m. I was at my shop. I saw an Arab come running up and pick up a bundle of soap which was lying in front of my shop. I have no idea who put it there. I heard no one running past just before that. Later the C.I.D. came and hid himself in my shop. This was the next day. About 8.15 a.m. two people came and said they wished to collect the soap they had left the day before. They are not here in court. I told them to come back in half an hour. Then two people came – two different people. They were accused 1 and 3 (identified). They said it was their soap so I let them take it. Then the C.I.D. man stepped out. When he did accused 1 ran away in one direction and accused 3 who was carrying the bundle threw it down. He ran also. The C.I.D. man blew his whistle and went after accused 3 whom he cought . The C.I.D. man took the soap."

It would appear, therefore, that when on June 12, 1962, the second appellant received the soap from Mohamed Abdallah the latter was a bailee of the owner, Abdul Mkubel, who, between the time of the theft of the soap on June 11, 1962, and the time of the receipt of it by the second appellant on June 12, 1962, had resumed possession of it.

The facts here are similar to those in the case of *R. v. Thomas Dolan* (1), 169 E.R. 794. That was a case which was reserved for the opinion of the Court of Criminal Appeal by the Recorder of Birmingham. At the Sessions held in Birmingham on January 5, 1855, William Rogers was indicted for stealing, and

Thomas Dolan for receiving, certain brass castings the goods of John Turner. Rogers pleaded guilty and Dolan was found guilty. It was proved that the goods were found in the pockets of the prisoner Rogers by Turner, who then sent for a policeman, who took the goods and wrapped them up in a handkerchief, Turner, the prisoner Rogers and the police going towards Dolan's shop. When they came near it the policeman gave the prisoner Rogers the goods and the latter was then sent by Turner to sell them where he had sold others, and Rogers then went into Dolan's shop and sold them and gave the money to John Turner as the proceeds of the sale. Upon these facts it was contended on the part of Dolan that Turner had resumed the possession of the goods and that Rogers sold them to Dolan as the agent of Turner, and that consequently at the time they were received by Dolan they were not stolen goods within the meaning of the statute. The conviction of Dolan for receiving was quashed by the Court of Criminal Appeal, Lord Campbell, C.J., in his judgment stating (inter alia):

> "In this case I must say I feel very strongly that the conviction is wrong. I do not see how it can be supported, unless the doctrine were laid down, that if at any period of the history of a chattel which has been stolen and has been restored to the owner, who has long had it in his possession, the same chattel should be received from the owner by a person who knew that it had been once stolen, such a receiving would be an offence within the statute. I think that such a receiving could never be said to be an offence within the meaning of the statute, any more than it could make the receiver an accessory at common law to the felony. If an article once stolen has been restored to the master of that article, and he having had it fully in his possession, bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods within the meaning of the Act of Parliament? What is stated in this case? We find that it was proved that the goods were found in the pockets of the prisoner Rogers by Turner the prosecutor, who then sent for a policeman, and he took the goods and wrapped them up in a handkerchief; Turner, the prisoner Rogers, and the policeman, going towards Dolan's shop; when they came near it, the policeman gave the prisoner Rogers the goods, and the latter was sent by Turner to sell them where he had sold others, and Rogers then went into Dolan's shop and sold them, and gave the money to Turner as the proceeds of the sale. Now, Turner, the owner, had possession of the goods just as much as if he had taken them into his own hands and had delivered them from his own possession to another person for a particular purpose. He was the bailor of the goods subsequently to the theft, and the other person was the bailee. After that the goods are carried by Rogers by the direction of the master of the goods to the prisoner, who receives them. That is not a receiving of stolen goods within the meaning of the Act of Parliament."

Similarly, in my view, the receipt of the soap by the second appellant and his co-accused was not receiving within the meaning of s. 311 (1) of the Penal Code. If we substitute Abdul Mkubel for Turner the prosecutor, and Mohamed Abdallah for the prisoner Rogers, the facts in *R. v. Thomas Dolan* (1) are on all fours with the facts in the instant case, except that in Dolan's case Rogers sold the stolen property to the receiver whereas in the instant case Mohamed Abdallah gave the soap to the receivers – the second appellant and his co-accused.

The decision in *R. v. Thomas Dolan* (1), was followed in two later decisions, namely, *R. v. Fanny Schmidt* (2) (1866), L.R. 1 C.C.R. 15, and *R. v. Villensky* (3), [1892] 2 Q.B. 597.

So, then, in the instant case the owner Abdul Mkubel having resumed possession of the stolen soap after the theft on June 11, 1962, the second

appellant cannot be said to be guilty of receiving the said soap knowing it to have been stolen on June 12, 1962, Abdul Mkubel having given the soap to Mohamed Abdallah later on June 11, 1962, and the latter, when he handed over the soap on June 12, 1962, to the second appellant and his co-accused, being a bailee and agent of Abdul Mkubel.

The appeal of the second appellant is accordingly allowed, his conviction is quashed and the sentence set aside.

As regards the first appellant, his conviction will stand. The nine months' imprisonment to which he was sentenced cannot be said to be excessive. It will also stand. His appeal is dismissed.

Appeal of the first appellant dismissed. Appeal of the second appellant allowed. Conviction quashed and sentence set aside.

The appellants did not appear and were not represented.

For the respondent:
The Attorney-General, Tanganyika
A. E. Taylor (Crown Counsel, Tanganyika)

Imperial Lime Stone Quarries v Gulamhussein Kermali Chella
[1962] 1 EA 793 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	22 October 1962
Case Number:	71/1962
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Mine – Interference with exercise of mining claims – Action for injunction and damages – Claims granted to holder under statute – Agreement also made with adjoining owner for facilities to mine – Alleged breach of agreement – Whether grant of claim under statute overrides agreement – Whether mining claim gives right to enter private land to exploit minerals – Mining Ordinance (*Cap.* 123), *s.* 2, *s.* 16, *s.* 26, *s.* 35, *s.* 41, *s.* 71 (*T.*) – *Land Ordinance* (*Cap.* 113), *s.* 3, *s.* 4, *s.* 18, *s.* 19 (*T.*) – *Highways Ordinance* (*Cap.* 167), *s.* 7 (*T.*) – *Indian Contract Act*, 1872, *s.* 28 *and s*. 29.

Editor's Summary

The plaintiff sought an injunction and damages against the defendant for alleged interference with the exercise of his rights under mining claims on certain land which were held by the defendant under a right of occupancy. The defendant admitted that the plaintiff was the holder of claims under the Mining

Ordinance for mining and removing sand, but denied the allegations of interference but he alleged that there was an agreement between himself and the plaintiff, whereby the latter had the right to remove sand for three years in consideration of certain payments, that the plaintiff was in breach thereof and had failed to pay compensation or give security for damage done when called upon to do or to refer the matter or to request that it be referred to the Commissioner of Mines.

Held –

(i) the provisions of the law as to mining override any contractual arrangement which may be arrived at between the holder of a mining claim and the occupier or owner of private land surrounding it and over which such holder has to pass in order to gain access to his claim.

(ii) whatever rights the parties may have had under any arrangement entered into between them, they were irrelevant to the plaintiff's claim, which was based on the provisions of the law.

(iii) section 16 of the Mining Ordinance did not place a continuing obligation on a grantee of a mining claim to give security if required; this section was to be invoked if security were required before mining operations had commenced; after such operations had commenced the relevant section to be invoked was s. 26 ibid.

(iv) as the sand did not belong to the defendant and the plaintiff had the right by law to enter the defendant's land and mine and take away the sand therefrom, the agreement was void for failure of consideration, and also for uncertainty.

(v) it was for the defendant to require the plaintiff to furnish security before mining operations commenced, and to seek the Commissioner's directions as to the quantum thereof.

(vi) the plaintiff by reason of the registration of his mining claims had the right under the Mining Ordinance to access to the area where the claims were situate and the defendant had no right to obstruct and prevent him from having such access.

Order for an injuction restraining defendant from interfering with the plaintiff's rights in respect of his mining claims. Hearing to continue on the question of damages.

Judgment

Mosdell J: This is a claim by the plaintiff trading as Imperial Lime Stone Quarries against the defendant in respect of alleged interference with the exercise of the plaintiff's rights under nine mining claims on certain land, the subject of a right of occupancy in favour of the defendant at Ubungu, Kisarawe District, known as Plot No. 11, flur IV, Segerea. It is alleged in the plaint that the plaintiff is the holder or grantee of these claims issued under the Mining Ordinance (Cap. 123), and on or about February 16, 1961, the defendant prevented the plaintiff, his servants and agents, from coming upon the said claims for the purpose of mining and removing sand and has ever since the said date continued and intends to continue to prevent the plaintiff, his servants and agents from exercising the rights created by the claims. By reason of the obstructions of the defendant, the plaintiff alleges that he has been obliged to purchase sand elsewhere and has been deprived of the profits which he would have made from the sale of sand and has suffered and continues to suffer damage which he estimates at the date of verification of the plaint as amounting to Shs. 20,000/-. The plaintiff claims:

(1) damages;

(2) an injunction restraining the defendant by himself, his servants or agents or otherwise from interfering with the rights of the plaintiff;

(3) further and other relief;

(4) costs.

In his written statement of defence the defendant admits that the plaintiff has been the holder of the claims issued under the Mining Ordinance (Cap. 123) and that the area in which the said claims were is situate on the defendant's land. The defendant further states that he does not know whether the plaintiff at the time of verification of the written statement of defence or at the time of the institution of the suit was entitled to the said claims, that in any case such rights which the plaintiff has were subject to the provisions of the Mining Ordinance as a whole. The defendant does not admit that on or about February 16, 1961, or at any time, he prevented the plaintiff, his servants and agents from coming upon the said area for the purposes of mining and removing

sand. And, further, he does not admit that he has ever since the said date continued or intended so to do. The defendant does not admit that the plaintiff has been obliged to purchase sand elsewhere or that he has suffered damage.

The remaining paragraphs of the written statement of defence, which were further or in the alternative and without prejudice to what had gone before, relate to an alleged agreement of September, 1958, whereby the plaintiff was granted by the defendant for three years commencing on February 1, 1959, the right to remove sand from the defendant's land in consideration of the payments therein set forth. The said paragraphs, inter alia, allege that the plaintiff was in breach of this agreement and that thereupon the defendant had required the plaintiff to desist from his mining operations on the defendant's land, that during the course of the plaintiff's mining operations on the defendant's land, the plaintiff had caused damage to the surface rights and property of the defendant, and that on May 24, 1961, by his advocate's letter addressed to the plaintiff's advocates, the defendant had called upon the plaintiff to give security in the sum of Shs. 10,000/- for the payment of compensation for damage to the defendant's surface rights and in accordance with the provisions of s. 16 of the Mining Ordinance had required the plaintiff to desist from his mining operations until such security had been given.

It is further alleged that the plaintiff had failed to pay or give security as required and had failed to refer the matter or to request that it be referred to the Commissioner of Mines or to acknowledge the defendant's said requirements until on or about July 14, 1961, when by his advocate's letter of that date he alleged, subject to dispute as to the period to which the additional Shs. 300/- referred, that the sum of Shs. 1,300/- was the sum agreed to be paid to the defendant by the plaintiff in respect of damage to surface rights during the period February 1, 1961, to January 31, 1962, and that the plaintiff had failed to pay or to tender the said sum or any part thereof until the month of October, 1961; that in respect of the period after January 31, 1962, no sum had been paid or tendered or assessed or agreed to be paid by way of security or compensation to damage to surface rights; nor had any reference been made to the Commissioner of Mines.

The defendant further alleges that in the course of his mining operations the plaintiff had caused damage to the defendant's property due to his negligence or that of his servants or agents and that in respect thereof the plaintiff was liable to the defendant in excess of the amount of damage, if any, to which the plaintiff might be entitled from the defendant in respect of the matters alleged in this suit by the plaintiff and denied by the defendant and the defendant seeks to set off against any sum which might be awarded to the plaintiff an equal amount in respect of the damage so sustained by him, and the defendant reserves the right to proceed against the plaintiff for the balance of such damage and prays that the plaintiff's claim be dismissed with costs.

In his written statement of defence the defendant relies heavily on the alleged agreement of September, 1958, and indeed it is clear from the evidence that some sort of agreement between the plaintiff and the defendant was entered into, but it is by no means clear in respect of what the payments due thereunder from the plaintiff were to be made. It is plain from the plaint that the plaintiff is relying on the rights given to him under the provisions of the Mining Ordinance and not on those given to him under any agreement entered into between himself and the defendant. Indeed, nowhere in the plaint is the agreement mentioned.

At the hearing, after Mr. Roden, for the defendant, had sought, and been granted, permission to amend cl. 6 of the written statement of defence, issues were agreed, but it was not until Mr. Murray for the plaintiff was addressing the court at the conclusion of the defendant's case that a dominant issue came

to the fore and, as it appeared to me, the most important issue of all; indeed had the matter come to the fore at an earlier stage, it might well have been dealt with as a preliminary issue. This issue is,

> "did the claims give the plaintiff the right to cross the defendant's land to reach the area of the claims?"

If the answer to this issue is in the affirmative, little remains of the defendant's written statement of defence. If, on the other hand, the answer is in the negative, little remains of the plaintiff's claim. Before dealing with the evidence, therefore, which was principally concerned with the "agreement" entered into between the plaintiff and the defendant and the alleged breaches thereof, it is necessary to consider whether by law, quite apart from agreement between the parties, the plaintiff had a right under the claims to cross the defendant's land in order to work them.

It is quite clear that mining under a claim is lawful. Section 28 of the Mining Ordinance reads as follows:

> "Mining shall be lawful under a claim or a mining lease; provided that pending the grant of the mining lease the Commissioner may grant permission to the applicant to mine on the area applied for on such conditions and subject to such restrictions as the Commissioner may think fit, and provided also that the provision of the Ordinance and Regulations which are applicable to mining leases shall apply to any areas in respect of which application has been made for a lease and on which permission to mine has been granted. Such permission may at any time be withdrawn by the Commissioner."

It was submitted by Mr. Murray that in s. 2 of the Mining Ordinance, from the meaning of the phrase "to mine", namely

> "intentionally to win minerals and shall include any operations necessary for the purpose",

it follows that the holder of a claim under the Mining Ordinance had the right to cross any public or private property for the purpose of winning minerals, for the exercise of such right was an operation necessary for the latter purpose, and that the holder of a claim had this right quite independently of the provisions of s. 35 of the Mining Ordinance which, so far as relevant, reads:

> "The holder of a claim shall have the right to enter upon the land the subject of the claim, and the exclusive right to prospect or mine thereon and to remove therefrom and dispose of the minerals in respect of which the claim shall have been registered."

Mr. Roden sought to place upon the provisions of s. 35 a narrow interpretation, submitting that it only gave the right to a holder of a claim to enter upon the claim itself and submitted that the phrase "any operations necessary for the purpose" in the definition of the phrase "to mine" in s. 2 of the Mining Ordinance would not allow a claim holder to cross private land in the ownership or occupation of another in order to obtain access to his claim.

Mr. Murray countered with a submission that it could not have been the intention of the legislature to place such a potentially sterile interpretation on the provisions of s. 35, and he referred to s. 3 and s. 4 of the Land Ordinance (Cap. 113), the effect of which sections, subject to qualifications which are for present purpose irrelevant, is that the whole of the land in Tanganyika is public land and all public land and all rights over the same are under the control and subject to the disposition, since the recent constitutional charges, of the Governor-General. Reference was also made to s. 18 of the Land

Ordinance, which is to the effect that the occupier under a right of occupancy shall have exclusive rights in the land against all persons other than the Governor-General, subject to the provisions of the next succeeding section and of any laws relating to prospecting for minerals or mineral oils or to mining. Section 19 of the Land Ordinance states that every right of occupancy shall be subject to any easement affecting the land at the date of the grant of the right of occupancy. It also states that the right of occupancy shall not confer on the holder any water rights or rights over any foreshore unless such rights are expressly mentioned, or confer any rights to mines, minerals, or mineral oil, and that the holder of a right of occupancy, if required by the Governor-General, shall allow a road over the land subject to his right of occupancy in certain circumstances.

Mr. Murray submitted that it would be an extraordinary proposition to state that where minerals are situated on land, as in the instant case, which is the subject matter of a right of occupancy in favour of another, the grant which is made to enable people to mine merely enables them to mine on the areas specified in the grants and makes no provision whatsoever for them to pass over the adjoining land of that other person. Mr. Murray further submitted that if this were intended, the legislature would be enacting something which, on its face, would be liable to be futile since the exercise of the right to mine would depend entirely on whether the owner of the claims was able to reach agreement with the owner of the land adjoining or surrounding the claims as to access to them. Mr. Murray drew the analogy between the case of an ordinary landlord who reserves minerals on the letting of his property and the case here where minerals are reserved to the Governor-General, and Mr. Murray cited authority for the proposition that where minerals have been reserved by a landlord the rights reserved include the right to go and win such minerals, and submitted that if the Governor-General could go on to private land and win minerals he could grant that right to others enabling them to go on to private land and win minerals.

Mr. Murray cited: Woodfall on Landlord and Tenant (26th Edn.), p. 250, para. 585 where it is stated:

> "Exception of minerals. An exception of minerals includes stones got from quarries, and also everything that is necessary for working the mines or quarries, including way-leave for carrying away the stone or minerals."

Halsbury's Laws of England (3rd Edn.), Vol. 23, p. 502, para. 1142:

> "Right to enter and cut. An exception of timber or other trees is usually accompanied by a reservation of the right to enter and to cut and carry them away; but this is not essential. An exception of trees carries with it the right to do all things necessary for getting and disposing of them, and consequently, without express reservation, the landlord may enter to show the trees to an intending purchaser, and either he or the purchaser can cut them down and carry them away, unless, indeed, the timber is ornamental, and the landlord has so acted as to make it inequitable that he should fell it, where, for example, he has consented to the tenant spending money in improving the grounds. In the absence of express agreement, the excepted trees are at the risk of the landlord, and the tenant is not bound to protect them from his cattle. *Liford's* case (1614), 11 Co. Rep. 46b."

Halsbury's Laws of England (3rd Edn.), Vol. 11, p. 434, para. 697:

> "Exceptions. Upon the grant of land there may be an exception of a specified part, and then this is not included in the grant at all and where the amount to be excepted is specified, but not its position, the uncertainty can be determined by election. The rule for construing exceptions is that what will pass by words in a grant will be excepted by the same or like words

> in an exception. Trees or minerals may be excepted. An exception of trees is held not to extend to fruit trees, but it carries so much of the soil as is necessary for the growth of the trees. An exception of "mines" or of any mineral occupying a continuous space, is an exception also of the space occupied; but a reservation of a right to get minerals does not operate as an exception of the minerals themselves, unless an intention to that effect is clearly shown. An exception of trees or of minerals carries with it the right to do all things necessary for getting and disposing of them. A reservation may in substance be an exception, as where there is a reservation of part of the thing granted; but the reservation will be void if it is repugnant to the grant, as a reservation of part of the profits of what is granted. *Dand v. Kingscote*, 1840 6 M. & W. 174; *Ramsay v. Blair*, 1876 1 App. C. 701."

Mr. Murray submitted that if the words of the Mining Ordinance could reasonably be held to bear the interpretation that the grant of a right to win minerals includes the grant of a right to pass over adjoining land in order to obtain access to a claim, that is the interpretation which the court should adopt. In my view the more liberal interpretation should be placed on the definition of the phrase "to mine" in s. 2 and upon s. 35 of the Mining Ordinance rather than the narrow interpretation which Mr. Roden seeks to have placed thereon. I cannot think that it was the intention of the legislature to place the holder of a mining claim in a position of such potential sterility if he happens to be in the position of the plaintiff here whose claims are completely surrounded by land occupied by another and who is able to secure access to the claims only be agreement with that other. What if such access be refused? Are the claim holder's rights under the law to be thereby nullified? I think not. Indeed if this interpretation be placed on the provisions just mentioned, the provisions of s. 16 and s. 26 of the Mining Ordinance fall neatly into place, as do the pieces of a jigsaw puzzle when placed in the position into which they are designed to go.

It is necessary to set forth the provisions of s. 16 in toto. It reads:

> "Any person intending to prospect on private land shall, when practicable give notice of his intention to the occupier of such land before commencing prospecting operations thereon, and shall if required by the owner or occupier, give security in such sum as the Commissioner may direct for the payment of compensation for the disturbance of surface rights and for any damage done to the lands by prospecting operations thereon, and, if required by the owner or occupier shall desist from prospecting on the land until such security has been given."

It is also necessary to set forth the provisions of s. 26 of the Mining Ordinance as far as is relevant. Sub-section (1) reads:

> "The holder of a prospecting right or of an exclusive prospecting licence shall on demand by an owner or occupier of land pay him fair and reasonable compensation for any disturbance of the rights of such owner or occupier or for any damage done to the surface of the land by such operations, and shall on demand being made by the owner of any crops, trees, buildings or works damaged by the holder of the right or licence, or by any agent or servant of such holder pay compensation for such damage."

Then follow provisions relating to non-payment of compensation when demanded or dissatisfaction by the owner or occupier with the compensation

By s. 41 of the Mining Ordinance it is provided

> "the provisions of s. 16 and s. 26 shall apply mutatis mutandis to a claim".

If the necessary mutations be made to the provisions of s. 16 and s. 26 of the Mining Ordinance it will be seen that s. 16 comes into operation when a person intends to mine on private lands and s. 26 comes into operation in a case where mining has commenced and damage is caused to the owner or occupier of the property on which mining operations have taken place.

In my view, on the proper interpretation of the relevant provisions of the Land Ordinance and the Mining Ordinance, the provisions of the law as to mining override any contractual arrangement which may be arrived at between the holder of a claim and the occupier of or owner of private land surrounding it and over which such holder has to pass in order to gain access to his claim. My view of the interpretation to be placed on the definition of "to mine" in s. 2 and on the provisions of s. 16 and s. 26 of the Mining Ordinance involves a wide interpretation being placed on the phrase "mining operations". Such phrase is not restricted to the actual winning of minerals, in my view, but includes any act necessary to enable the minerals to be won, e.g. taking lorries over private land.

It is clear that on or about February 17, 1961, and on another occasion shortly thereafter the defendant prevented the plaintiff from coming upon the area on which the claims are situate and has ever since continued and intends to continue to obstruct and prevent the plaintiff from exercising the rights given to him by the grant of the mining claims. Whatever rights the parties may have under any agreement entered into between them, they appear to me to be completely irrelevant to the plaintiff's claim, in support of which he is relying entirely on the provisions of law, so that the answer to what has been called the dominant issue is that the mining claims give the plaintiff the right to cross the defendant's land to reach the area of the claims.

Before I pass to some of the evidence concerning the "agreement" I must advert to another interpretation which Mr. Roden sought to have placed on s. 16. Mr. Roden submitted that a person did not only "intend to prospect on private land" before any such prospecting had commenced but that before the commencement of each day of such prospecting he intended to prospect and should give notice of his intention to the owner or occupier of such land before commencing prospecting operations thereon. Similarly with the mutations authorised by s. 41, a person intended to mine on private lands each day when he went to his claims to mine, and that the provisions of s. 16 placed a continuing obligation on him to give security if required.

I cannot place such an interpretation on s. 16. The section appears to me to relate to the period of time before any mining operations have commenced, and that security is to be given, if required, before any such operations have commenced. In my view, after mining operations have commenced the relevant section to be invoked by an aggrieved owner or occupier of land is s. 26.

Much evidence was given in this case concerning the agreement purported to have been reached by the plaintiff and the defendant. Indeed, the plaintiff, has endeavoured to comply, and even on the defendant's evidence, has substantially succeeded in complying, with the provisions of the so-called agreement as to payment of money to the defendant. But what in fact was agreed? We have one document produced by the plaintiff, a different document produced by the defendant, both documents containing (inter alia) a provision as to "terms of payment". But what were the payments in respect of? The plaintiff

seemed to be in some doubt, for at one stage he deposed in chief "Payment for any damage caused was included in the payment", and later in chief

> "The terms did not specifically refer to compensation for damage. There was no mention by the defendant of any compensation for disturbance of his rights".

From the terms of the two documents produced, and from the evidence of the plaintiff and the defendant's witnesses, it appears to me to be likely that, in fact, the payments were intended to be made in respect of sand removed and the fact that in both documents the plaintiff was to have the right to use the road giving access to the claims was purely an incidental matter. Although it is not clear for what purpose the payments were intended by the parties to be made, it is clear that the original payment of Shs. 750/- per annum for each of the three years was increased to Shs. 750/- for the first year, and Shs. 1,000/- per annum for each of the remaining two years, and that the Shs. 1,000/- per annum was subsequently increased to Shs. 1,300/- per annum when the three additional claims were registered. It is also clear that the plaintiff has paid to the defendant Shs. 750/- for the year 1959-60, Shs. 1,300/- for the year 1960-61 and Shs. 1,300/- for the year 1961-62.

The question arises as to whether the Mining Ordinance deprives persons of the right to contract with each other in respect of a mining claim. I can find nothing in the Mining Ordinance which indicates such a deprivation. Indeed that no such deprivation was intended seems able to be inferred from s. 71 of the Mining Ordinance which reads:

> "Nothing in this part (Part IV dealing with disputes) contained shall be deemed to prevent any person from instituting in any of the courts of the Territory any proceedings he may think fit to institute as provided by law."

But one matter in any such contract, I should have thought, with which the parties would not be able to deal would be payment for minerals removed from private land, for such minerals do not belong to the owner or occupier of the private land, but to the Governor-General. I use the expression "private land" in this context and indeed throughout this judgment as meaning land legally owned or occupied by a person or corporate entity. So, if a person agrees, as appears to have been the case here, to pay the owner or occupier of the land upon which the claims are situate for minerals won, he is paying such owner or occupier for something which does not belong to him. On this hypothesis it can be said that the "agreement" between the plaintiff and the defendant is void for want of consideration under s. 28 of the Indian Contract Act. For what consideration did the defendant provide for the payments made by the plaintiff? It appears to me none, for the sand did not belong to the defendant and upon my interpretation of the Mining Ordinance and the Land Ordinance the plaintiff had the right by law to enter upon the defendant's land and mine and take away the sand therefrom. Moreover I would hold the "agreement" void for uncertainty under s. 29 of the Indian Contract Act.

It is apparent, moreover, that the so-called agreement between the plaintiff and the defendant was entered into in total ignorance of their respective rights in law. Indeed after the dispute arose it was referred to as being one arising entirely from alleged breaches of the "agreement" entered into between the parties. A perusal of the correspondence produced to the court indicates that the first occasion upon which any provision of law was referred to was in the letter of May 24, 1961, from Mr. Roden to Messrs. Fraser Murray, Thornton & Co. The letter of February 16, 1961, which the plaintiff collected from the post office from Messrs. Master & Co. then acting for the defendant, written to the plaintiff, enclosing a copy of a letter from Messrs. Master & Co. to the

Commissioner of Mines of even date, indicates that the defendant was of the opinion that the rights of the plaintiff depended upon contract and not on law, for in the said letter, Messrs. Master & Co. refer to "permission" to remove sand from the Plot No. 11 flur IV being "withdrawn". This was followed by the letter of February 25, 1961, from Mr. Kesaria, then acting for the plaintiff to Messrs. Master & Co. in which reference is made to "permission" to remove sand being given by the defendant in consideration of moneys paid by the plaintiff.

The letter of May 24, 1961, from Mr. Roden to Messrs. Fraser Murray, Thornton & Co. inter alia requested, in view of an alleged breach by the plaintiff of the agreement, namely to pay the sum agreed, to give security under s. 16 of the Mining Ordinance, and even in this letter it is stated:

> "Please now take note that this requirement is related both to the agreement between the parties and to the provisions of s. 16 and s. 41 of the Mining Ordinance (Cap. 123). In any event your clients will not be able to mine on my client's property with his consent after February, 1962."

As I have already stated, upon my interpretation of the provisions of s. 16 of the Mining Ordinance, it was too late for the defendant on May 24, 1961, to request security under s. 16 ibid. The nine claims in favour of the plaintiff were produced to the court, and it is noticed that, by reason of renewals thereof, each one is valid until March 31, 1963, and that the six original claims were effective from January 28, 1959, and the three additional claims from June 8, 1960.

So, then at what stage have we now arrived? It appears to me that the provisions of the Mining and Land Ordinances entitle the plaintiff to work his still valid claims. In my view it is too late for the defendant at this stage, and indeed it was too late for him at any stage after the plaintiff had commenced mining operations, to request the plaintiff to give security under s. 16.

Again, I must disagree with the interpretation Mr. Roden seeks to have placed on s. 16 in connection with the giving of security. As I read s. 16 it was for the defendant to require the plaintiff to furnish security before mining operations commenced, and for the defendant and not the plaintiff to seek the Commissioner's directions as to the quantum thereof. For under s. 16 the defendant it is who seeks security, not the plaintiff.

The plaintiff seeks damages and an injunction. In my view he is entitled to both, subject to proof of the latter. The defendant seeks to set off against any damages to which the plaintiff may be entitled an equal amount in respect of damages sustained by him by reason of the plaintiff's activities, and to reserve his right to proceed against the plaintiff for the balance of any such damage suffered by him, if any. As I have already stated, in my view, taking advantage of s. 26 of the Mining Ordinance is not the only method by which an owner or occupier of land can obtain fair and reasonable compensation for disturbance of his surface rights and for damage done to the surface of his land by mining operations and to crops, trees, etc. I apprehend that s. 71 of the Mining Ordinance enables the defendant to set off the damage, if any, he has suffered against the damage suffered by the plaintiff in the manner he seeks and to claim the balance, if any.

Eleven issues were agreed upon and fixed by the court at the inception of the trial, but two of them, namely Nos. 4 and 11, do not, at this stage, require dealing with, as they relate to the question of damages suffered by the plaintiff and the defendant respectively. Moreover, in view of my finding that the provisions of the Mining Ordinance override the rights of the defendant as the owner or occupier of land, under the "agreement", which, moreover, I have held to be void for lack of consideration and uncertainty, I apprehend that it

is not necessary for me to deal with the issues which relate to the "agreement". I would, however, state in this connection that when a decision as to the damage suffered by the plaintiff and defendant respectively is reached, the sums paid by the plaintiff for the exercise of the rights purported to have been given to him under the "agreement" should be taken into account and that the total of these payments received by the defendant should be deducted from the amount of the damages, if any, claimable by him.

Issue 1 is as follows:

> "was the plaintiff at the date of institution of the suit the holder and grantee of mining claims as alleged in the plaint and were such claims then valid and subsisting?"

The answer to this is clearly in the affirmative.

2. (*a*) and (*b*) read as follows:

> "(*a*) did the defendant on or about February 16, 1961, prevent the plaintiff from coming upon the areas of the said claims for the purpose of mining and removing sand? (*b*) Has the defendant ever since that date continued and does he intend to continue to obstruct and prevent the plaintiff from exercising the right created by the said claims?"

Mr. Roden in this connection submitted that what the defendant had done was not to prevent the plaintiff from coming on the land occupied by him, that he thereby prevented the plaintiff from reaching the area on which the claims were situate and thus frustrated the exercise by the plaintiff of his rights thereunder. It cannot really be seriously suggested that the plaintiff could have had access to his claims and removed sand therefrom by helicopter, or that the plaintiff should have taken action under s. 17 of the Highways Ordinance, Cap. 167, or s. 19 (3) of the Land Ordinance for the grant of a road of access to his claims. It is clear on the evidence that the answers to issue 2(*a*) and (*b*) are both in the affirmative.

Issue 3 was as follows:

> "If there were or have been such acts of obstruction and prevention, have they been unlawful?"

The acts whereby the defendant obstructed and prevented the plaintiff from having access were clearly unlawful. As I have already stated the plaintiff by reason of the registration of his claims had the right given to him under the Mining Ordinance to have access to the area where the claims are situate, and the defendant had no right to obstruct and prevent him from having such access.

It is not necessary, in view of my findings as to the law, to deal with the remaining issues, apart from Nos. 4 and 11 which relate to damages and will have to be dealt with later.

In sum then, I hold that the plaintiff is entitled to damages, subject to proof thereof, and grant him an injunction restraining the defendant by himself, his servants or otherwise from interfering with the rights of the plaintiff in connection with the latter's mining claims on Plot No. 11 flur IV, Segerea.

I direct that the hearing be continued on the question of damages, as to the nature and quantum thereof both in the case of the plaintiff and the defendant.

The question of costs is reserved.

Order for an injunction restraining defendant from interfering with the plaintiff's rights in respect of his mining claims. Hearing to continue on the question of damages.

For the plaintiff:
Fraser Murray, Thornton & Co., Dar-es-Salaam

S. J. Jadeja

For the defendant:
Adrian Roden, Dar-es-Salaam
B. A. S. Versi

Bombay Flour Mill v Chunibhai M Patel
[1962] 1 EA 803 (HCT)

Division:	High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	31 August 1962
Case Number:	12/1962
Before:	Sir Ralph Windham CJ
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[1] Appeal – Practice – Summary judgment – Ruling refusing leave to defend – Formal judgment entered – Whether appeal lies from magistrate's ruling or from judgment – Indian Civil Procedure Rules, O. XXXVII, r. 2 *and r.* 3 *– Indian Civil Procedure Code*, 1908, *s.* 2, *s.* 96 *and s.* 104.

[2] Practice – Affidavit – Summary judgment – Application for leave to defend supported by affidavit – No statement of means of deponent's knowledge or sources of his information and belief – Whether affidavit competent – Indian Civil Procedure Rules, O. XXXVII, r. 3.

Editor's Summary

The respondent filed a summary suit in a district court upon a promissory note made by the appellant firm in favour of the second defendants. The respondent claimed to be the holder in due course of this note. The appellant firm applied for unconditional leave to appear and defend the suit supporting the application by an affidavit of one of its partners which, inter alia, alleged fraud. The magistrate dismissed the application on the ground that the affidavit did not state the deponent's means of knowledge or his sources of information and belief, and on the next day judgment was formally entered against the appellant firm. Subsequently, the appellant appealed against the ruling and at the hearing of this appeal the respondent took the preliminary points that no appeal lay from a ruling upon an application under O. XXXVII, r. 3, of the Indian Civil Procedure Rules, and that, even if an appeal lay, the proper course was to appeal against the formal judgment and not against the ruling itself. The respondent also contended that the affidavit was deficient.

Held –

(i) the appellant firm had the right to challenge the order or ruling as being a "decree" by virtue of the right of appeal conferred by s. 96 (2) of the Indian Civil Procedure Code.

(ii) however, the affidavit was defective and incompetent, and the application could not be granted on the strength of it.

Appeal dismissed.

Cases referred to in judgment:

(1) *Ramanlal & Co. v. Chunilal* (1932), A.I.R. Bom. 163.

(2) *A. S. Chettiar and Others v. Veerappa Chettiar* (1935), A.I.R. Rang. 245.

(3) *Justices of the Peace for Calcutta v. Oriental Gas Co*. (1872), 8 Bang. L.R. 433.

(4) *Miya Mahomed v. Zorabi* (1909), 2 I.C. 157.

(5) *Madanlal v. Kedarnath* (1930), A.I.R. Bom. 364.

(6) *Phakey v. World Wide Agencies Ltd*. (1948), 15 E.A.C.A. 1.

(7) *Noormohamed Janmohamed v. Kassamali Virji Madhani* (1952), 20 E.A.C.A. 8.

(8) *Standard Goods Corporation Ltd. v. Harakchand Nathu* & Co. (1950), 17 E.A.C.A. 99.

(9) *Chandrika Prashad Singh and Others v. Hira Lal and Others* (1924), A.I.R. Pat. 312.

(10) *Padmabati v. Rasik* (1910), 37 Cal. 259.

Judgment

Sir Ralph Windham CJ: The appellant firm are the first defendants in a summary suit instituted against them and the second defendant firm by the plaintiff-respondent under O. XXXVII of the Indian Civil Procedure Rules upon a promissory note made by the first defendants in favour of the second defendants and endorsed in blank by the latter, of which note the plaintiff claims to have become the holder in due course.

The appellant firm, by chamber application under r. 2 and r. 3 of O. XXXVII, applied to the district court for unconditional leave to appear and defend the suit, the application being supported by an affidavit of one D. J. Mistry, a partner in the appellant firm. The application came before the resident magistrate, who in a written ruling dated March 26, 1962, dismissed it, refusing even conditional leave to defend. On the next day, March 27, judgment was formally entered against the appellant accordingly, in the rubber-stamped words – "Judgment for the plaintiff as prayed". On June 8, the appellant lodged his appeal against the ruling of March 26, praying that he be given unconditional leave to appear and defend the suit.

A preliminary objection to my hearing this appeal has been advanced on behalf of the plaintiff-respondent, and it is necessary that I should deal with it before considering the appeal on its merits. The objection is that no appeal lies to the High Court from a ruling upon an application under O. XXXVII, r. 3, of the Civil Procedure Rules, refusing even conditional leave to appear and defend a summary suit. This objection may be divided into two alternative contentions: first, that the validity of such a ruling cannot be canvassed at all; secondly that, even assuming that it can be canvassed, the only proper manner of doing so is to lodge an appeal against the formal judgment in the plaintiff's favour which was consequent upon the refusal of leave to defend, and not (as was done here) to appeal against the ruling itself in which leave was refused.

As to whether an appeal lies at all against an out-and-out refusal of leave to defend, whether by way of appealing against the consequent judgment or against the order or ruling in which leave was refused, there appears to be no reported decision in which the right to appeal against such an outright refusal was directly in point. If such an appeal does lie, it is conceded on behalf of the appellant that it does not lie under s. 104 of the Indian Civil Procedure Code, 1908, neither the "ruling" nor the consequent ex parte judgment being an "order" falling within any of the categories set out in that section, but that it lies under s. 96 (2) of the Code, as being against an "original decree passed ex parte", within the meaning of "decree" as defined in s. 2 (2) of the Code. In short, it is contended that the "ruling" refusing leave to defend even conditionally is a "decree", and therefore appealable, in that, in effect and in reality, it is an adjudication which conclusively determines the rights of the plaintiff and the first defendant in the suit by holding that there can and shall be no defence to the plaintiff's claim and that consequently, by operation of O. XXXVII, r. 2 (2),

> "the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree . . ."

There is, as I have said, no reported case in which the right of appeal against an outright refusal of leave to appear and defend, on an application under O. XXXVII, r. 2, has been specifically in issue. But it is common ground upon the authorities that if the effect of an order upon an application for leave to appear and defend (whether it is expressed to be an "order" or a "ruling" or whatsoever other term) is to determine, in effect, the rights between the parties,

then it is appealable. And in at least two cases, both concerned with the question whether an order granting conditional leave to defend is appealable, it is clearly stated that an order refusing leave to appear and defend at all would certainly be appealable; nor is that proposition challenged in any reported case. In *Ramanlal & Co. v. Chunilal* (1) (1932), A.I.R. Bom. 163, it was even held that an order under O. XXXVII, r. 2, granting conditional leave to appear and defend, was appealable, on the ground that in effect it determined the rights of the parties and was accordingly a "judgment". A fortiori an outright order refusing leave to defend would be appealable, on the authority of that case. It is true that in other Indian decisions, to which I will presently refer, it has been held that an order granting conditional leave to appear and defend is not appealable, in that such an order does not conclusively determine the rights of the parties. But the general principle as enunciated in *Ramanlal's* case (1), certainly does apply, in my opinion, to a refusal to grant leave to defend at all, even if there is a divergence of view, on the authorities, as to whether it can be applied to a granting of leave upon conditions.

The principle is stated by Beaumont, C.J., in *Ramanlal's* case (1), in the following words, at p. 165:

> "I think we must look at the substance of this matter and consider what the real effect of the order is, having regard to the provisions of O. XXXVII, r. 2, and I think we ought to hold that the effect of the order is to determine the rights between the parties, since in substance it entitles the plaintiff to the order claimed in the plaint. That being so, I think such an order is technically a judgment within the meaning of cl. 15, Letters Patent."

Again, in *A. S. Chettiar and Others v. Veerappa Chettiar* (2) (1935), A.I.R. Rang. 245, although an order granting conditional leave to defend was there held not to be appealable, the distinction between such an order and one refusing leave to defend outright was laid down by Page, C.J., at p. 246 in clear terms as follows:

> "With all due deference it appears to me that the two orders differ toto coelo. An order refusing absolutely an application for leave to defend is an order which finally disposes of the rights of the parties. All that remains to be done is that the order should be worked out in accordance with law."

It is pointed out by learned counsel for the respondent that *Ramanlal's* case (1), is concerned, as indeed it is, with whether an order refusing leave to defend is a "judgment" within the meaning of cl. 15 of the Letters Patent for the High Court of Bombay; whereas in the present case we are concerned with whether it is a "decree" as defined in s. 2 (2) of the Civil Procedure Code. As touching a case such as the present, however, the essential meaning of "judgement" for the purpose of cl. 15 and of "decree" as defined in s. 2 (2) is the same, namely that, subject of course to any appeal, it must conclusively determine some or all of the rights between the parties. This is clear from the decision in the leading case of *Justices of the Peace for Calcutta v. Oriental Gas Co*. (3) (1872), 8 Bang. L.R. 433, followed by the Bombay High Court in *Miya Mahomed v. Zorabi* (4) (1909), 2 I.C. 157, upon the meaning to be given to the expression "judgment" in cl. 15 of the Letters Patent of the High Courts of Calcutta and Bombay, and from a perusal of the commentary on cl. 15 in Mulla's Code of Civil Procedure (12th Edn.), at pp. 1462-4.

An order or ruling under O. XXXVII, r. 2, refusing leave to appear and defend even upon conditions, clearly does determine conclusively the rights as between plaintiff and defendant, by preventing the defendant from putting forward any rights that he may claim to have, with the result that the rights claimed by the plaintiff shall be deemed to be unchallenged and the automatic

consequence that judgment shall be entered in his favour against the defendant. The defendant accordingly has the right to challenge the order or ruling, as being a "decree", by virtue of the right of appeal conferred by s. 96 (2) of the Civil Procedure Code.

And that brings us to the second limb of the preliminary objection, namely the contention that the first defendant-appellant ought to have appealed, not against the ruling of March 26, refusing leave to appear and defend, but against the consequent formal judgment entered against him on the next day. Now I think there can be no doubt that the appellant could have chosen to appeal against the formal judgment of March 27, and moreover that, had he done so, he could in such an appeal have canvassed the validity of the ruling of March 26, upon which it was founded. The decisions in such cases as *Ramanlal & Co. v. Chunilal* (1), and *A. S. Chettiar and Others v. Veerappa Chettiar* (2), make this plaint. So too does *Madanlal v. Kedarnath* (5) (1930), A.I.R. Bom. 364, another case in which it was held that an order granting conditional leave to defend is not appealable. But, notwithstanding the contention of learned counsel for the respondent, who relies on this last case in support of this limb of his preliminary objection, I can find nothing in it which decides or suggests that an appeal would not also lie direct from the order upon the application for leave to defend, if that order were an absolute refusal of such leave. That question was expressly left open in *Madanlal's* case (5). On the other hand, in *Ramanlal's* case (1), it is clearly stated, not only that such an appeal against the order would also lie, but that it would be preferable to an appeal against the consequential formal judgment or decree. Beaumont, C.J., in holding in that case that an appeal did lie against the order, said at p. 165:

> "If in a summary suit in which leave to defend is refused and in consequence decree follows as a matter of course in favour of the plaintiff and there is an appeal against the decree, it is obvious that the court of appeal cannot go into the merits of the suit, because the merits have not been tried, and all that the defendant can do in such a case is to challenge the interlocutory order. But in the meantime the plaintiff, having got his final decree, may have levied execution, and it may be too late for practical purposes for the defendant to challenge the interlocutory order. If in substance an appeal lies from an interlocutory order refusing leave to defend by the process of challenging the order on an appeal from the final order, it is obviously more convenient that there should be a right of appeal direct from the interlocutory order."

For these reasons I hold that an appeal lies from the order of March 26, 1962, in the present case, and I turn to the merits of the appeal.

The application of the first defendants, the Bombay Flour Mill, for leave to appear and defend this suit upon a promissory note which they had made in favour of the second defendants, Messrs. L. D. J. Patel & Co., was, as I have said earlier, supported by an affidavit of one D. J. Mistry, a partner in the first defendant firm. The paragraphs of his affidavit on which the appellants relied, and still rely, as showing that they had some legal defence to their liability upon the promissory note, are paras. 3 to 6, and they read as follows:

> "3. That the promissory note, the subject-matter of this suit, was drawn by the said D. J. Patel as partner of Bombay Flour Mill in favour of L. D. J. Patel & Co. and was discounted by the latter with the plaintiff.
>
> "4. That the said promissory note was so drawn without my knowledge and/or consent and without any consideration whatever moving from the second defendant firm (L. D. J. Patel & Co.).
>
> "5. That the entire proceeds of the said promissory note were, to the knowledge of the plaintiff, solely meant for the use and benefit of the second

> defendant firm (L. D. J. Patel & Co.) who were, to the knowledge of the plaintiff, in financial difficulties at all material times and have, in fact, been so applied for its benefit (which fact was also known to the plaintiff) without in any way benefiting the first defendant firm.
>
> "6. That my said co-partners have acted in fraud of their partner in the first defendant firm (namely, myself) and that the plaintiff had notice, actual or constructive, of such fraud."

Learned counsel for the respondent, in supporting the ruling of the court below, has argued that, for the purpose of obtaining leave to defend, the allegations in the affidavit that I have quoted are deficient in two respects: first, in that the deponent's means of knowledge or his sources of information and belief are not stated; secondly, that in any event, by reason of their vagueness and ambiguity, the allegations do not disclose a prima facie defence or any triable issue such as would place on the plaintiff, who was the holder in due course, the burden of proving that he gave consideration for the promissory note sued on. It would appear that the learned trial magistrate refused the application for leave to defend mainly if not entirely on the first of these two grounds. After quoting O. XXXVII, r. 3, which provides that the supporting affidavit must

> "disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the court may deem sufficient to support the application",

he continued, with reference presumably to Mulla's Commentaries, as follows:

> "The commentary thereon indicates that a defendant must show a prima facie case or raise triable issues if the defendant is to be granted leave to defend. The defendant herein relies substantially on paras. 4, 5 and 6 of his affidavit for the exercise of that rule in his favour. I am therefore thrown back to consideration of the affidavit since the application is necessarily based thereon. The sources of information referred to in the affidavit are certainly not specified. If this affidavit is on information and belief, and I can only conjecture that it is so, then clearly the source of that information and the grounds of that belief must also be stated. The authority therefor would be the two cases quoted by Mr. Davda. I consider I am bound by such decisions and although the cases to which reference has been made were not similar to the present case, nevertheless the principles annunciated therein in regard to the contents of affidavits are, I believe, applicable. It is a consideration, as I understand it, precedent to any contemplation of an application under these rules that the affidavit, when required in support thereof, be sufficient to enable the court to deal with the matter. I can only hold it is not so in the circumstances of this case. For the reasons which I have stated I dismiss this application."

The two cases referred to and relied on in the above ruling were *Phakey v. World Wide Agencies Ltd*. (6) (1948), 15 E.A.C.A. 1, and *Noormohamed Janmohamed v. Kassamali Virji Madhani* (7) (1952), 20 E.A.C.A. 8. Now in the first of those cases the affidavit in question, or the relevant paragraph of it, was expressed to be upon the deponent's information and belief; and the source of the information or the grounds of the belief were not stated. It was held that for this reason the affidavit was worthless, and the motion based on it was dismissed. In the affidavit in the present case it is nowhere stated, in respect of the affidavit as a whole or of any paragraph or allegation in it, that the facts deposed to, or any and if so which of them, are true to the deponent's knowledge, or are true to the best of his information and belief. To that extent, the decision in *Phakey's case* (6), is not wholly in point. But in the second of

the two cases relied on, that of *Noormohamed's* case (7), the position would appear to have been essentially the same as in the present case. For there, as here, it is stated in the judgment of Worley, V.-P., at p. 11, that

> "the deponent does not pretend to say whether he is deposing to the facts sworn to of his own knowledge or on information given to him by someone else".

The deponent there, as here, was a party to the suit. The learned Vice-President accordingly rejected the application for an interim injunction that was based on the affidavit, relying on an earlier case, *Standard Goods Corporation Ltd. v. Harakchand Nathu & Co.* (8) (1950), 17 E.A.C.A. 99, in which the Court of Appeal for Eastern Africa had held, at p. 100, that

> "an affidavit of that kind ought never to be accepted by a court as justifying an order based on the so-called 'facts',"

and that the defect was fatal to the application based on it.

It is but right to observe that in an Indian case which was not cited to me and which does not appear to have been considered by the Court of Appeal in *Noormohamed's* case (7), namely *Chandrika Prashad Singh and Others v. Hira Lal and Others* (9) (1924), A.I.R. Pat. 312, a vital distinction was drawn between an affidavit of the kind under consideration both there and here, where nothing at all is said about whether the facts are deposed to from knowledge or from information and belief, and one where it is stated that they are upon the deponent's knowledge, information and belief without its being made clear which facts are from his knowledge and which upon information and belief. In that case it was held that an affidavit of the former kind was not bad, while that of the latter kind was. Referring to and distinguishing an earlier decision, *Padmabati v. Rasik* (10) (1910), 37 Cal. 259, in which the affidavit had been of the latter kind, Miller, C.J., said, in *Chandrika's* case (9), at p. 313:

> "It must be borne in mind that in making the observations which I have just quoted from their judgment, the learned judges were dealing with a case where the affidavit states that the information deposed to is true to the best of the deponent's knowledge, information and belief without stating specifically which parts of it are true to his knowledge and which parts are merely stated as his belief from information obtained by him. In such a case it is clearly desirable and imperative that the deponent should state how much of the affidavit is sworn to from his own knowledge and how much is merely sworn to from information which he believes to be true; but if the affidavit contains no such statement as that to which I have referred but merely alleges certain facts and is signed by the deponent who swears to them, it must, I think, be taken that the statements made by him are represented as statements true to his knowledge. I, therefore, think that in the present case no exception can be taken to the form of the affidavit on that ground."

Having drawn attention to this decision in *Chandrika's* case (9), however, and being faced with the contrary decision of the Court of Appeal for Eastern Africa in *Noormohamed's* case (7), I can but say that it is the latter decision which is binding upon this court, as it was binding upon the court below, unless it can be shown to be distinguishable. Learned counsel for the appellant has contended that in a case such as the present any defect in the affidavit can be remedied, if and when the application for leave to defend which is founded upon it is granted, in the ensuing written statement of defence itself. The strictures upon defective affidavits in *Chandrika's* case (9), however, as in the

earlier cases there relied on, are phrased in terms that are as general in their application as they are emphatic; and I do not think I would be justified in distinguishing affidavits in support of applications for leave to appear and defend, which applications are required by O. XXXVII, r. 3 (1) to be supported by affidavits of facts and in no other manner.

For these reasons, and without holding it to be necessary, or this court to be entitled, to examine upon their merits the "facts" alleged in the supporting affidavit to see whether they do or do not disclose any triable issue, I must and do hold, supporting the decision of the learned trial magistrate, that the affidavit is incompetent and that the application cannot be granted on the strength of it. This appeal must accordingly be dismissed with costs.

Appeal dismissed.

For the appellant:
P. R. Dastur, Dar-es-Salaam
H. K. Udvadia

For the respondent:
C.J. Davda, Dar-es-Salaam

J Hoareau v R.
[1962] 1 EA 809 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	21 December 1962
Case Number:	120/1962
Before:	Sir Ronald Sinclair P, Sir Trevor Gould JA and Mayers Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles – Souyave, J.

[1] Criminal law – Jurisdiction – Revision – Trial and conviction by subordinate court – No right of appeal – Application for revision – Arguments heard – Refusal by appellate court to interfere with conviction and sentence – Further appeal – Jurisdiction to hear further appeal from "Revision Order" – Criminal Procedure Code, s. 301, *s.* 302, *s.* 319, *s.* 321, *s.* 323, *s.* 324 (*S.*) *– Local Government Act*, 1888, *s.* 29.

[2] Criminal law – Trial – Irregularity – Visits by magistrate to locus in quo in absence of accused or his advocate after judgment reserved – Whether irregularity curable or fatal to conviction – Criminal Procedure Code, s. 338 (*S.*).

Editor's Summary

The appellant was convicted in a subordinate court of stealing and was sentenced to a fine of Rs. 25, from which in view of s. 302 (2) of the Criminal Procedure Code, no appeal lay. The appellant, however, applied to the Supreme Court for revision of his conviction and sentence and the judge, after hearing argument on behalf of the respondent and by the appellant, delivered a "Revision Order" in which he intimated that he did not propose to interfere with the conviction or sentence. On further appeal the two questions considered were whether the appellate court had jurisdiction to entertain the appeal; and whether a visit by the magistrate to the locus in quo, accompanied by the prosecutor but in the absence of the accused and his advocate, after judgment had been reserved, was a fatal irregularity.

Held –

(i) the formal pronouncement after argument of the conclusions of the Supreme Court that the acts of the subordinate court were a valid exercise of its powers, must be regarded as an act done in the exercise of the revisionary jurisdiction of the Supreme Court and accordingly an appeal therefrom lay to the Court of Appeal.

(ii) the visit of the magistrate to the locus in quo accompanied by the prosecutor, but in the absence of the accused and his advocate, constituted a departure from the essential principles of justice and was an irregularity which could not be cured under s. 338 of the Criminal Procedure Code.

Poole v. R., [1960] E.A. 62 (C.A.); [1960] E.A. 644 (P.C.) distinguished.

(iii) the magistrate's visit to the locus in quo in the absence of the accused and his advocate but in the company of the prosecutor also offended the principle that justice should not only be done but be seen to be done.

Appeal allowed.

Cases referred to in judgment:

(1) *Michael s/o Meshaka v. R.*, [1962] E.A. 81 (C.A.).

(2) *Ex parte County Council of Kent and County Council of Dover. In re The Local Government Act*, 1888, [1891] 1 Q.B. 725.

(3) *Winter and Calder v. Winter* (1933), N.Z.L.R. 289.

(4) *Reidy v. Herry* (1897), 23 V.L.R. 508.

(5) *Poole v. R.*, [1960] E.A. 62 (C.A.).

(6) *Tameshwar and Another v. R.*, [1957] A.C. 476; [1957] 2 All E.R. 683.

(7) *Poole v. R.*, [1960] E.A. 644 (P.C.).

Judgment

Mayers Ag JA, read the following judgment of the court: This is an appeal from a refusal by the Supreme Court of Seychelles to quash, in the exercise of its revisionary powers, the conviction of the appellant by a subordinate court of theft and to set aside the sentence of a fine imposed by that court on him for that offence.

The case for the prosecution was that the appellant and another man, who was jointly convicted with him but, in relation to whom, there is no appeal before us, were employed as shop assistants by the complainant who is a trader. About 3.30 p.m. on February 20, 1962, the complainant was in a room upstairs over his shop having his tea when he saw through a window the appellant leave the shop carrying in his hand an empty milk carton containing two packets of "Job" cigarette papers – a brand of cigarette paper which the complainant sold. The appellant, according to the complainant, went to the store in the back yard of the shop and came out very shortly afterwards carrying nothing. Thereafter the complainant went downstairs into the shop and asked his brother to check the stock. Shortly thereafter the complainant's brother reported that he had seen two packets of "Job" cigarette papers under a plank in the store. The complainant also warned his cook to watch the appellant and his co-accused. The complainant made a report to the police later that afternoon as a result of which arrangements were made for the complainant's premises to be watched.

About 5.30 p.m. according to the complainant, his brother and the cook, they all heard the appellant speak to his co-accused and say in Seychelloise in substance that it was impossible for him to do

anything as there were many men in khaki about. According to the cook, she also saw, just before the appellant left the premises that evening, the appellant push something with a stick under a plank in the store.

When the appellant and his co-accused left the shop they were searched but nothing was found on the appellant or his co-accused. Subsequently the complainant showed the police where the cigarette papers were hidden under a plank in the store.

The appellant denied the allegation of the complainant in toto, maintaining that he had not been to the store that afternoon. According to the magistrate in his judgment, it was suggested by the accused (but he does not specify which of them) that someone standing upstairs could not see what went on in the yard or in the store. No evidence is recorded as having been given either by the appellant or by his co-accused to this effect. On May 30 the magistrate delivered his judgment in which he refers to this incident in the following terms:

> "During the hearing of the case it was suggested by the accused that someone standing upstairs could not see what went on in the yard or in the store and I visited the place on the afternoon of May 28 accompanied by Sgt. Morel – the prosecutor – after I had informed Mr. Thomas of my intention – I am satisfied that this is not so."

Section 301 of the Seychelles Criminal Procedure Code (Ordinance No. 13 of 1952, as amended) confers a general right of appeal to the Supreme Court from conviction before a subordinate court subject to certain specified exceptions. Sub-section (2) of s. 302 is in the following terms, so far as is material:

> "No appeal shall be allowed in cases in which a subordinate court has passed a sentence of a fine not exceeding Rs. 100 only:"

The fine imposed upon the appellant was one of Rs. 25, hence no appeal lay from the decision of the subordinate court.

On June 16, however, the appellant applied in writing to the Supreme Court for the revision of the his conviction and sentence on the grounds:

> "1. That the magistrate visited the locus in quo in the absence of the accused and without informing him.
>
> "2. That the conviction of the first accused is not warranted having regard to the evidence."

The powers of the Supreme Court to revise criminal proceedings before subordinate courts are laid down by s. 321 and s. 322 of the Criminal Procedure Code, which are as follows:

> "321. The Supreme Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
>
> "322 (1) In the case of any proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the Supreme Court may –
>
> (*a*) in the case of an order of acquittal, reverse such order and direct that further inquiry be made or direct that the accused be retried;
>
> (*b*) in the case of a conviction, exercise any of the powers conferred on it as a Court of Appeal by s. 309, s. 311 and s. 312 and may enhance the sentence;
>
> (*c*) in the case of any other order, alter or reverse such order.
>
> "(2) No order under this section shall be made to the prejudice of an accused person unless he has had the opportunity of being heard either personally or by a pleader in his own defence."

As a result of the application above referred to, the Supreme Court in the exercise of the powers conferred by the proviso to s. 323, the provisions of which are as follows:

> "323. No party has any right to be heard either personally or by pleader before the Supreme Court, when exercising its powers of revision:
>
> "Provided that such court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect sub-s. (2) of the last preceding section.";

ordered the matter to be set down for argument. Having heard argument by the Attorney-General on behalf of the Crown and by the appellant in person, the learned additional judge of the Supreme Court on July 26, 1962, delivered what for want of a better term I will now refer to as an opinion which he entitled "Revision Order", and in which he intimated that he did not propose to interfere with the conviction or sentence by the police magistrate.

From this so-called revisional order, the appellant has appealed to this court. The first question for determination is whether the court has jurisdiction to entertain the appeal. In *Michael s/o Meshaka v. R.* (1), [1962] E.A. 81 (C.A.), this court was constrained to consider whether there was a right of appeal from a decision of a judge in the exercise of the confirmatory powers of the High Court of Tanganyika varying the sentence passed by a subordinate court. At p. 83, O'Connor, P., said:

> "The powers so exercised, [that is the power to vary the sentence passed by the subordinate court] though exercised in confirmation proceedings, are revisional, and not merely confirmatory powers."

Clearly, therefore, the case is an authority in relation to revisionary proceedings. Subsequently, after reviewing the authorities at p. 87, the learned President said:

> "A sentence of a subordinate court which is merely confirmed by the High Court remains a sentence of the subordinate court. But where, as here, a conviction of a subordinate court has been set aside by the High Court exercising revisional powers, a conviction of another offence has been substituted and a sentence has been imposed by the High Court in lieu of the sentence imposed by the magistrate, the order of the magistrate has gone: the operative order is the order of the High Court. The provision of s. 322 of the Code requiring the magistrate to make orders conformable to the High Court's decision refers to ancillary orders of the kind mentioned above and does not affect the fact that the decision and order are the decision and order of the High Court. From that decision and order no appeal lies either to the High Court or to this court, for the reason that none is conferred by the Tanganyika Code."

From the above observations of the learned President it follows that as the Supreme Court in the instant case declined to interfere with the conviction by the subordinate court, the order imposing that conviction and sentence remains the order of the subordinate court, and is therefore by virtue of the provisions of sub-s. (2) of s. 302 of the Seychelles Criminal Procedure Code not capable of being the subject of any appeal.

This appeal, however, is or purports to be not an appeal from the order of the subordinate court but from the decision of the Supreme Court upholding the conviction and sentence imposed upon the appellant by the subordinate court. Unlike the Tanganyika legislation as in force at the time of the decision in *Michael s/o Meshaka* (1), the Seychelles Criminal Procedure Code makes provision for such an appeal in sub-s. (1) of s. 319, which is in the following terms:

> "(1) Any party to an appeal from a subordinate court may appeal against the decision of the Supreme Court in its appellate jurisdiction to the Court of Appeal for Eastern Africa (hereinafter called the Court of Appeal) on a matter of law (not including severity of sentence) but not on a matter of fact or mixed fact and law.
>
> "For the purposes of this section the expression 'decision of the Supreme Court in its appellate jurisdiction' shall include a decision of that court made in revision or on a case stated."

Clearly, therefore, the existence or otherwise in this court of jurisdiction to entertain this appeal depends upon whether the refusal of the Supreme Court to vary an order of a subordinate court is a decision made by the Supreme Court in revision.

"Decision" is defined in the Oxford English Dictionary as follows:

> "1. The action of deciding (a contest, controversy, question, etc.); settlement, determination. (*b*) The final and definite result of examining a question; a conclusion, judgment, esp. one formally pronounced in a court of law."

The remaining definitions of the word "decision" are clearly irrelevant for present purposes. In *Ex parte County Council of Kent and County Council of Dover. In re The Local Government Act*, 1888 (2), [1891] 1 Q.B. 725, the House of Lords was called upon to determine whether there was a right of appeal from "decisions" of the High Court upon questions referred to that court by local authorities under s. 29 of the Local Government Act, 1888. At p. 728, Halsbury, L.C., said:

> "Now, the language of s. 29 of the Local Government Act, 1888, which we have to construe, provides that the matter (which we shall describe presently) is to be 'decided' by the High Court of Justice. If those words are to be taken by themselves, and without reference to the subject matter dealt with in the section, they certainly imply no right of appeal. . . . Now, in this case (again postponing the consideration of the thing to be done under the section, and confining ourselves for the moment to the mere words), there is no rule; there is no order; there is no judgment; there is no decree. The word used in the section is 'decision'.
>
> "We think the legislature must be taken to have been aware of the state of the law, as pronounced by the House of Lords in 1878; and if those who framed the Act of Parliament had intended that an appeal should lie, they would have either given it by express words, or taken care to use language, the importance of which had been pointed out ten years before by the decision of the House of Lords in the case to which we have referred. But the legislature has not done so. It has used a popular, and not a technical or legal, word; and we are of opinion that it must be taken to have intentionally used a word which would exclude the right of appeal."

The foregoing observations of Lord Halsbury are not an authority for the proposition that there is no right of appeal in the instant case inasmuch as by virtue of the provisions of s. 319 of the Criminal Procedure Code above referred to, an express right of appeal is conferred from "decisions" made in the revisionary jurisdiction of the Supreme Court of Seychelles, but is cited as authority for the proposition that the word "decision" does not necessarily connote an order, rule or decree.

The actual meaning of the word "decision" in a statute appears to be defined by Reed, J., in a New Zealand case – *Winter and Calder v. Winter* (3) (1933), N.Z.L.R. 289. Unfortunately, that report is not available here, but according

to Words and Phrases Judicially Defined (Vol. 2), p. 41, REED, J., there said at p. 295:

> "It is true that under s. 58 [of the Divorce and Matrimonial Causes Act, 1928] an appeal lies against 'the decision of the court or judge thereof in any matter'; but a formal judgment, which is admittedly in accordance with the verdict of a jury, is not a 'decision' within the meaning of this section: the word 'decision' implies the exercise of a judicial determination as the final and definite result of examining a question."

Further support for the view that the word "decision" is not synonymous with the word "order" appears to be found in the provisions of s. 324 of the Criminal Procedure Code, which are as follows:

> "324. When a case is revised by the Supreme Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and if necessary, the record shall be amended in accordance therewith."

In the above section the word "decision" seems to be used in antithesis to the word "order".

According to Words and Phrases (op. cit.) in *Reidy v. Herry* (4) (1897), 23 V.L.R. 508 (a copy of which is not available here), Williams, J., said at p. 510:

> "I take it that an adjudication or decision of justices is something which is announced but not what is passing in the minds of the justices. It is a decision announced in open court. That is their decision or adjudication."

In the light of what we have said it appears to us that an appropriate definition of the word "decision" for present purposes is

> "a formal pronouncement by the court of its conclusion upon some question which is required to be determined in the course of proceedings before it".

The word "revision" is defined in the Oxford English Dictionary as –

> "1. The action of revising or looking over again, esp. critical or careful examination or persual with a view to correcting or improving".

The purpose of the examination of the record of a subordinate court by the Supreme Court pursuant to the provisions of s. 321 and s. 322 of the Criminal Procedure Code is to correct the conclusions of that subordinate court if necessary. It therefore seems to us impossible to say that the act of the Supreme Court in hearing argument as to whether the conclusions of a subordinate court are or are not valid is not an act in the exercise of its revisionary powers. From this it would seem to us that a formal pronouncement of the conclusion of the Supreme Court after hearing such argument that the acts of the subordinate court were a valid exercise of its powers, must be regarded as an act done in the exercise of the revisionary jurisdiction of the Supreme Court. In our view, therefore, an appeal lies in the instant case. We expressly abstain from expressing any opinion as to whether a refusal by the Supreme Court without hearing any argument, to exercise its revisionary jurisdiction would constitute a decision in the exercise of its revisionary jurisdiction.

We turn to the examination of the merits of the appeal.

The second ground of appeal can be disposed of without difficulty. There was evidence which, if believed, warranted the conviction of the appellant and

therefore no question of law which could be entertained on second appeal, arises under this head.

The first ground of appeal, however, merits careful consideration. That ground was that the magistrate had visited the locus in quo in the absence of the accused and his advocate. The learned judge of the Supreme Court carefully considered this ground and posed for himself three questions. First, was it an irregularity in the proceedings for the magistrate to visit the locus in quo in the absence of the accused and his pleader? Secondly, if the answer to the first question was in the affirmative, was that irregularity curable under the provisions of s. 338 of the Criminal Procedure Code? Those provisions are as follows:

> "338. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account –
>
> (*a*) of any error, omission or irregularity in the summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code; or
>
> (*b*) . . . ; or
>
> (*c*) of any misdirection in any charge to jury, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:
>
> "Provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The third question posed by the learned judge to himself was, if there had been an irregularity in the proceedings, had that irregularity entailed any prejudice to the appellant?

The learned judge answered the first question in the affirmative, he then, however, went on to say that in the light of the decision in *Poole v. R.* (5), [1960] E.A. 62(C.A.), by which he was of course bound, that irregularity was in his view curable.

The facts in *Poole v. R.* (5), so far as presently material were that a witness having been unable to demonstrate certain distances as to which he had testified in the courtroom by reason of its smallness, was taken outside and there demonstrated those distances. On return to the court it was immediately ascertained that the accused had not been present at the demonstration. Immediately thereafter the court again went outside and the same distances were re-demonstrated in the presence of the accused.

On appeal to H.M. Court of Appeal for Eastern Africa, it was contended that the absence of the accused from this view vitiated the trial. In support of this proposition reliance was placed on the observations of their lordships of the Privy Council in *Tameshwar and Another v. R.* (6), [1957] A.C. 476; that was a case in which the jury visited the locus in quo and certain questions were asked in the absence of the trial judge. In the course of their judgment, their lordships said at p. 487:

> "There remains the question whether the absence of the judge at this view vitiates the trial. Their lordships are mindful of the principles on which they advise Her Majesty in criminal cases. Slow as their lordships are to interfere, yet if it is shown that something has taken place which tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future, then their

> lordships may well think it necessary to advise Her Majesty to allow an appeal – . . . Their lordships think it plain that if a judge retired to his private room whilst a witness was giving evidence, saying that the trial was to continue in his absence, it would be a fatal flaw. In such a case the flaw might not have affected the verdict of the jury. They might have come to the same decision in any case. But no one could be sure that they would. If the judge had been present he might have asked questions and elicited information on matters which counsel had left obscure; and this additional information might have affected the verdict. So here, if the judge had attended the view and seen the demonstration by the witnesses, he might have noticed things which everyone else had overlooked; and his summing-up might be affected by it. Their lordships feel that his absence during part of the trial was such a departure from the essential principles of justice, as they understand them, that the trial cannot be allowed to stand."

In commenting on the foregoing passage quoted in the judgment in *Poole v. R.* (5), the Court of Appeal said at p. 74:

> "Counsel contended that the same principle should be applied to the absence of an accused person during the course of a trial, and that it should be held to be 'too distrubing a precedent to allow it to pass'. It must be noted, however, that, while there is no provision in the Code, or for that matter, in any other system of law of which we are aware, which enables a trial to proceed in the absence of the trial judge, s. 193 of the Code expressly contemplates that there may be circumstances in which a trial can proceed in the absence of an accused. No doubt such a procedure is only to be adopted in exceptional circumstances, as is indicated by s. 290 of the Code, which provides for the discharge of the jury and adjournment of the case if an accused through sickness or other sufficient cause becomes incapable of remaining at the bar. But the fact that circumstances can exist in which evidence may be taken in the absence of an accused indicates that the accused's presence throughout the trial is not so fundamental a requirement as is the presence of the trial judge."

The judgment continued at p. 75:

> "We think it follows that the presence of an accused person throughout a trial is not an absolute requirement that necessarily goes to the root of a conviction. We consider that in the instant case the trial was conducted substantially in accordance with the provisions of the Code. It is true an irregularity occurred in that a witness gave a demonstration of distances in the absence of the appellant. The demonstration was in no sense a view and was merely supplemental to evidence he had already given in court in the presence of the appellant. The demonstration was in the presence of the appellant's advocate. The demonstration was immediately repeated in the presence of the appellant. The appellant's advocate had the opportunity of cross-examining the witness after the demonstrations. No objection was taken at the trial to the procedure which had been followed. And no suggestion is made that the appellant suffered any actual prejudice as a result of the irregularity. In these circumstances we are of opinion that the appellant's absence from the demonstration, notwithstanding that his presence had not been dispensed with under s. 193 of the Code, amounts to no more than an irregularity curable under s. 381 of the Code. We think this ground of appeal must fail."

On appeal from this court to the Privy Council, their lordships of the Privy Council in *Poole v. R.* (7), [1960] E.A. 644 (P.C.) said at p. 646:

> "The Court of Appeal for Eastern Africa after considering certain English authorities and some Indian decisions under s. 537 of the Indian Code of Criminal Procedure, which is in similar terms to s. 381 of the Kenya Code set out above, were of opinion that although an irregularity had occurred and it could not be said that the accused's presence had been dispensed with, his presence throughout a trial was not an absolute requirement necessarily going to the root of a conviction, and that in the circumstances of this case the appellant had been in no way prejudiced by the incident which was curable under s. 381. Their lordships are in agreement with this reasoning and would only observe that the decision in such cases must always be a matter of degree. The consequences of accepting to the full the submission of counsel for the appellant would result (to take an extreme case) in vitiating a trial because a formal witness had given his name and address in the witness box after an adjournment and it had not been noticed that the prisoner had not yet been brought up from the cells. On the other hand it is not difficult to envisage many instances in which his absence would be fatal."

The facts in *Poole v. R.* (5) (7), seem to us to be clearly distinguishable from those in the instant case. In the *Poole* case (5) (7), the demonstration took place in the presence of the accused's advocate although not of the accused himself. In the instant case neither the appellant nor his pleader were present at the view. In the *Poole* case (5) (7), the demonstration was repeated in the presence of the accused immediately after the irregularity had been discovered. In the instant case, the view having taken place after judgment had been reserved, there was no opportunity of repeating the view in the presence of the accused or his pleader. In the *Poole* case (5) (7), the advocate had the opportunity of examining the witnesses who had taken part in the demonstration. In the instant case, no witnesses took part in the view and the purpose of the view was for the magistrate to satisfy himself as to the vital fact whether or no the complainant could see from the upstairs window what he claimed to have seen. Nor was there any evidence on the record to prove that the window through which the magistrate looked was the one referred to by the complainant in evidence. For these reasons it seems to us that, in the instant case, unlike the *Poole* case (5) (7), the irregularity was one which in the words used by their lordships in *Tameshwar's* case (6), constituted a departure from the essential principles of justice and cannot be cured under s. 338 of the Criminal Procedure Code.

Another matter to which it may be worthwhile to draw attention is that for a magistrate to visit the locus in quo in the absence of the accused and his pleader but in the company of the prosecutor in itself seems to offend the principle that justice should not only be done but be seen to be done.

For the foregoing reasons the appeal is allowed and the conviction and sentence of the appellant are quashed.

Appeal allowed.

The appellant did not appear and was not represented.

For the appellant:
James E. Thomas, Victoria, Mahe

For the respondent:
The Attorney-General, Seychelles
G.A. Twelftree (Ag. Senior Crown Counsel, Kenya)

Eastern Radio Service and Another v R J Patel t/a Tiny Tots and another

[1962] 1 EA 818 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	22 October 1962
Case Number:	20/1961
Before:	Sir Ronald Sinclair P, Sir Trevor Gould and Newbold JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya, Miles, J.

[1] Landlord and tenant – Forfeiture – Action for arrears of rent and possession – Plaint amended excluding claim for possession – Whether tenancy terminated – Landlord and Tenant (*Shops*) *Ordinance*, 1956, *s.* 19 (*K.*) – *Civil Procedure Ordinance*, *s.* 26 (2) (*K.*) – *Civil Procedure* (*Revised*) *Rules*, 1948, *O. VI*, *r.* 19 *and r.* 21 (*K.*) – *Indian Transfer of Property Act*, 1882, *s.* 111(*g*).

[2] Landlord and tenant – Distress – Action filed for arrears of rent and possession – Distress later levied for rent accrued after filing of suit – Claim that tenancy terminated – Whether distress illegal – Distress for Rent Ordinance, *s.* 3 (1), *s.* 8, *s.* 15 *and s.* 18 (4) (*K.*) – *Common Law Procedure Act*, 1852, *s.* 212 – *Law of Distress* (*Amendment*) *Act*, 1888, *s*. 8 – *Law of Distress* (*Amendment*) *Act*, 1895.

Editor's Summary

The appellant was a tenant and the first respondent was landlord of certain premises in respect of which the landlord's advocates on April 29, 1958, by letter claimed some Shs. 14,000/- for arrears of rent and expenses and pointed out that the landlord might on non-payment exercise his rights of re-entry. On May 19, 1958, proceedings were instituted for the arrears and for an order for vacant possession. Subsequently, the plaint was amended to exclude the claim for possession and judgment was later entered for the arrears. In February, 1959, the first respondent authorised the second respondent to levy distress in respect of rent accruing from June 1, 1958, to January 31, 1959; there were no proceedings in replevin and the goods were later sold by auction. The appellant then filed an action for damages against both the respondents, claiming that the distress was wrongful as it was for arrears of rent accrued due after May 31, 1958, and that, by filing the original plaint claiming possession, the first respondent had enforced his right to forfeiture of the tenancy, that the appellant thereupon became a trespasser and no rent as such accrued. It was further alleged that the second respondent at the material time was not the holder of a bailiff's certificate. The judge held that there was not in the circumstances an unequivocal election by the first respondent to treat the tenancy as determined, that the first respondent was not vicariously liable for the act of the second respondent in levying distress while uncertificated, that the appellant was entitled only to general damages, and only against the second respondent, for trespass in distraining when he was not a certificated bailiff. The judge awarded him Shs. 4,000/- damages. The appellant thereupon appealed against the dismissal of the suit against the first respondent and upon the quantum and basis of the award of damages against the second respondent.

Held – (per Sinclair, P., and Newbold, J.A.).

(i) in bring his suit, claiming possession, the first respondent acted so as to show his intention to determine the lease; and while the old tenancy had been terminated on May 19, 1958, a new tenancy was to be implied as from that date on terms identical with those of the former tenancy.

(ii) the first and second respondents were both liable in trespass and were so as joint tortfeasors, as it was a case of principal and agent.

(iii) the damages awarded by the trial judge should be increased by an amount equal to the value of the goods distrained.

Appeal allowed in part. Damages to be decided by the Supreme Court awarded against the respondents jointly and severally for the value of the goods distrained.

Cases referred to in judgment:

(1) *Grimwood v. Moss* (1872), L.R. 7 C.P. 360.

(2) *Serjeant v. Nash, Field & Co*., [1903] 2 K.B. 304.

(3) *Penton v. Barnett*, [1898] 1 Q.B. 276.

(4) *Price v. Worwood*, 157 E.R. 941.

(5) *Civil Service Co-operative Society Ltd. v. McGrigor's Trustee*, [1923] 2 Ch. 347.

(6) *Evans v. Enever*, [1920] 2 K.B. 315.

(7) *Sneade v. Wotherton Barytes and Lead Mining Company Limited*, [1904] 1 K.B. 295.

(8) *Warner v. Sampson*, [1959] 2 W.L.R. 109; [1959] 1 All E.R. 120.

(9) *Weldon v. Neal* (1887), 19 Q.B.D. 394.

(10) *Re Caidan, Official Receiver v. Regis Property Co. Ltd*., [1941] 3 All E.R. 491.

(11) *Perring & Co. v. Emerson*, [1906] 1 K.B. 1.

(12) *Hayward v. Pullinger & Partners Ltd*., [1950] 1 All E.R. 581.

(13) *Shearman v. Folland*, [1950] 2 K.B. 43; [1950] 1 All E.R. 976.

(14) *Panton v. Jones*, 170 E.R. 1415.

(15) *Cooper v. Blandy*, 131 E.R. 1034.

(16) *Blyth v. Dennett*, 138 E.R. 1165.

(17) *Freeman v. Evans*, [1922] 1 Ch. 36.

(18) *Attack v. Bramwell*, 122 E.R. 196.

The following judgments were read:

Judgment

Sir Trevor Gould JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya at Nairobi in an action claiming damages for wrongful distress. The appellant, who was plaintiff in the action, was the occupier of premises upon which he carried on business and in which he had a quantity of goods. The first respondent, through his advocate, authorised the second respondent as bailiff to distrain upon these chattels for rent in arrear and the chattels were seized by the second respondent and later sold; whether, at the relevant time, the relationship of landlord and tenant existed between the first respondent and the appellant, was one of the issues in the action. The appellant brought his action against both

respondents but succeeded only in respect of the second respondent, against whom he was awarded Shs. 4,000/- general damages with interest from the date of institution of the suit. The appeal is against the dismissal of the suit against the first respondent and the quantum and basis of the award of damages against the second respondent.

Over the years there has been much litigation between the appellant and the first respondent but it is necessary to refer (in some detail) to only one action. Up to May 19, 1958, it is common ground that the appellant was the tenant of the first respondent in respect of the said premises. By a letter dated April 29, 1958, the advocates for the first respondent demanded from the appellant payment of the sum of Shs. 14,600/09 for arrears of rent and other disbursement, within seven days. The letter continued:

> "Failing payment our instructions are to institute proceedings for the recovery thereof and in this connection we are instructed to refer to the terms of the lease granted to you in Misc. Civil Case No. 25 of 1957 in the resident magistrate's court at Nairobi, whereby upon non-payment your landlord may exercise his rights of re-entry and cancellation of the lease.
>
> "Unless you comply with the request set out herein we are to proceed against you in order to safeguard our client's rights in law without any further notice to you."

On May 19, 1958, the first respondent filed a suit in the Supreme Court (No. 738/58) claiming the abovementioned sum of Shs. 14,600/09 which included rent up to May 31, 1958; the rent for May, 1958, was payable in advance on the fifth day of that month. Paragraphs 9 and 10 of the plaint read:

> "9. In terms of the Order of the resident magistrate's court under the Ordinance applying to the terms of lease, the plaintiff may re-enter and forfeit and terminate the defendant's tenancy upon the defendant's non-payment of rent, his other remedies notwithstanding.
>
> "10. The landlord after giving due notice in writing has exercised his right under the said provisions of the Order, and the Lease."

Paragraphs 1 and 2 of the prayer were as follows:

> "1. Under para. 8 hereof, Shs. 14,600/09.
>
> "2. An Order for vacant possession of the premises occupied by the defendant and mesne profits until date of vacant possession."

The appellant, upon an application by the first respondent for summary judgment, was given leave to defend upon condition of payment of a portion of the rent, in default of which there was to be a decree for payment of the whole amount claimed and for possession. The security was apparently provided, as there is upon the court file of the action, which was put in evidence, a defence by the appellant, based, so far as possession was concerned, mainly upon grounds related to the non-execution of a lease of the premises which had been ordered by a court under the Landlord and Tenant (Shops) Ordinance, 1956. There was a denial that the conditions of tenancy relied upon as entitling the first respondent to re-enter were "correct" or were applicable at the material time.

The defence was dated July 4, 1958, and on the 18th of that month the first respondent filed an amended plaint, which he was entitled to do without leave by virtue of O. VI, r. 19, of the Civil Procedure (Revised) Rules, 1948, within fourteen days from the filing of the defence. In the amended plaint paras. 9 and 10 and para. 2 of the prayer, all set out above, did not appear. As a result the claim for possession was dropped and the first respondent finally obtained judgment on his claim for rent and expenses.

I return now to the present case. The distress, the legality of which is in issue, was levied in respect of rent which allegedly accrued due after May 31, 1958. The appellant's claim that the distress was wrongful was based (inter alia) upon an allegation that by the filing of the original plaint in Civil Suit 738/58, claiming possession, the first respondent elected to and did enforce his right to forfeiture of the tenancy. The appellant thereupon became a trespasser and no rent accrued. There was subsequently, however, an amendment of the plaint to add an allegation that the second respondent at the material time was not the holder of a general or special certificate as a bailiff under the Distress for Rent Ordinance (Cap. 154 of the Laws of Kenya, 1948). In the court below the learned judge held that this allegation was proved, and, as there

has been no challenge to that finding, the lack of certification of the second respondent at the material time has been common ground on the appeal. The evidence in the Supreme Court indicates that the second respondent was a certificated bailiff both before and after the material time, but, whether by negligence or inadvertence is not material, no certificate was in force when the distress was actually levied.

The material findings of the learned trial judge, so far as this appeal is concerned, were:

(*a*) The issue by the first respondent of the plaint in Civil Suit No. 738/58 would have had the effect of determining the tenancy then subsisting between the first respondent and the appellant if the plaint had remained in its original form; but having regard to the amendment of the plaint, the subsequent conduct of the case on the footing of an existing tenancy, and the award of rent up to May 31, 1958, there was not in the circumstances an unequivocal election by the first respondent to treat the tenancy as determined.

(*b*) That the first respondent was not vicariously liable for the act of the second respondent in levying the distress while uncertificated.

(*c*) That on the evidence there was only one distress levied by the second respondent and even if it could be said that there was a succession of distresses, they resulted from the action of the appellant.

(*d*) That the appellant was entitled only to general damages, and only against the second respondent, for trespass in distraining when he was not a certificated bailiff.

All these matters were agitated in argument on the appeal and, in dealing with the first question, Mr. Nazareth, for the appellant, submitted that where there is a lease containing a condition for re-entry on breach of covenant, and there is a breach of covenant to pay rent, then the commencement of an action for possession is a final and irrevocable election on the part of the landlord, to forfeit the lease. Support for this as a general proposition is to be found in such cases as *Grimwood v. Moss* (1) (1872), L.R. 7 C.P. 360 and *Serjeant v. Nash, Field & Co.* (2), [1903] 2 K.B. 304. There it was stated that the bringing of an action of ejectment is equivalent to the ancient entry. In Kenya the law as it stood at the date of the filing of the plaint in Civil Suit No. 738/58 was contained in s. 111(*g*) of the Indian Transfer of Property Act, which, as applied to this territory, then read:

> "111. A lease of immovable property determines:
>
> (*g*) by forfeiture; that is to say –
>
> (1) in case the lessee breaks an express condition which provides that on breach thereof the lessee may re-enter or the lease shall become void; or
>
> (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; and in either case the lessor or his transferee does some act showing his intention to determine the lease."

It was not disputed in argument that the words "in either case" in that passage refer to sub-paras. 1 and 2 of the sub-section and not merely to the alternatives in sub-para. 2.

Mr. Khanna, counsel for the first respondent, argued on this question that the key word in s. 111(*g*) is "intention" and that the intention of the first respondent in filing the plaint must be gathered from the construction of the plaint and all surrounding circumstances including the notice of April 29, 1958.

The claim for rent up to May 31, 1958, due on May 5, 1958, might not per se be inconsistent with an election to forfeit, but the taking of a decree for rent up to the 31st could only be on the basis of the tenancy lasting until that date. The first respondent, it was submitted, thought (wrongly) that his notice was sufficient to terminate the tenancy and therefore he did not intend to do so by issuing the plaint.

On the question of the construction of the notice of April 29, 1958, and the plaint, I think it is clear that the notice gave the appellant an opportunity of remedying the breach of covenant by paying the arrears of rent, and called attention to the right of re-entry. Paragraphs 9 and 10 and the prayer of the plaint in Civil Suit No. 738/58 are clearly intended to implement the threat contained in the notice by determination of the lease. I think that is the only possible construction of these documents and it is to be observed that the words used in s. 111(*g*) of the Indian Transfer of Property Act are – "does some act showing his intention"; the intention is to be gathered from the act, in this case the issuance of the plaint in its original terms, following upon the notice. The subjective state of mind of the first respondent is not relevant and there is in any event no evidence of it. As to the taking of a decree for rent up to May 31, 1958, this was done after the plaint had been amended, the claim for possession dropped, and the action had been fought out upon the basis of a claim for rent upon a subsisting tenancy. It cannot be said what form the decree might have taken had the action continued upon the plaint as originally framed.

As I understood Mr. Khanna's argument he did not submit, at least with any force, that the mere inclusion of a claim for rent due on May 5, 1958, was inconsistent with an intention to determine the tenancy. The learned judge in the Supreme Court placed some reliance upon the case of *Penton v. Barnett* (3), [1898] 1 Q.B. 276. There the tenant was in breach of two convenants – one to repair within three months after notice and the other a continuing general covenant to keep in repair. The landlord included in his action for possession a claim for rent due before the date of the writ but after the breach of the covenant first mentioned. The court held that the claim for rent due after the breach of the specific covenant and with knowledge thereof, might have waived that particular breach, but that as the breach of the general covenant continued beyond the due date of the rent the breach of that covenant was not waived and the landlord could recover possession. I presume that the analogy which the learned judge had in mind was that there was a recognition of the tenancy by demand for rent up to a date after the breach of the specific covenant which would have waived that breach, and that in the present case there was recognition of the tenancy after the date of the plaint by a claim for rent due before but covering a period beyond that date.

It is difficult to draw a complete analogy between a case where the cause of forfeiture is breach of the covenant to pay rent and one in which breach of another type of covenant is relied upon. The rent of May 5, 1958, had accrued due and the first respondent had a complete cause of action in respect of it. If he had actually re-entered on May 19 and then sued for the rent he would have succeeded (subject to any defence based on apportionment, which is not material) without affecting the validity of his re-entry. In *Price v. Worwood* (4), 157 E.R. 941 at pp. 942-943 Martin, B., said:

> ". . . the entry for a condition broken does not at all affect the right to receive payment of a pre-existing debt."

A brief passage from the judgment of Rigby, L.J., in *Penton v. Barnett* (3), at p. 280 appears to be in point:

> "At any rate, he had the power of re-entry so long as there was a broken covenant and a continuing breach. The position on January 14, 1897, would be that, as nothing had been done since the notice as to repairs, the plaintiff had the right to determine the tenancy by the issue of the writ, and to sue in respect of such rights as had accrued to him during the tenancy."

In *Civil Service Co-operative Society Ltd. v. McGrigor's Trustee* (5), [1923] 2 Ch. 347 it was held that a demand for rent made (and acceded to) after the commencement of an action for possession, the rent being in respect of a period partly before and partly after the action, was not a waiver, because the issuing of the writ was a final election to forfeit. I do not think therefore that the inclusion of such a claim in the action itself is sufficient to negative the otherwise manifest election to determine the tenancy, particularly as the contractual right to recover the rent accrued prior to the commencement of the action.

I have dealt so far with the plaint in its original form and come now to the question of the effect of its amendment. There are two principles which appear to conflict, or are at least difficult to reconcile. The first is that the election to determine a tenancy by forfeiture manifested by the commencement of an action for possession is final. In *Evans v. Enever* (6), [1920] 2 K.B. 315 Lord Coleridge, J., said at p. 320:

> "But there is a series of cases which establish that if an action is brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election to determine the lease, and that no subsequent acts of the plaintiff can be relied on as qualifying that position."

In *Serjeant v. Nash, Field & Co.* (2), Collins, M.R., at p. 311, described such a writ as a conclusive election. The other principle is that under the law it is open to a litigant to amend his pleading in an action, sometimes as of right and sometimes by leave of the court, and once a plaint has been amended, there is authority for saying it speaks as from the commencement of the action. The leading authority is the case of *Sneade v. Wotherton Barytes and Lead Mining Company* (7), [1904] 1 K.B. 295, a decision of the Court of Appeal. Collins, M.R., said at p. 297:

> "In this case, however, the application is not, as it seems to me, based on any reduction of the claim indorsed on the writ by anything subsequent to action, but on the fact that there has been a substitution in due form of law of a claim for 24 L for the original claim of 138 L. It appears to me that the writ as amended becomes for this purpose the original commencement of the action, notwithstanding the fact that the writ originally claimed a larger sum. The reason why the judges have always held that the question on what terms such an amendment should be allowed requires very careful consideration, is that, except in so far as such terms may provide to the contrary, the leave to amend involves that the claim as amended may be treated as if it were the original claim in the action. In this case the amendment was allowed on such terms as the learned judge thought would meet all the equities of the case. Upon that amendment being allowed, the writ as amended becomes the origin of the action, and the claim thereon indorsed is substituted for the claim originally indorsed."

That is a very firm statement, though counsel for the appellant drew our attention to the phrase "may be treated". A more recent case is *Warner v. Sampson* (8), [1959] 2 W.L.R. 109. It also was a case of landlord and tenant; the tenant filed a statement of defence which was alleged to contain a denial of the landlord's title, and the landlord replied saying that she

> "hereby exercises her right to forfeit the term, and claims to be thereby entitled to re-enter . . .".

The defence was then amended to admit the landlord's title. Subsequently a counterclaim for possession was put in. Lord Denning's judgment proceeded on other grounds, but it was held by Hodson and Ormerod, L.JJ., that if the denial did create a forfeiture it was not effectively claimed by the landlord, by re-entry or writ for possession, before the final counterclaim, by which time the defence had been amended, and that which stood before the amendment was no longer material. Hodson, L.J., said, at pp. 123-124:

> "Moreover, the defence was amended before the reply claiming forfeiture, on which the plaintiff now relies, came into existence. I do not think that this amendment can be ignored. Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried. Here the defendant has obtained leave to amend, and there has been no appeal against that order; and, whatever may have taken place at the hearing of the application to amend, the court must, I conceive, regard the pleadings as they stand, the purpose of amendment being to determine the real question in controversy between the parties:"

The learned Lord Justice then quoted *Sneade's* case (7); and later (p. 124) he said:

> "It is said that, the condition having been broken, this cannot be cured by amendment, even though the breach of condition is contained in a pleading which normally is capable of amendment. I cannot accept that this pleading should be regarded as any more immutable than any other pleading, and, accordingly, if it were necessary, would hold that the appeal should succeed on the ground that before the landlord had re-entered or taken effective proceedings for re-entry the defendant by amending his defence had removed from it the denial of title which it had previously contained."

Ormerod, L.J., said, at pp. 127-128:

> "Mr. Scarman argued that the landlord acquired the right to forfeit when the defence was delivered in its original form, and no amount of amendment could deprive her of that right. This is a proposition that I find some difficulty in following. The defence in question is a pleading which is capable of amendment like any other pleading. Once it is amended, it takes its place on the record as a part of the pleadings setting out the issues upon which the action will be tried. When the amended defence was delivered, nothing had been done by the landlord to claim possession of the premises. Had a writ claiming possession been issued before the amendment the position might have been different. This was not done, and when a claim was made the position on the record was that the landlord's title was admitted."

That case comes very close to the present one. A pleading effected a breach of a condition of a lease. (I should perhaps say that the particular pleading was held not to do so, but the portions of the judgments set out above proceeded on the assumption that it did.) It might be thought that once a tenant had broken a condition that was something which was done and beyond retraction, but it was held that the particular pleading was no more immutable than any other. The plaint in the present case is a pleading and capable of amendment, and if the result of the amendment is in effect, to retract an election to forfeit, that is no more anomalous than deeming a breach of condition never to have taken place.

The strongest argument, as I see it, in favour of the appellant's case is that in theory the filing and service of the plaint was equivalent to actual re-entry

(*Serjeant v. Nash, Field & Co.* (2)), and actual re-entry is something which cannot be undone. I think, however, that it is clear that the filing and service of a writ does not inevitably and irretrievably have that effect in all cases. As Collins, M.R., pointed out in the case last mentioned (at p. 311) the rights of the parties are not determined by the issue of a writ and cannot be determined until the action is decided. The plaintiff must prove the breach relied upon. There is something in the nature of a period of suspension, and if the plaintiff fails, the writ can no longer be said to work a forfeiture. Again, take the case of the tenant's rights under s. 212 of the Common Law Procedure Act, 1852, in England. If he tenders rent, arrears and costs, in an action for possession based on non-payment of rent the proceedings will "cease and be discontinued". Relief against forfeiture may be given in similar circumstances under s. 114 of the Indian Transfer of Property Act. It may be said that those are statutory rights, but the rules providing for amendment of pleadings have statutory authority. It may also be argued that the provisions I have mentioned were enacted especially for the relief of tenants, but in a matter of amendment of pleadings a tenant has a right to be heard and, if he can show prejudice the amendment might well be refused or struck out, and that would certainly happen if the tenant could show that he had accepted or acted on the forfeiture: if there is an amendment or an application to amend which, if granted, would, under the ordinary rules of pleading, replace what had gone before, surely it is for the party who, knowing its effect, objects to it, to do so then and there by resisting the amendment? There is some analogy with the cases in which an amendment has been refused because it would have defeated a defence of limitation, which class of case, I mention in passing, provides another illustration of the principle that an amendment of a writ once made, speaks from the inception of the action – see *Weldon v. Neal* (9) (1887), 19 Q.B.D. 394.

Having regard to all these considerations, and being influenced substantially by the effect of what was said in *Warner v. Sampson* (8), I am of opinion that the amendment, to which no objection was taken by the appellant, rendered what preceded it no longer material before the court. If I am wrong in that, I remain of the opinion that the appellant is not entitled to have this question resolved in his favour. The original plaint claimed possession. The defence denied that the first respondent was entitled to it under the conditions of the tenancy. The first respondent then amended the plaint and dropped the claim for possession. The appellant, who had the right to apply under O. VI, r. 21, to have the amendment disallowed, took no such step. Surely the effect of that sequence of events is the same as if the first respondent had proceeded with his claim for possession and failed. There would then have been no forfeiture. As Collins, M.R., indicated in *Serjeant v. Nash, Field & Co.* (2), the election to forfeit is subject to proof of the breach giving that right. When the right was denied and the claim was dropped the first respondent impliedly conceded that he was unable to establish it. That, I think, ended all question of forfeiture.

There is yet another possible approach to this question. If there is an actual entry by a landlord, the tenant might prevail upon him not to enforce his rights or the landlord might have a change of heart and say to the tenant, "Let us treat my entry as though it had never been, and go on as before". Then if the tenant agreed, either expressly, or impliedly by continuing to pay rent, or by performing the functions and exercising the rights of a tenant, there would arise a new tenancy upon the terms of the old. The events in the present case are analogous. Upon the assumption that the election shown by the prayer for possession in Civil Suit 738/58, was something irretrievable, at least the intention of the first respondent to nullify that national re-entry was made manifest by the amendment by which that prayer was eliminated. It must be remembered that the right to re-enter was being contested by the appellant.

The action continued on the basis that it was an action only for rent the amount of which was in dispute. If the amendment could not operate in law to nullify the national entry it must at least be regarded as an offer to continue the relationship of landlord and tenant upon the previous terms, one of which (the amount of the rent) was in dispute and was being settled by due process of law in the action. There was of course no express acceptance of this offer, but the subsequent conduct of the appellant in my opinion showed acceptance of a continuing relationship of landlord and tenant and was inconsistent with the claim put forward in the present action that he was nothing but a trespasser. The continuation of the action itself on the question of the amount of the rent, could not be held against the appellant as the claim was limited to amounts which had fallen due prior to the plaint, though his failure to contest the amendment showed at least the absence of any intention at that stage to insist that he had become a trespasser. But, after the amendment of the plaint, the appellant continued to prosecute an appeal which he had lodged against the order of a magistrate by which the tenancy sued upon in Civil Suit 738/58 had been granted to him under the Landlord and Tenant (Shops) Ordinance, 1956. He claimed in the appeal, in which he was opposed by the first respondent, to be entitled to a tenancy containing different terms, but his appeal was dismissed by the Supreme Court on December 1, 1958. By virtue of s. 19 of the Landlord and Tenant (Shops) Ordinance, 1956, that decision was final, and had the effect of affirming the terms of tenancy granted by the magistrate. The appellant next appealed against an order that a lease on those terms be executed on his behalf by an executive officer of the court. In that appeal he succeeded on procedural grounds and not on any submission that he could not be held bound by such a lease because it had been forfeited and he was a trespasser. So far as the first appeal of the two mentioned is concerned, could the appellant be permitted to take the position that if he succeeded in obtaining a variation of the terms granted by the magistrate he would accept them and claim his rights as a tenant, but if (as happened) he lost his appeal he would say that the tenancy had in any event been forfeited? He could not in equity be permitted to take advantage of a mental reservation of that kind and I am confident that the appellant in fact accepted the position that there had been no determination of his tenancy, and his acceptance of that position was demonstrated by his actions. That is consistent also with the fact that when the distress which is now challenged was levied, he made no protest on the ground that he was not a tenant, and took no steps in replevin – in fact the present action was brought a year later. Whatever technical position was brought about by the plaint and the amendment thereof I am of opinion that the parties thereafter regarded themselves as landlord and tenant on the conditions imposed by the magistrate's order, subject to the questions to be resolved on the appeal therefrom, and that the appellant should not at this stage be permitted to resile from that position.

For the foregoing reasons I consider that the learned judge was correct in his finding that there was no determination of the tenancy. It follows that at the time of the distraint the rent was due and owing and the appellant fails in his claim for double the value of the goods distrained under s. 8 of the Distress for Rent Ordinance. That section applies only where "in truth no rent is in arrear or due". I pass now to the second question, which is whether the first respondent is liable in damages for the act of the second respondent in distraining at a time when he held no certificate.

The learned judge's finding was that neither the first respondent nor his adovcates who gave the instructions were aware that the second respondent held no certificate at the material time. This, indeed, is common ground and there was evidence from the advocate, Mr. Kean, that he had employed the second respondent previously as a certificated bailiff. The judge considered that absence of knowledge would be a defence to the first respondent if charged

under s. 18 (4) of the Distress for Rent Ordinance with authorising such a distress. He found that there was no ratification of the act after knowledge of the lack of certification, no lack of enquiry and no recklessness.

The Distress for Rent Ordinance deals comprehensively with that subject so far as Kenya is concerned and by s. 3 (1) confers the same remedy by distress as is given by "the Common Law of England in the like case". The first part of s. 15 reads:

> "15. Where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or by his agents, the distress itself shall not be therefore deemed to be unlawful nor the party making it be deemed a trespasser ab initio, but the party aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he shall have sustained thereby, and no more, in a suit for that purpose:"

We were not referred to this section by counsel for any party and I will therefore assume that it has no application to the circumstances of the present case. Section 18, sub-ss. (1), (3) and (4) read:

> "(1) No person shall act as a bailiff to levy any distress for rent unless he shall be authorised to act as a bailiff by a certificate in writing to that effect, and such certificate may be general or apply to a particular distress or distresses, and may be granted at any time in such manner as may be prescribed by rules under this Ordinance.
>
>
>
> "(3) If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this section, the person so levying shall be guilty of an offence, and shall be liable, on conviction, to a penalty not exceeding two hundred shillings or to imprisonment for any term not exceeding three months, in addition to any other liability which he may have incurred by his proceedings.
>
> "(4) Any person who shall authorise any person not holding a certificate under this section to levy a distress contrary to the provisions of this Ordinance shall be guilty of an offence, and shall be liable, on conviction, to a fine not exceeding two hundred shillings in addition to any other liability which he may have incurred by his proceedings."

It will be seen that any person not holding a certificate who levies a distress and any person who authorises him to do so are guilty of an offence and subject to penalties. I do not think, in the present case, that any advantage is to be derived from consideration of the question of criminal liability, in relation to the question of whether knowledge of the lack of certification is an essential element in sub-s. (4) or whether absence of knowledge would afford a defence. That does not arise. The final words in sub-ss. (3) and (4) are important:

> ". . . in addition to any other liability which he may have incurred by his proceedings."

In sub-s. (4) the phrase "by his proceedings" hardly seems apt to describe the giving of authority to an uncertificated bailiff, but I do not find any other meaning which could properly be attached to them. Mr. Khanna suggested that the concluding words of the sub-section were to be construed as meaning any other *criminal* liability but I see no justification for such a limited construction and, in the case of sub-s. (4) I can find no room for it. In my opinion, the words clearly preserve any civil liability which may exist; they do not of themselves create such a liability but indicate that the penalties provided are not to do away with any liability which may arise from any other source.

Mr. Nazareth's submission was that the levying of the distress by an un-certificated bailiff was illegal and a trespass; and that any person who authorised such an act, irrespective of the presence or absence of knowledge that the bailiff held no certificate, was liable for that trespass. The act of distraint was within the scope of the bailiff's employment and also directly authorised, and the first respondent was responsible for the acts of his agent. In *Re Caidan, Official Receiver v. Regis Property Co. Ltd.* (10), [1941] 3 All E.R. 491 at p. 496, Morton, J., accepted as correct the law as stated in Halsbury's Laws of England (2nd Edn.), Vol. 10, p. 493, that a bailiff distrains merely in the capacity of an agent for the person levying the distress. In the third edition the law is stated in Vol. 12, p. 129 as follows:

> "The bailiff is not an officer of the court so as to relieve the landlord from liability for the irregular acts of the bailiff. He remains the agent of the landlord who employs him. The landlord is liable to the tenant for any irregularities committed by the bailiff in the course of his employment so far as he is acting within the scope of his employment. For illegal acts outside the scope of such employment the landlord is not liable without proof that he actually directed them or ratified and adopted them with knowledge of what had been done, or that he chose without inquiry to take the risk upon himself and adopt such acts."

Mr. Khanna argued first that the second respondent was authorised by Mr. Kean as advocate for the first respondent and not by the latter directly. It was not within the scope of Mr. Kean's authority to employ an uncertificated bailiff, and the first respondent would not be liable unless he had expressly authorised Mr. Kean to do so. I am not concerned to discuss the question of Mr. Kean's general authority as the evidence is quite clear that the first respondent knew that Mr. Kean was employing the second respondent and prior to the distress the first respondent signed an indemnity addressed to the second respondent and to Messrs. Sirley and Kean, Advocates, relating to the particular intended distress.

The main submission for the first respondent was based on the difference between the English and Kenya legislation on the subject of distress for rent. In Kenya a distraint by an uncertificated bailiff is made illegal, as is the authorisation of such a distress on the part of a landlord. Liabilities other than criminal remain unaffected and it is the common law which is to be looked to to ascertain what those liabilities are. In England the requirement that a bailiff must have a certificate was introduced by the Law of Distress (Amendment) Act, 1888. Section 8 provided that no person should act as a bailiff without a certificate, and concluded:

> "If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act, the person so levying, and any person who has authorised him so to levy, shall be deemed to have committed a trespass."

Only by the Act of 1895 was it made a criminal offence for a bailiff to act without a certificate and that liability was not extended to the person authorising him. Counsel sought to show that the use of the words "shall be deemed to have committed a trespass" indicated that, apart from the Act there would have been no trespass. This is hard to follow for, apart from the Act, there is no requirement that a bailiff should have a certificate. In *Perring & Co. v. Emerson* (11), [1906] 1 K.B. 1 Wills, J., expressed the opinion that the words in question were introduced to prevent the application of the rule that a person doing an act forbidden by statute is guilty of a common law misdemeanour, if the consequences attendant upon the doing of the act are not specified. However

that may be, there can be no doubt that at common law where an act is a trespass, the person who authorised the doing of it, as well as the doer, is liable.

I think that the law is clear, and it does not involve entering upon a discussion as to the scope of employment. A trespass to goods is a wrongful interference with the possession of them – Winfield on Tort (6th Edn.), p. 405. A carrying away of goods is therefore a trespass against the possessor. The second respondent carried away the appellant's goods and unless he can justify that asportation he committed a trespass. He cannot justify, because his act was one which he was forbidden by law to do without the certificate, which he did not at the relevant time possess. He was guilty of trespass, and for the same reasons his entry on the land was a trespass, though in the present case I think the major trespass giving rise to damage was to the goods. The second respondent was authorised to distrain upon the goods by the first respondent who thereupon under the common law became equally liable for the trespass. What he seeks to rely upon in defence is mistake and that is no defence. In Winfield (supra) at p. 50 mistake is described:

> "In mistake the effect produced is intended and the error consists in thinking that such effect is not tortious;"

That is the case here. The effect was the entry and carrying away of the appellant's goods. The first respondent thought that was not tortious because he thought he had employed a proper agent; the effect was in fact tortious because the agent was prohibited from doing what he did. A close analogy is the case of a man who enters on land believing it to be his own-he is a trespasser.

For these reasons I would allow the appeal so far as this question is concerned. The first and second respondents are, in my judgment, both liable in trespass, and as it is a case of principal and agent, as joint tortfeasors. Having arrived at this view it is unnecessary for me to consider the question whether the second respondent levied successive distresses as neither respondent would be subject to any additional liability on that account.

That brings me to the question of damages. The distress in question was in my opinion illegal and the general principle concerning damages is stated in para. 730 of Mayne & Mcgregor on Damages (12th Edn.), thus:

> "The damages therefore are the same as in the ordinary tort action, and indeed the plaintiff can sue in trespass to goods, in conversion, or, generally, in trespass to land.
>
> "Thus the normal measure of damages is the value of the goods illegally distrained; in particular the defendant is not entitled to deduct for the rent properly due."

The appellant is also entitled to compensation for such consequential damage as he may have suffered, but as both first and second respondents acted quite honestly and the appellant relied, as he was entitled to do, on what was little more than a technicality, there is no case for exemplary damages. The matter of damages is, however, in the present case affected by a question of pleading and by an agreement arrived at by counsel during the hearing. I will refer to this after setting out the findings of the learned judge:

> "The last issue is as to the damages. The only claim in respect of damages which now remains is that against the second defendant in respect of the Trespass on his part in distraining when he was not a certificated bailiff. There is no claim for special damages and I am left with the task of assessing the general damages.

> "The plaintiff had been in business for a period of eighteen years. The effect of the distress was undoubtedly to cause his complete ruin from a business point of view, but the damage under this head would, of course, result from the fact of a distress having been levied at all rather than the fact that a legal distress was carried out in an illegal manner. It is reasonable to suppose that if it had been known to the first defendant and his legal advisers that the second defendant was uncertificated they would have employed a duly certificated bailiff to carry out the distress. Nevertheless, the act was a trespass. It must have caused some damage to the plaintiff's reputation and I assess the general damages at Shs. 4,000/-."

The appellant's submission is that the learned judge was wrong in saying that there was no claim for special damages, that the question of damages should not have been dealt with at all at that stage, and that in any event the award of general damages was manifestly inadequate. The paragraphs of the plaint which touch on the question of damages are as follows:

> "20. At the dates of the aforementioned pretended distresses no rent was due and owing under the terms of any written lease duly executed, stamped and registered or otherwise. And the plaintiff claims to recover from the defendants by virtue of s. 8 of the Distress for Rent Ordinance double the value of the said goods distrained and sold.
>
>
>
> "23. In the premises the plaintiff has been injured in his credit and reputation in trade and has suffered annoyance, inconvenience, loss of and interference with his trade and damage.
>
> "24. The plaintiff accordingly claims damages arising from illegal distresses, trespass to his premises and or goods and chattels, for loss of credit and reputation and interference with his trade."

The prayer is for judgment for:

> "(*a*) Damages in such sum as this honourable court may deem fit to grant;"

I have already held that the claim for double the value of the goods in para. 20 is not maintainable and I am no longer concerned with it. It will be convenient before proceeding further, to refer to portions of the record which are relevant to the question of the agreement between counsel. After the settlement of issues (Issue No. 7 was "To what damages is the plaintiff entitled") there is the following record of a statement by Mr. Nowrojee, who appeared for the appellant, then the plaintiff:

> "Nowrojee: Damages – I suggest if all issues establish liability of defendants damages be referred to registrar."

Apparently there was no immediate response to this suggestion, for the note appears in isolation. Then, after the taking of evidence had commenced, there is the following entry by the learned judge:

> "Note: It is agreed that in the first instance the question of liability only be decided. The consideration of the method of deciding the amount of damages (if any) to be deferred until after judgment on liability."

At the conclusion of the evidence the court was addressed by counsel for the first respondent whose references to damages were brief. He referred to s. 15 of the Distress for Rent Ordinance, which I have set out above, and said – "Special damage should be pleaded". He then quoted or referred to paras. 386

with special and nominal damages. Mr. Adams then addressed for the second respondent and made no reference to damages. Mr. Nowrojee addressed and is recorded as saying:

> "Issue 7 – Damages. Court will be invited to state heads. (*a*) Double value. Value of goods will be assessed by someone.
>
> "(*b*) General damages for trespass. This court will assess those. Plaintiff in business eighteen years. Derogatory conduct not to be considered so far as plaintiff is concerned. Not running for fifteen years at a loss. Entire business came to a stop. Plaint para. 20 – credit injured. I ask for judgment jointly and severally."

Before this court Mr. Nazareth claimed that the agreement between counsel meant that the whole question of damages would be deferred and that the appellant should have had an opportunity of calling further evidence as to special damage after issues of liability had been decided. Agreements of that type are common enough but such a construction is repugnant to the implication of Mr. Nowrojee's final submission. All that Mr. Nazareth said in explanation was that Mr. Nowrojee seemed to have overlooked the agreement. Mr. Shaylor, for the second respondent, submitted that the proper construction of the agreement was not that the taking of evidence should be postponed but that the "method" of calculation was deferred. This receives some support from Mr. Nowrojee's statement that "Value of goods will be assessed by someone". He appears to have been thinking in terms of method at that stage. What I cannot accept is that Mr. Nowrojee could have addressed the court in the terms he did if he had been reserving evidence as to the value of the business, loss of customers and the like. There had been a submission that no special damage was recoverable; it may be that Mr. Nowrojee accepted this either as a matter of pleading or of law and was content to rely upon the claim for double the value of the goods and general damages.

This court has received no assistance from any of the counsel concerned, either by affidavit or statement from the bar, upon the question of this misunderstanding, if one existed. In the circumstances, the learned judge in the Supreme Court was the person who must be assumed to have had the fullest understanding of the position and I would not therefore interfere with his finding that there was no claim for special damages.

That disposes of the question of special damages, but I would add my view that the plaint, without amendment, was not a fit vehicle to support a claim for damages of that type. With proper particulars such a claim as "interference with trade" would be sufficient, but it was not incumbent upon the respondents to apply for them – *Hayward v. Pullinger & Partners Ltd.* (12), [1950] 1 All E.R. 581. I am unable to agree with Mr. Nazareth that loss of business is exclusively a matter of special damage. It depends on circumstances and pleading, and in *Shearman v. Folland* (13), [1950] 2 K.B. 43 at p. 51, the Court of Appeal said:

> "all damage which up to the time of the hearing has not yet crystallised in actual disbursement is still prospective in general damages".

There remains the question of general damages. As I have said, the appellant is entitled to the value of the goods and this is not necessarily properly represented by the price obtained at the auction at which they were sold. If this head of damage should be regarded as "special" I would make an exception of it as Mr. Nowrojee specifically asked for the question of value to be decided. It is a matter which will have to go back to the Supreme Court, to decide in such manner as is thought fit. Apart from the question of the goods the learned judge awarded a sum of Shs. 4,000/-, and it is claimed that this was manifestly

inadequate. The judge had been invited to assess these general damages on the evidence before him, which, on this topic, was meagre. On the same material I am unable to say that the award was so far below what was reasonable that a Court of Appeal would be justified in interfering.

In the result I would order that (in the absence of agreement) the question of the ascertainment of the value of the goods distrained be remitted to the Supreme Court for determination in such manner as to the court appears appropriate, that the award of damages by the learned trial judge be increased by the value of the goods so ascertained, that there be judgment for the total damages against the first and second respondents jointly and severally with interest thereon as awarded by the learned judge at court rates, and that the decree be varied in accordance with these orders. Counsel for all parties desire to be heard upon the question of costs and that I would accordingly defer pending argument.

Newbold JA: On February 17, 1959, the second respondent (hereinafter referred to as the bailiff) levied distress on the goods of the appellant (hereinafter referred to as the tenant) which were in the premises in Portal Street, Nairobi (hereinafter referred to as the premises) in which the tenant carried on business. The distress was levied in order to recover rent alleged to be due by the tenant to the first respondent (hereinafter called the landlord) in respect of the premises for the period from June 1, 1958, to January 31, 1959. On subsequent days in March, 1959, the bailiff took certain action in relation to the goods on the premises which the tenant alleges constituted at least a second distress but which the bailiff and the landlord claim to be no more than an implementation of the original distress. As a result of these acts of the bailiff the goods of the tenant were sold during various days in March, 1959. At the time that the bailiff performed these acts he did not hold a certificate authorising him to act as a bailiff under the Distress for Rent Ordinance (Cap. 154 of the Laws of Kenya) (hereinafter referred to as the Ordinance). On February 12, 1960, the tenant filed a suit against the landlord and the bailiff claiming (as subsequently amended) damages against each of them for trespass and illegal distress in distraining by an uncertified bailiff and when it was alleged there was no rent due by the tenant to the landlord in respect of the premises and also claiming damages for irregular distress in levying more than one distress. No quantified particulars of any damages were set out but double the value of the goods distrained were claimed by virtue of s. 8 of the Ordinance and, broadly, damages were claimed for illegal distress, trespass and loss of reputation and credit in trade.

It was common ground that from some time in 1942 and up to May 19, 1958, a tenancy existed between the landlord and tenant in respect of the premises. It is also incontrovertible, having regard to a number of judgments and rulings given both before and after that date in other litigation (which has been considerable) between the landlord and the tenant, that the tenancy terms included a condition that the landlord was entitled to forfeit the tenancy if rent was in arrears, and that on that date rent was in arrears. The terms of the tenancy which admittedly existed between the parties up to May 19, 1958, were those contained in an order of a resident magistrate made on April 28, 1958, on an application by the tenant for a tenancy under the Landlord and Tenant (Shops) Ordinance, 1956. The tenant appealed against these terms to the Supreme Court in Civil Appeal No. 20 of 1958, seeking a tenancy but on different terms, and this appeal was dismissed on December 1, 1958.

On May 19, 1958, the landlord filed Civil Suit No. 738 of 1958 against the tenant claiming rent from January 1, 1957, to May 31, 1958, and an order for vacant possession, and the landlord stated in his pleadings that he was exercising

his right under the terms of the tenancy to forfeit it on the rent being in arrears. On June 28, 1958, there was an application by the landlord to enter summary judgment in the terms of the claim in the suit. This application was opposed and leave was given to the tenant to defend on certain terms. A defence was filed on July 4, 1958, and on July 18, 1958, the landlord amended his plaint by omitting the claim for possession and substituting a claim for rent from June 1, 1958. There were a number of interlocutory applications in this suit which were supported or opposed by affidavits filed by both the landlord and the tenant. Judgment was given on June 3, 1959, in favour of the landlord on his claim as amended. The tenant appealed therefrom to this court which dismissed the appeal on November 8, 1960.

In the meanwhile the landlord had on April 10, 1959, filed another suit, No. 765 of 1959, against the tenant claiming both rent and possession of the premises. A defence was filed in that suit on September 19, 1959, and in that defence the tenant claimed to be a monthly tenant of the premises under a tenancy which had not yet been determined. In this suit also there were a number of interlocutory applications in respect of which affidavits were filed by both the landlord and tenant and in an affidavit made by the tenant on October 13, 1959, he denied that he was a trespasser on the premises and stated that he was a tenant.

It appears from the evidence of the landlord given in the trial which is the subject of this appeal that the tenant ceased to be the tenant of the premises in October, 1959. It is not clear what this means but I assume it to mean that the landlord obtained possession of the premises some time in October, 1959, and that thereafter no tenancy was in existenace, but how this came about is by no means clear.

On these rather involved facts the first main issue which was argued on the appeal was whether the amount in respect of which distress was levied on February 17, 1959, was an amount owing by way of rent (as I have said it was alleged to be rent owed for the period from June 1, 1958, to January 31, 1959) and also whether the relationship of landlord and tenant had existed between the parties in respect of the premises at least up to six months prior to that date. This in effect resolved itself into the question whether the tenancy which was admittedly existing between the parties on May 19, 1958, was forfeited by the filing of the suit No. 738 of 1958 on that date claiming possession of the premises and, if so, what was the effect of the subsequent amendment of the plaint substituting a claim for rent from June 1, 1958, for the claim for possession and what was the relationship of the parties in respect of the premises subsequent to May 19, 1958. If on that date the tenancy was determined and no new tenancy was created subsequently, then the amount in respect of which distress was levied could not be rent and clearly the tenant is entitled to obtain, against both the landlord and the bailiff, damages of double the value of the goods distrained on, quite apart from any other damages to which he may be entitled; if, however, that amount was owed as rent and the relationship of landlord and tenant existed within six months of that date then the tenant would not be able to recover as damages double the value of such goods against either the landlord or the bailiff, whatever other damages he might recover against either or both of them on other issues. The trial judge held on this issue that the tenancy had not been determined by the filing of the suit claiming possession on the ground that the claim by the landlord in the same suit for rent up to May 31, 1958, and his subsequent amendment of the plaint showed that the claim for possession was not an unequivocal election by the landlord to treat the tenancy as forfeited.

Section 111(*g*) of the Indian Transfer of Property Act, 1882, as applied to Kenya, provides that a lease determines by forfeiture when the lessee breaks a

condition on the breach whereof the lessor may re-enter and the lessor does some act showing his intention to determine the lease. As I have said, it is clear from other decisions of the courts in the litigation between the landlord and the tenant that the tenant on May 19, 1958, was in arrears with his rent and that he had thereby broken a condition of the tenancy which entitled the landlord to re-enter. In bringing the suit claiming possession did the landlord do some act showing his intention to determine the lease? In my view he clearly did so. If he had re-entered that act would have been unquestionably an act showing an intention to determine the tenancy. It has been held in a number of cases that the bringing of an action of ejectment, which asserts the right to possession, is the equivalent of actual entry and is an unequivocal indication of an intention to put an end to the tenancy (see *Serjeant v. Nash, Field & Co.* (2); *Grimwood v. Moss* (1)). Does the fact that the plaint included a claim for rent up to May 31, 1958, in any way affect the position? In my view it does not. The rent was due on May 5, 1958, which was before the suit was filed and it has been held that the demand and acceptance of rent due before the date of forfeiture does not waive the forfeiture (see *Civil Service Co-operative Society Limited v. McGrigor's Trustee* (5); *Price v. Worwood* (4)). I see no reason why the inclusion of a claim for rent due before the date of the suit should make the claim for possession any the less an unequivocal indication of an intention to terminate the tenancy. In my view the filing on May 19, 1958, of Civil Suit No. 738 of 1958 with its claim for possession showed beyond any doubt an unequivocal intention on the part of the landlord to terminate the then existing tenancy, and as the facts were such that the landlord had the right to forfeit the tenancy it consequently came to an end on that date.

Can it be said that any subsequent amendment of the plaint by abandoning the claim for possession has the effect of obliterating ex post facto an act having legal consequences which has already taken place. In my view clearly no. I entirely accept, as was said in *Sneade v. Wotherton Barytes and Lead Mining Company Limited* (7), that a plaint as amended may be treated as if it were the original claim, but I know of nothing in that case or in any other case which requires that it must be so treated for all purposes and in all circumstances. In *Warner v. Sampson* (8), Hodson, L.J., said at p. 130:

> "I . . ., if it were necessary, would hold that the appeal should succeed on the ground that, before the landlord had re-entered or taken effective proceedings for re-entry, the defendant by amending his defence had removed from it the denial of title which it had previously contained.",

and Ormerod, L.J., said at p. 133:

> "When the amended defence was delivered, nothing had been done by the plaintiff to claim possession of the premises. Had a writ claiming possession been issued before the amendment, the position might have been different."

It is inconceivable that these words would have been used if the effect of the amendment was automatically to treat the previous pleading as if it had never existed. Logic and common sense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed. One could multiply examples to show that such could not be the position. Suppose for example, in this case that after the plaint had been filed, the tenant had quit the premises, delivered up possession and filed a defence denying liability for the rent claimed and the landlord had then amended his plaint in the same way, could it possibly be said that there was never an action for possession, that the tenant was wrong to deliver up possession and that whether the tenant liked it or not he was still the tenant of the premises under the old tenancy.

Merely to cite that one example shows how impossible it is to say that in all circumstances an amendment is to be treated as if it and it alone had existed. If, as is my undoubted view, an amendment does not automatically have the effect that the plaint prior to amendment never existed, the question is whether in this case the amendment had the effect of waiving the determination of the lease. This depends on whether the plaint in the original form had effectively terminated the then existing tenancy. As I have already said, it did in fact do so and no subsequent action can alter that fact. As was said at p. 320 by Lord Coleridge, J., in *Evans v. Enever* (6):

> "But there is a series of cases which establish that if an action is brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election to determine the lease, and that no subsequent acts of the plaintiff can be relied on as qualifying that position."

The amendment which abandons the claim for possession and substitutes a claim for rent from June 1, 1958, may be evidence of an implied agreement to treat the tenant as if he were continuing as tenant under a new tenancy, but it cannot have the effect of obliterating an act which had already had effect. At the top of p. 724 of Mulla's Transfer of Property Act (3rd Edn.), there is a reference to two cases in which it appears that the leases in question were forfeited by the bringing of suits in ejectment even though the suits were subsequently withdraw. I do not, however, rely on this reference as I have been unable to obtain the reports of these cases.

For these reasons I am satisfied that the then existing tenancy, the terms of which were the subject of bitter controversy between the landlord and the tenant, was terminated on May 19, 1958, by the filing of suit No. 738 of 1958. This does not necessarily mean, however, that the amount for which the distress was levied was not rent, and that the relationship of landlord and tenant did not exist in relation to the premises at the time of the distress. There are several unusual features in the relationship of these parties in respect of the premises, a relationship which had existed from 1942 until at least October, 1959. Up to May 19, 1958, the relationship was admittedly one of landlord and tenant, but the precise terms of the tenancy were very much a matter of dispute and indeed were not determined finally until the decision of this court, given on November 8, 1959, in an appeal from the decision given in Civil Suit No. 738 of 1958. Subsequent to May 19, 1958, the tenant remained in possession of the premises, and while in such possession the landlord levied distress for what he claimed to be rent due in respect of a period subsequent to that date and brought another suit for possession and arrears of rent, and the tenant took no action to replevy the goods distrained on and defended the subsequent suit on the ground that he was a tenant. On this appeal it was argued for the tenant that he was a trespasser on the premises in February and March, 1959, and had been such since May 19, 1958, a period of nearly a year.

Basically the position between the parties from the year 1957 was that the landlord was trying to obtain possession of the premises but somewhat reluctantly was forced into the position of a landlord on terms determined by the courts, while the tenant was trying to obtain a tenancy on terms which he considered had been promised previously by the landlord. The landlord, in spite of the fact that the previous tenancy had been determined on May 19, 1958, is clearly precluded, by his act in levying distress, from denying a tenancy (see *Price v. Worwood* (4)), quite apart from the inferences which arise from his amendment and subsequent suit for rent and possession. In the circumstances therefore I have no hesitation in coming to the conclusion that the courts must infer that the landlord had agreed to the tenant remaining in possession under a new tenancy. As far as the tenant is concerned, he submitted to the distress in the sense that he at no time sought to replevy the goods, and it was

a year before he saw fit to bring this action for trespass. In *Panton v. Jones* (14), 170 E.R. 1415 it was said:

> ". . . submitting to a distress acknowledges the tenancy. . . . the occupier, if he does not replevy, I think, is precluded from denying the title of the landlord".

It is to be noted in that case it was argued that the person in possession might prefer to bring an action for trespass rather than replevying, but that argument did not avail him. In *Cooper v. Blandy* (15), 131 E.R. 1034 it was said by Bosanquet, J., at p. 1037:

> "As a general rule, it is not competent to a tenant, after submitting to a distress, or payment of rent, to dispute his landlord's title. There are exceptions, indeed, to that rule, but this case is not one of them."

In that case the plaintiff had come into possession under title from the previous occupier who had paid rent under distress, and it was held that the plaintiff was precluded from disputing the defendant's title to the rent. Tindall, C.J., in effect said that where the person in occupation comes in under title from a previous tenant the law would imply a tenancy. Jervis, C.J., said in the course of argument in *Blyth v. Dennett* (16), 138 E.R. 1165:

> "Payment and acceptance of rent accruing subsequently to the expiration of the notice, or a distress acquiesced in (which amounts to payment), would be evidence of such new contract."

The concept of an implied new tenancy after a previous tenancy had been determined by an effective notice to quit has been established beyond doubt by the Court of Appeal in *Freeman v. Evans* (17), [1922] 1 Ch. 36 and I can see no difference between a tenancy brought to an end by a notice to quit given by reason of a breach of a covenant and a tenancy brought to an end by re-entry or by an action for possession founded upon a cause for forfeiture. As regards the terms of any new tenancy, I would adopt some words of a passage quoted by Younger, L.J., at p. 50 in the *Freeman* case (17):

> " . . . as between the landlord and the tenant themselves, it is an arrangement to continue to hold . . . upon the terms that the new tenancy shall be, in all respects, identical with the old".

It is, however, urged by the tenant that he did not submit to the distress. It is true that the tenant stated to the bailiff that the matter was in dispute and that the distress had ruined the tenant, but I do not understand that evidence to be a denial of the relationship of landlord and tenant, but merely a denial of the amount of rent due, a matter which was subsequently determined by the courts in favour of the landlord. Further, at about this same time the tenant, in affidavits filed in the various proceedings to which I have referred earlier, was denying that he was a trespasser and was asserting a tenancy. All these facts satisfy me that the tenant regarded his possession of the premises as being under a tenancy the terms of which a court had determined but which he was seeking to better.

All the circumstances of this case, therefore, lead me to the inevitable conclusion that while the old tenancy had been terminated on May 19, 1958, a new tenancy is to be implied as from that date on terms identical with those of the former tenancy. This being so, the distress was levied in respect of an amount due as rent and at a time when the relationship of landlord and tenant subsisted between the parties. As a consequence the appellant fails on the first main issue, and even if he succeeds on any other issue he would not be entitled to damages of double the value of the goods distrained on.

The second main issue was whether, as the distress had been levied by an uncertified bailiff, the landlord as well as the bailiff was liable to the tenant in a civil action for damages. The learned judge held that the bailiff was liable; he held, however, that, as the landlord did not know that the bailiff was uncertified and as such lack of knowledge was not due to recklessness, the landlord was not liable. With respect to the learned judge I regret that I cannot agree. For the reasons given by Gould, J.A., with which I agree, I am satisfied that the landlord authorised the bailiff to levy the distress; that the bailiff in levying the distress when he was uncertified was committing a trespass; that the landlord, having authorised the distress, was liable for the trespass, whether or not he knew that the bailiff was uncertified; and that the tenant has a right of civil action against both the landlord and the bailiff. The appeal, therefore, must succeed as against the landlord.

The third main issue was whether there was more than one distress and, if so, whether in the circumstances the second or subsequent distresses were justified. The learned judge held that there was only one distress. With respect to the learned judge, the evidence of the bailiff and the two notices delivered by him to the tenant on February 17, 1959, and March 2, 1959, lead me to the inevitable conclusion that there were two distresses. Having regard to my conclusions on the second main issue it would affect neither the liability nor the quantum of damages in respect of either the bailiff or the landlord and in these circumstances I consider it unnecessary to arrive at any conclusion on the question of whether the second distress was justified.

The fourth main issue related to damages and was divided into three subsidiary issues; first, whether the judge in his judgment should have made any assessment of damages; secondly, the nature of the damages awarded; and thirdly the quantum of the damages. The first of these subsidiary issues arises out of an agreement between the advocates and the nature of their final addresses. The agreement, according to the record, is as follows:

> "Note: It is agreed that in the first instance the question of liability only be decided. The consideration of the method of deciding the amount of damages (if any) to be deferred until after judgment on liability."

The record shows that subsequent to this agreement the advocate for the landlord in his final address touched briefly on the nature and quantum of the damages recoverable, the advocate for the bailiff did not address on this matter, and the advocate for the tenant addressed on both the nature and quantum of the damages claimed and submitted that the court would assess the general damages. The trial judge did not refer to the agreement, held that there was no claim for special damages and assessed the general damages. After delivering judgment submissions were made as to costs, but no advocate made any submission to the effect that the judge was incorrect in assessing the general damages. On this appeal it is urged that the trial judge was wrong in assessing general damages. It is noteworthy that before us there was no statement from or on behalf of any of the advocates as to his understanding of the agreement and his explanation of the course taken in the case, though there were submissions on the inferences to be drawn from what appeared on the record. In all the circumstances I am not satisfied that the agreement meant anything more than that if the judge came to the conclusion that the tenant was entitled to damages the amount of which was dependent on the value of the goods distrained then the method of arriving at the value of the goods and the consequent quantum of such damages would have to be determined subsequent to his judgment on liability.

The second subsidiary issue relates to the nature of the damages awarded and is basically the question whether the tenant is entitled on his pleadings to

any and, if so, what special damages; and if he is entitled to recover special damages how are they to be assessed. Special damages cannot be recovered unless they are specifically claimed in the pleading and, subject to any agreement to the contrary, quantified particulars of them are given and evidence to support those particulars led. It is submitted for the tenant that the pleadings specifically claim certain types of special damages. If this is so the pleadings are not very clear, though there are references to certain types of damage which could cover a claim for special damages or which could be matters for the consideration of the court in assessing general damages. In these circumstances it is submitted for the tenant that any claim for special damages should not be rejected out of hand but that particulars should have been called for. Assuming, but by no means deciding, that the pleading specifically claimed special damages, they were never quantified and no evidence was led in relation to them. Unless, therefore, this omission was the result of specific agreement, the tenant must in any event fail in his claim for special damages. I have already stated that in my view the agreement related only to damages in respect of the value of the goods. As a result the tenant would not be entitled to recover any form of special damages other than one related to the value of the goods. I have already come to the conclusion that the tenant could not recover damages of double the value of the goods. The goods, however, were undoubtedly sold, and the case of *Attack v. Bramwel*l (18), 122 E.R. 196 makes it clear that the tenant would be entitled to recover their full value without deduction for any sum due for rent. In my view this is a claim for special damages and in this respect it is necessary to decide whether it is specifically claimed in the pleadings. While the claim is by no means as clear as it should be, the pleadings refer to specified goods, the details of which are contained in specified inventories, as having been distrained and removed. In para. 24 the tenant claims damages arising "from illegal distress, trespass to his . . . goods and chattels . . ." and in his prayer he asks for damages in such sum as the court may deem fit. In these circumstances I think there was a sufficiently specific claim in the pleadings so as not to reject this claim for special damages and the learned judge erred in failing to consider this claim. As the tenant was undoubtedly entitled to recover the value of the goods and as this value was the subject of the agreement between the advocates, in my view the tenant was entitled to judgment against the landlord and the bailiff jointly and severally for the value of such goods. The case should be remitted to the Supreme Court for a decision, subject to any agreement between the parties, on the method of ascertaining such value, that is whether the judge himself will ascertain the value or refer the matter to a referee or other person, and what evidence is to be adduced for such purpose.

The third subsidiary issue relates to the quantum of the general damages. Nothing has been said in this appeal which would lead me in any way to interfere with the amount awarded by the learned judge.

In the result I would allow the appeal against the landlord and hold him jointly and severally liable with the bailiff for a distress which was illegal and a trespass by reason of the bailiff being uncertified. I would also allow the appeal against both the landlord and the bailiff and hold them jointly and severally liable for special damages representing the full value of the goods distrained on and would remit the case to the Supreme Court for a decision, subject to any agreement by the parties, as to the method of ascertaining such value. I would also order that interest at the court rate be paid on the general and special damages awarded to the tenant as from the date of filing the suit up to the date of the decree and that the landlord and bailiff be jointly and severally liable for the payment of such interest and of any interest which may subsequently become payable by virtue of s. 26 (2) of the Civil Procedure Ordinance of Kenya. In all other respects I would dismiss the appeal. The decree of the Supreme Court should be accordingly amended.

As regards costs both here and in the Supreme Court, the parties desire to address this court further after hearing the decision of this court on the other matters under appeal, and I would accordingly defer consideration of this matter.

Sir Ronald Sinclair P: I have had the advantage of reading in draft the judgments prepared by Gould, J.A., and Newbold, J.A. I am satisfied that the amount in respect of which distress was levied was an amount owing by way of rent and, accordingly, that the appellant fails in his claim for double the value of the goods distrained under s. 8 of the Distress for Rent Ordinance. On this aspect of the case I prefer to leave open the question as to the effect of the amendment of the plaint, and base my decision on the ground that, even if the original tenancy was determined on the filing of the suit on May 19, 1958, a new tenancy is to be implied as from that date on the same terms as the former tenancy. I agree with the reasons given by Newbold, J.A., for his conclusion that a new tenancy should be implied.

As to the other issues raised in the appeal, I am in entire agreement with the reasoning and conclusions of Gould, J.A.

The appeal is allowed only to the extent indicated in the judgment of Gould, J.A., and there will be orders in the terms proposed by him.

Appeal allowed in part. Damages to be decided by the Supreme Court awarded against the respondents jointly and severally for the value of the goods distrained.

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